# Philosophical Dimensions of Human Rights

Claudio Corradetti
Editor

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## Some Contemporary Views

Springer

*Editor*
Claudio Corradetti
University of Rome "Tor Vergata"
Rome, Italy
Senior Researcher
European Academy, Bolzano, Italy
Claudio.Corradetti@uniroma2.it

ISBN 978-94-007-2375-7 e-ISBN 978-94-007-2376-4
DOI 10.1007/978-94-007-2376-4
Springer Dordrecht Heidelberg London New York

Library of Congress Control Number: 2011941659

*To Conrad and Therese Ross with love*

# Acknowledgements

I would like to express my gratitude to those authors and editors who have made possible the reprint of the following essays.

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Claudio Corradetti
University of Rome "Tor Vergata", Rome, Italy
Senior Researcher European Academy, Bolzano, Italy
Claudio.Corradetti@uniroma2.it

# Contents

# Contributors

**Albena Azmanova** University of Kent, Brussels, Belgium

**Richard Bellamy** University College London, London, UK

**Seyla Benhabib** Yale University, New Haven, CT, USA

**Giovanna Borradori** Vassar College, Poughkeepsie, NY, USA

**Hauke Brunkhorst** University of Flensburg, Flensburg, Germany

**Lorella Cedroni** University of Rome "La Sapienza", Rome, Italy

**Claudio Corradetti** University of Rome "Tor Vergata", Rome, Italy

Senior Researcher European Academy, Bolzano, Italy"

**Alessandro Ferrara** University of Rome "Tor Vergata", Rome, Italy

**Jeffrey Flynn** Fordham University, New York, NY, USA

**Rainer Forst** J.W. Goethe-University, Frankfurt, Germany

**Jürgen Habermas** J.W. Goethe-University, Frankfurt, Germany

**Joseph Marko** Graz University, Graz, Austria

**David Reidy** University of Tennessee, Knoxville, TN, USA

**Wojciech Sadurski** University of Sydney, Sydney, Australia

**Giovanni Sartor** University of Bologna, Bologna, Italy

**William E. Scheuerman** Indiana University, Bloomington, IN, USA

**Justus Schönlau** Advisor of the committee of the Regions, European Union, Brussels, Belgium

# Introduction

Never before has the appeal to human rights been as pervasive as it is today. At the international level there is, indeed, a great deal of discussion about the moral standards countries must comply with in order to be considered a part of the international community. As recent events show, it is also true that the instrumental use of human rights has often been oriented to justify new forms of ideological imperialism that have little to do with the defense of a true interest in human rights protection.

Nevertheless, the incorporation of human rights and democracy as clauses of conditionality for the establishment of bilateral relations within the European Union represents more than simple wishful thinking. Also, the ideological opposition between liberal and communist countries, which influenced the structuring of the *Universal Declaration of Human Rights* of 1948, has been replaced now by new legitimising procedures rooted in a plurality of cultural traditions. Scholarly work, what was once composed solely of few studies on the cultural approach to human rights, has now become a systematic field of investigation. What was once perceived as a relatively unstructured field of study can now be labeled outrightly and without ambiguity "the philosophy of human rights." The intuitive understanding and recognition among scholars of a domain of study dealing with the philosophical reflection on human rights is not in itself a sufficient reason for yet another theory of human rights. As a matter of fact, the search for new patterns of legitimation may or may not be accompanied by the proposal for a new form of human rights justification. The question then becomes whether or not we really need new philosophical justifications of human rights and why – if yes – do we need them. Let us start from some skeptical views on new justifications to human rights: Bobbio once claimed that after the promulgation of the Universal Declaration we don't need a justification phase but rather a process of human rights implementation. What he meant by this was that the problem has nowadays become political and not simply philosophical.[1] Is this really true? Can we really separate political practice from a

[1] N. Bobbio, *L'età dei diritti* (Torino: Einaudi, 1990, 16).

philosophical justification? That is, can we simply be content with the actual philosophical foundation of the Universal Declaration and with its suggested political implications of human rights protection?

If one considers the type of justification emerging from the Universal Declaration and based on the natural law theory, it follows that the rights defended therein is insensitive to cultural interpretations and pluralistic variations. According to its strictest interpretation, natural law theory approaches to human rights do imply an homogeneous application of the proclaimed rights across different cultural and political traditions. Is this an appropriate strategy for the enforcement of a policy of human rights? The dissatisfaction arising from such views represents the most highly motivating factor for proposing, pace Bobbio, yet new justifications of human rights.

This book aims at answering not only the quest of justification, but also the contemporary ever-increasing request for a new politics of human rights. Important political signs calling for a renovation of international relations and new politics are indicated, for instance, by Obama's Cairo discourse on 4 June 2009, where a clear reference has been made to the wrongfulness of imposing democracy with force.[2]

Before this radical shift in intents, the previous American foreign policy strategy was inspired by the doctrine of "the democratic peace theory." Such theory was based upon the wrong assumption that peace is strictly dependent on democracy since democracies do not fight each other. The arbitrary conclusion drawn from such a view was that the higher the number of democratic arrangements worldwide, the higher the chance to obtain durable peace. This over simplistic view of what was the much more refined Kantian argument of *Perpetual Peace*[3] has been interpreted therefore as presenting a sufficient motivation for "stabilising" the Middle East along democratic lines. We all know the dramatic consequences this has produced.

Western failure in proposing a reliable international politics of peace has been paralleled by its incapacity to propose a reliable politics of human rights. If one is ready to embark on a more in-depth historical analysis on how human rights have become part of our modern history, it would be hard to fail to observe a strict link between a certain abstract/universalist approach to human rights principles and a certain naïve practice of human rights politics. This latter, due to its insensitivity to the recognition of the relevance of local processes of cultural interpretation and pluralist transformation of abstract principles, has resulted incapable of providing an enlightened guidance to local politics.

[2] This introduction was completed a few months before the so-called "Arab Spring." After initial enthusiasm, the hope is now that the next transitional phase will truly fulfil, at least some of, the people's expectations. The reality is, though, that those who start revolutions are very rarely the same ones who conclude them.

[3] I. Kant, "Perpetual Peace: A Philosophical Sketch," in *Political Writings*, trans. H.B. Nisbet, ed. H. Reiss (Cambridge: Cambridge University Press, [1795] 1994).

We know where from this descending parable originated. When the *Declaration of the Rights of Man and the Citizen* of 1789 was proclaimed, Europe reached the apex of a historical turning point. For the first time it seemed that there was a meaningful way to address humanity as a whole, and that this was to be found within its common moral status. It is true that, before this, other documents had been proclaimed and yet the *French Declaration* seemed to contain all the tradition-breaking force inspiring the revolution itself. Besides the great innovation it produced, its limits became immediately evident with the publication of the *Declaration of the Rights of Woman and the Female Citizen* by Olympe de Gouges in 1791.[4] As it often happens when an epochal change takes place, this case also exhibits that the innovative force of the Declaration has proved its value by manifesting its limits and, through this, prompting further changes.

In this regard, it is interesting to observe that the separation between the rights of man and those of the citizen characterising the French Declaration has found a "reunification" only with the Universal Declaration of Human Rights. Indeed, it was only in 1948 that the recognition of a universal right to take part in the government of one's country either by direct means or through the free choice of political representatives appears clearly (Art. 21.1). The Universal Declaration, therefore, is the highest level of expression of the natural law theory, setting a universal standard for rights to be respected without exceptions. The decline of a theory and a politics of human rights, though, began precisely from this apex. With the exception of *The European Convention on Human Rights* and notwithstanding the numerous cultural and regional charters proclaimed throughout the last decades, such as *The African Charter on Human and People's Right*, *The Islamic Declaration of Human Rights* (also known as the Cairo Charter) or even the *Asian Charter on Human Rights*, not much legal recognition has been given by regional and international bodies towards local governments for regulating and monitoring the respect of human rights. This lack of supranational empowerment has limited the scope and application of the same *Universal Declaration* or, worse, has made its content obsolete in most of the cases.

How can these lacunae be remedied? One possible path would involve the promotion of regional courts for the judicial vindication of wrongs, as well as for the development of horizontal patterns of consultation, favouring what I have termed in the past "judicial legal pluralism."[5] This strategy, in order to be pervasive, requires that a fresh reinterpretation of those same grounding principles characterising human rights is proposed. One can imagine that a new normative arrangement among international, regional and national bills of rights could be established, an arrangement moving from the abstract universalism of the 1948 Declaration down to a more and more inclusive regaining of cultural richness and life-forms pluralities.

[4] O. de Gouges, "The Declaration of the Rights of Woman and Female Citizen," in *Women in Revolutionary Paris, 1789–1795*, ed. D.G. Levy, H.B. Applewhite, and M.D. Johnson (Urbana: University of Illinois Press, 1980, 87–96).

[5] C. Corradetti, *Relativism and Human Rights* (Dordrecht: Springer, 2009).

What is at stake here is not simply the strictly legalistic problem of the hierarchical order of the sources of law, but rather the provision of "local" interpretations to "global" principles of law. The mutual confrontation between a global and a local dimension of human rights remains true even when there is a counter reaction of the local, either as a denial of human rights principles or as a declaration of autonomy as in the case of the US courts. What is not to be ignored, though, is the fact that the hermeneutical process attached to the contextualisation of human rights principles does not stop until it reaches the "phronetic" level of the *judgment of experience*. At this stage, one should question the relation between the principles of human rights and the judgmental – case by case – assessment. The problem, indeed, consists in the evaluation of the relevance that human rights principles hold when confronted with widespread conflict occurring in factual contexts. When the judgmental activity tries to find a way out of the infra-conflictual opposition among human rights, a transition from the level of *principles* to the level of exchange of *arguments* occurs. What is meant by this can be simplified as "whenever human rights principles x, y, z, etc. are in conflict in context A, a judgment capable of balancing the conflicting claims should be provided." This opens up a new perspective of human rights analysis. Last but not least, the changing approach both to the study and to the practice of international relations is widely reflected into some contemporary documents and state initiatives. In this regard, one of the most important attempts to reframe the approach to international relations in accordance to normative principles is that conducted by the *Independent International Commission on Intervention and State Sovereignty* [ICISS], established by the Canadian government in September 2000 and recently discussed (Sept. 2009) by the UN General Assembly as a framework of action for future reshaping of international relations.[6] The result of the Commission amounted to the formulation of two documents published in December 2001 under the title *The Responsibility to Protect*. The first document focused on the redefinition of the notion of state sovereignty, intervention and institution building, and the second on an expansion of some central concepts drawn from the first and followed by a large bibliography. It is important to highlight that both documents are the result of a wide process of consultation, and that especially the first one has been conducted via cooperation platforms and roundtables with experts and representatives coming from all continents.

Once the *duty* to protect one's own citizens from genocide is established as a universal and unavoidable condition of state legitimacy, the first and most relevant question is *which actors* are allowed to intervene in the internal affairs of third states. Such a principle implies, as a consequence, that in those states where genocide takes place the international community is not only justified in intervening but, most importantly, maintains a *moral duty* to do so. The discussion of whether or not interference into third states is justified and, if so, on which conditions has been

[6] See the *Report on the General Assembly Plenary Debate on the Responsibility to Protect* (2009), at: http://www.responsibilitytoprotect.org/ICRtoP%20ReportGeneral_Assembly_Debate_on_the_Responsibility_to_Protect%20FINAL%209_22_09.pdf.

widely debated both in cases in favour of intervention (e.g. the NATO intervention in Kosovo in 1999) and in cases with no resulting intervention (e.g. the Rwandan genocide in 1994). As is widely known, very often international military action was initiated without the authorisation of the UN Security Council, the only international body which can assign legitimacy to interference into third states. Is there any convincing reason to derogate from this requirement? How can violations be judged systematically enough to require an urgent, unilateral intervention not legitimised by the UN? No clear answer can be given without the precise assessment of the normative criteria justifying intervention and an empirical survey of the committed crimes. The opposite case, which is nevertheless indicative of the necessity to construct binding rules of state intervention, is that of Srebrenica and Rwanda, where UN troops were not only unable to protect civilians despite their physical presence in the area, as in the first case, but let one of the most systematic and tragic genocides occur without taking immediate action, as in the latter. As clearly stated by the ICISS document, the central point of conflict is how to find a solution between one of the most fundamental principles of international law and state sovereignty (Art. 2.1 of the UN Charter) and the moral requirement to stop genocides through armed intervention. This prompted the ICISS to reformulate the notion of state sovereignty by claiming that state sovereignty cannot be defined as military control over a territory. The very principle of sovereignty implies both the requirement of respect of other states' sovereignty and of citizens' dignity and fundamental rights. Sovereignty, according to the ICISS, must be reframed in terms of *internal and external responsibility*. Accordingly, the notion of responsibility cannot be left unspecified but must be articulated into a particular set of parameters and finalities defining the constraints on military intervention. These include its capacity to be effective, to minimise human casualties and to reinforce the possibility of an enduring condition of peace. Since the new notion of sovereignty includes replacing a state control of force with both an internal and an external notion of responsibility, this paradigm shift implies the respect of three further constraints: (1) responsibility to protect the welfare and security of citizens; (2) responsibility to protect other states on the basis of the principles of the UN Charter; and (3) direct accountability for one's own political actions. Such constraints reinforce a general trend that contemporary international law has developed within its documents – the centrality of the individual within the international scenario. The responsibility to protect, in as far as it represents a core mission of the states, is directed towards individuals regardless of their citizenship or affiliation; it also involves the need to prevent systematic crimes through bilateral or multilateral agreements and to rebuild those basic conditions of justice.

The ICISS constitutes a central element of a gestalt picture in need of clarification. For this reason, it is important to revitalise the debate on the theoretical aspects involved in a theory of human rights before focusing again political action. The essays presented here share a commitment, either explicitly or implicitly, to the assumption that classical abstract universalism constitutes an inadequate form of understanding of the moral world, such that a new model of universalism becomes necessary. This assumption creates the premise for a reformulation of a notion of

human rights theory capable of being maximally inclusive of cultural pluralism and contextual differentiation.

The essays collected here are thus organised in such a way to guide the reader through a progressive web of topics and arguments grounded in the conceptual history of human rights and its contemporary debate. They are organised along three central axes revolving around the reconstruction of the historical and philosophical traditions of human rights, the forms of validity of human rights and the relationship between democracy and human rights.

The first section, entitled "Historical and Philosophical Perspectives on Human Rights," is opened by Flynn's discussion on whether it is possible to provide a definition of human rights that is capable of incorporating the features of an emerging practice without missing its historical meanings. The author starts with the problem of how to propose a definition of human rights without contributing to the semantic inflation of the concept. And again, how can a notion of human rights be reconstructed in accordance with the natural law theory of the rights of man? What discontinuities can be detected through history? The author attempts to balance past meanings and contemporary definitions by referring both to Hunt's and Moyn's historical studies on human rights, as well as to Griffin's, Habermas' and Forst's historical and normative reconstructions of the concept of human dignity. One of the most interesting points is the observation of the disruption of a pattern between the meanings of the past and those of the present. By quoting Nickel, the author notices that contemporary theories of human rights are characterised by a strong egalitarian profile as well as by a low individualistic orientation and a strong international orientation. Among others things, Flynn engages himself in a truly philosophical discussion noticing that the inherent legal nature of human rights as well as the "revolutionary founding of nation-states" defended by Habermas, cannot explain the contemporary use of human rights as a "language of moral protest." Thus, it seems that a more inclusive definition of human rights must be provided and that a work of historical and conceptual clarification is required. With this view, Flynn highlights a distinction and a possible interconnection between humanitarianism and human rights.

Flynn's reconstruction of the philosophical debate is integrated by Reidy's paper. The author introduces some of the central topics debated today within human rights theory, followed by a reconstruction both of Rawlsian perspective on international law and human rights as well as its influence on Talbott and Griffin. Reidy claims that recent debate has revolved primarily around three questions: the nature and the function of human rights, their routes of justification and their specific enumeration or "list question." These issues are in turn intertwined in a further set of problems raised by skeptical challenges to human rights, and an assessment of various forms of skepticism such as positivist skepticism, relativist skepticism, realist skepticism and theological skepticism, is provided.

If human rights as universal moral norms can be saved from skeptical criticism, then it becomes interesting to see which non-skeptical approaches have advanced recently in philosophical debate. The second half of Reidy's contribution is aimed precisely at introducing the reader to some detailed technicalities

concerning contemporary debate. For instance, Reidy observes that human rights are not considered as a moral theory of interpersonal relations, but rather as a moral theory of international relations in Rawls' *The Law of Peoples*.[7] Furthermore, human rights are approached as part of a moral theory embedded within a practical perspective of existing constitutional liberal democracies. Finally, human rights represent the moral thresholds for setting states' standards for mutual recognition. Within such a picture, Reidy claims, one should be prepared to consider that Rawls commits himself to a defense of natural duties as preconditions for the achievement of an overlapping consensus within the international order and that this does not commit him to defend a parallel system of natural rights.

Moving to Talbott's approach, Reidy observes that Talbott rejects the Rawlsian account on human rights because it is too weak in as far as the status assigned to human rights and the range of included rights is concerned. For instance, according to Talbott, Ralws should have included a wider range of political, social and welfare rights, just to mention a few, and these should have been considered as truths discovered through historical experience and not as derived by *a priori* reflection. Human rights, in this sense, express the requirement of institutions working in defense of such truths. The first and most relevant ones concern the first-person authority for valuing personal good. Talbott claims that human rights are aimed first at supporting individual autonomy of the members of a society. As in Rawls, Talbott understands human rights as part of a theory of political morality and not as part of a theory of interpersonal relations. In contrast to Rawls, he does not take human rights as a condition of reciprocity for well-ordered states, but rather as moral thresholds for the legitimation of state intervention.

Reidy analyses one of the most widely discussed positions nowadays – Griffin's theory of human rights. Griffin's views consist in seeing human rights as direct descendants of natural law theories, even if he recognises that contemporary strategies are much more sophisticated today than they used to be. According to Griffin, all people have an interest in developing their capacities for normative agency. From the universality of this common interest it follows that three component parts can be analysed: the capacity to make choices (autonomy), the capacity to act on choices (liberty) and the material conditions necessary for acting on one's choices (material welfare). These three goods are common to all since they are considered fundamental interests by all persons. The authors whom Reidy considers, while differing in the strategy they adopt for justifying human rights, are similar in that they all promote non-skeptical views.

The third contribution is Scheuerman's essay. One of the most interesting elements of Scheuerman's perspective is the reconstruction he provides for alternative and not standardly normative justifications of human rights. In his *Reconsidering Realism on Rights*, the author directs his endeavours to the clarification of how realism in international relations is far from being the naïve caricature that several normativists have depicted. Contrary to this, there are several overlapping topics

[7] J. Rawls, *The Law of Peoples* (Cambridge, MA: Harvard University Press, 1999).

and worries, not to mention outputs, that are shared between the two rival positions. Scheuerman develops his arguments by replying to Caney (2005) who has recently considered the notion of "selectivity lacuna" following which human rights have not been consistently defended in all relevant cases. According to Caney, realist skepticism regarding human rights is accompanied by the requirement of adopting a uniform human right response. The lack of perception of cultural differentiations is to be seen as a form of "contextualist lacuna" to the advantage of normativist positions. According to Caney (2005), a third charge against realists exists, namely that a state does not have to prioritise human rights over its national interests in all circumstances.

Scheuerman's task is devoted to show how realists have always shared a substantial ground with cosmopolitans, a position contrary to what is commonly believed. As a matter of fact, notwithstanding certain skepticisms in totally abandoning the centrality of the state, several realists understood the contemporary relevance of a "world community" and a "world government," as was the case of Herz (1959) and Schuman (1952). Scheuerman provides a detailed reply to the three criticisms. He does so by explaining the type of rationality characterising realists' claims, for instance, by referring to power inequality as in the case of "selectivity lacuna." This is hardly a position against a strengthening of human rights at the international level; on the contrary, it recognises the limits of human rights within the Westphalian system. Scheuerman observes also that there are several elements for the consideration of realists' attention to the cultural specificities involved in the implementation of human rights. Thus, to a very large extent, realists appeared to be sensitive to the problem of pluralism as a political resource against mechanic universalism and relativism. They simply countervailed the naïve understanding of those "idealists" whose aim was to exclude the role of prudence and compromise as fundamental elements of political practice. Similarly, concerning the charge of "positive exemplarity" versus "human rights intervention," it is recalled that realists' positions against Vietnam's military intervention were motivated on the basis of a specific consideration and not an aversion to human rights intervention.

Scheuerman's essay completes what can be conceptualised as a first group of contributions dedicated to the historical and philosophical reconstruction of the debate on the meaning and the justification of human rights theory. The critical readings of the introductory section are followed by some of the most relevant essays influencing contemporary debate over the justification of human rights. The second chapter opens with Habermas' insight into the historical and philosophical role of human dignity. Habermas introduces a complex web of problems and perspectives that are reconsidered either directly or indirectly later in this book by other authors. Habermas starts his genealogical investigation into the concept of human dignity by considering the interpretation offered by the Federal Constitutional Court of Art. 1 of the German Constitution concerning the declaration of unconstitutionality of the Aviation Security Act of 2006. What the Court reaffirmed was the principle of human dignity as formulated by Art.1, which prohibits the sacrifice of passengers in a hijacked plane as a means of protection for the life of potential victims. Whereas the notion of human dignity constitutes a key concept today for interpreting

national and international legal documents, human dignity did not play a role within the declarations of the eighteenth century. Besides this element, Habermas claims, it is possible to defend the thesis according to which "an intimate […] conceptual" relation of the notion of dignity to human rights formulations has existed since the beginning, and this explains the "explosive political force of a concrete utopia" of today's process of juridification of international relations. The moral significance of human dignity has consisted in clarifying the significance of "equal dignity" among human beings, so that the positivisation of such principle has resided in the articulation (and enforcement) of specific subjective rights. Human dignity has thus played a normative-generative role from which human rights categories as well specific human rights lists have been generated. Such right-generative functions have been pragmatically activated by experiential violations of equal dignity and this explains why Habermas claims that human dignity "grounds the *indivisibility* of all categories of human rights." The synthetic unity between law and morality realised by the notion of human dignity, though, can be grasped only if two crucial steps are defined by what Habermas reconstructs as a "conceptual history." Such steps include both the role occupied by the concept of human dignity in the shift from a purely duty-centred moral perspective to a right-centred legal perspective, and the semantic generalisation of the notion of dignity from status difference (the so-called "dignitaries") to the equality of moral worth. Habermas considers two further interconnected passages consisting in a double process of universalisation and individualisation. Such process duplicity has allowed all citizens to be recognised as "*subjects of equal actionable rights*." According to Habermas, human rights constitute a realistic utopia for the fact that they have states to connect justice to real institutions of the constitutional state. This process is still the uncompleted project of post-modernity, so to say, even though the progressive institutionalisation of international justice indicates which role human dignity plays in the jus-generative constitutionalisation of the post-national constellation.

In line with Habermas' approach, Forst proposes a reflexive definition in which it is claimed that human beings have the right not to be subordinated to norms and institutions that cannot be "adequately justified to them." Differently from what authors such as Griffin or even Rawls have recognised, human rights are not primarily aimed at limiting state sovereignty in international relations, but they rather grant internal political legitimacy through the recognition of the right to justification. The double and reflexive character of human rights is the following: they not only protect against social domination but, above all, they protect against the exclusion from political self-determination. The argument is divided into three parts: the moral, the political and the legal dimension. First of all, the right to justification is characterised by a moral dimension; second, its legal and political dimension helps to make it effective; finally, the openness of the right to justification to the most extensive inclusion of the affected is aimed at rejecting any charge of ethnocentrism. What is meant precisely by the notion of "morally reflexive justification"? First of all, by following Habermas and Dworkin, Forst draws a distinction between "the moral" and "the ethical," dismissing the second option in view of its being intertwined with the notion of "the good"; secondly, he considers that since any moral justification of

the rights of men presupposes the respect of reciprocity then it must be admitted that a right to justification exists. It is precisely in view of the "normative grammar" unveiled by the right to justification that the reflexive approach can distance itself from ethnocentric views as well as from "false" universalisations.

In such a normative reconstruction of the significance and function of human rights, the same classical notion of "human dignity" refuses to be translated into a metaphysical or ethical concept based on the view of "the good." What it becomes is rather the idea that each must be respected as someone worth of receiving political justification. Accordingly, Forst claims that while the notion of human dignity and agency must be placed at the centre of human rights reflections, this is to be done in quite a different way from how Griffin, for instance, has proposed. Human rights cannot be justified teleologically as protecting basic interests in achieving the good. Rather than representing subjective interests, human rights are the outcome of an inter-subjective process of justification based on the test of reciprocity and generality. Indeed, only those interests which can be granted to all on the basis of the generative process of the principle of justification can be properly considered as human rights. Forst's proposal captures an interesting and so far insufficiently theorised dimension of political life, that regarding the full accountability of politics and institutional arrangements. In fact, the emphasis placed on the "receiving" dynamics activated by the right to justification provides only a partial account of the struggles for emancipation as a deliberative and participatory process for a closer involvement of citizens in public affairs.

Continuing in this direction, Azmanova's essay advances a proposal for the strengthening of mechanisms of political participation. The idea consists in providing an insight on the moral tension between the abstract character of human rights universalism and the contextual contingency of political judgment. She does so by proposing what she calls a "critical deliberative judgment" model, which, far from replicating classical models of justice based upon procedural or substantive criteria, elaborates a so-called "pragmatics of justification." The latter is inspired by a realistic approach to "human motivation in social interactions" rather than by purely normative/counterfactual scenarios. In order to develop this approach, Azmanova considers that struggles for social emancipation are neither totally cooperative nor totally conflictual, but a combination of the two. The dynamics she highlights is one that considers the process of "cooperation-within-conflict" and the reverse relation as a primary source of preservation and transformation of social order. The emancipation from mechanisms of domination, though, rather than grounded on the moral character of individuals and on some idealizing moral presuppositions of action coordination, must be seen as an element placed in the same socio-political conditions of power operation. From this perspective, the validity of the proposed "critical political judgment" does not follow from the logic of "the force of the better argument," but rather from the more contextually situated critical perspective of reaching a mutual understanding on the cooperative production of injustice. This socio-political deliberative process has precisely the goal of discussing those experiences of injustice which should be remedied through social transformation. In that sense, as clearly recognised by the author, the outcome of public deliberations is not

to produce a just political order as such, but, more modestly, to alter the existing chain of "legitimacy relationships" by highlighting the previously unconsidered relevance of new social practices.

It seems that Azmanova, by assigning this primary function to critical judgment, overemphasises the *epistemically heuristic* function of deliberation. Indeed, the modification of already existing chains of "legitimacy relationships" can occur only if judgment is recognised as a capacity to establish new politically relevant interconnections among social phenomena. All this seems very plausible and certainly part of the critical function of deliberative judgment, even if questions arise on how one can defend the epistemic relevance of judgment from outside a fully fledged model of idealising conditions of justice.

A further author whose work on human rights has targeted the contribution of contingency and contextual variation in the light of normative principles is Sadurski. His view of the normative status of universalism occupies a distinct position in the landscape of contemporary justifications to human rights. Sadurski recognizes that there are factual constraints to a pure universalist project since there are factual elements that make discourse a context-dependent variable. The author addresses three major areas in which human rights universalistic aspirations cease to be purely universalistic: the justificatory, the empirical and the institutional sector; these are, accordingly, accompanied by three explanatory examples. For instance, in the assessment of specific human rights principles, Sadurski discusses reasons in favour of the limitation of the right to free speech when outrageous speech is involved. He claims that the prohibition of discourses denying the Holocaust are justified in those countries where the risks of negative counter reactions are such that it is *prudent* to limit such right. Now, it is precisely from these prudential implications that Sadurski's position should be compelled to draw a distinction between the level of justification of human rights and its application. Were the author to claim that the application of the universal right to free speech is contextually constrained then, I believe, no one would have anything to object; but the author defends a much stronger position than only that factual elements play a role within the same *justificatory* level of human rights, and this is a much harder thesis to defend. The most obvious criticism is that Sadurski violates Hume's law, even though at the end of his essay it is clarified that the empirical variables for the justification of the right to non-outrageous speech are connected to the differential relation with other goods rather than to the same justification of that right.

The contribution of Borradori is devoted to the aspect of contingency and to the quite innovative perspective of visual image analysis. With the support of visual samples, the author shows how contemporary civil society has been capable of constructing the notion of "suffering" and of violation of "humanity." According to this analysis the critical force of TV images or photographs lies in the negative-dialectical movement of visual representation which reverses any "document of civilization" to a "document of barbarism," according to Benjamin's quotation. Such self-interpretive pattern is also presented by the author on the basis of the dynamics of the "showing and seeing" the suffering of others, according to which a "we" is contingently constructed through differential relations. The contingency of image

narrations, then, serves as an interpretive context for the self-interpretation of humanity itself. One has to be careful, though, not to lose the dialectical and critical aspect to which the irreducible contingency of images lead. Indeed, the author warns us from a merely rigid definition of human rights violations such as that described by the "unloading ramp at Auschwitz." This would prevent rather than favour the recognition of others' existence and therefore of their full humanity. One unconvincing argument is that the contingency of iterations results in including *any* iteration as a legitimate element of signification. In the last footnote, the author clarifies that the iterative structures for meaning formation are not to be seen on par with the structure of iterability that defines the identity of a sign as in the token/type relation. I believe there are two problems here. The first is that if no one form of identity criterion is deployed then "anything would go," so to say. Secondly, one should not conflate a form of "positive" or "assertive" identity with the more sophisticated version of "differential identity" as the one developed by Saussure's structuralism. In this latter case, indeed, one could rather defend *both* a dialectical dynamics of visual meaning construction *and* a contingent definition of "humanity" precisely on the basis of the differential identity springing out of what "humanity is not." One final point to observe is whether visual image communication can provide *by itself* an extra load of reasoning or if, in the end, its critical force is parasitic on a discursive model of reason. Were the latter true then one would better confront what imagine analysis adds while remaining *within* a discursive system of communication.

Ferrara's essay in favour of the draft of a new Charter of Fundamental Rights, follows naturally from previous proposals. In an ever politically interdependent world, it seems that the pedagogical function traditionally assigned to the Declaration can only inadequately fulfil the international normative role it is meant to play. The problem of the international status of the Charter, is strictly connected to a second aspect concerning the limits of the Universal Declaration, namely its division into four areas that are not hierarchically structured. Such "unstructured structuring" of the Universal Declaration, as Ferrara defines it, places both the "right to life" and "the right to paid holydays" on the same level of importance, so that the result is an impossibility to intersect a large portion of internationally relevant rights that can neither be left to the will of the states nor legitimise a UN humanitarian military intervention. It is precisely in between such intersections where the need for a new Charter resides – one that is capable of integrating, without substituting, the actual international Bill of Rights. How should such a new Charter be conceived? First of all the author claims that if we were to conceive rights once again as natural rights anteceding a political will, we would be criticised again for producing yet another Western approach to human rights. Accordingly, the author defines all those liberal-perfectionist attempts pretending to superimpose one comprehensive model over a plurality of doctrines as 'anti-liberal.' Moreover, the new Charter should be given legal binding force and define the contours of international sovereignty, that is, its possibility to limit domestic state sovereignty. One can observe at this point that Ferrara's proposal requires an overall amelioration of the UN decision-making bodies, as well as a rearrangement of electoral procedures for public officials. In other words, it seems that Ferrara's new Charter, in order to be implemented, requires the

activation of a large number of institutional improvements in support of his distinct cosmopolitan views.

Finally, according to the author, the Charter should be conceived as a "thin" view of the good for humanity with which different "reasonable comprehensive views" would overlap. It is precisely starting from such minimalism that Ferrara sees the "realistic utopia" of human rights. And yet, its interconnection with the Universal Declaration, that is, the interplay the author mentions about the differentiated functions of promoting an "elementary conception of justice" and a "fully-fledged conception of justice" raises further questions on whether there is more to say about a sort of cosmopolitan "teleology."

The third section, which addresses the relation between democracy and human rights, includes a fairly articulated spectrum of interventions. The chapter opens with the well-known essay by Benhabib assessing the problem of whether it is possible to defend a human right to democracy.

Moving from Rawlsian's absence of formulation of a right to self government, as well as from Cohen's distinction between *substantive* and *justificatory minimalism*, the conclusion the author reaches is that while Rawls leads to a form of "liberal indifference" if not of "unjustified toleration," Cohen leads to considering "the equality of political rights" as a non-necessary condition for "interest representation." Benhabib's proposal consists in extending the interpretation of Arendt's famous view on the strictly political notion of "the right to have rights." The author's aim is to suggest a reformulated approach moving beyond an institutionally-state-centred view. The point consists in taking "self-government" as a fundamental human right and to conceive human rights as legal measures grounded upon moral principles for the protection of communicative freedom. Benhabib conceives that communicative freedom lies at the intersection of the generalised other and the concrete other, that is, at difference and commonality. One question which arises concerns whether the principle of having a right to self-government can be seen on par with having a right to democratic arrangement. As a matter of fact, if self-government represents a broader category than democracy then the latter becomes a non-compelling criterion and Rawlsian notion of "decent consultation" reappears as a favourite candidate. Furthermore, the interesting discussion of Aristotle's *Ethics* on the circularity of practical reason points in the same – Rawlsian – direction, since the same "recursive validation" of the preconditions of discourse that Benhabib considers in her argument can be seen on par with the hermeneutical function of Rawls' reflective equilibrium. The argumentative richness of the essay suggests many philosophical echoes, for instance that "the right to have rights" defended here is strictly dependent upon the condition of *recognition* of the communicative potentiality of the other. Due to this strict interdependence, it becomes necessary to provide a comprehensive explanation for which function recognition has within the theory. Let's return to the alternative between sovereignty and democracy and assume, as done by the author, that a human right can be established to democracy and not simply to self-sovereignty in general. For those who are familiar with the Habermasian view on the mutual co-implication between democracy and human rights, the proposed recognition of the communicative capacity of the other would

sound like a new version of a well-known strategy. If this is true, then one could claim that the most important contribution of this essay is the clarification and the enrichment of this interpretive model. The enquiry into the philosophical meaning of human rights and democracy as institutionalisations of communicative settings, unexpectedly, does not lead to an interventionist foreign policy conducted in the name of a right to democracy. On the contrary, the author, quoting Kofi Annan's reference to the "responsibility to protect" previously presented in this introduction, suggests the opportunity to promote a "new Law of Humanitarian Interventions" clarifying more precisely the political and social conditions in which military interventions are required. Indeed, it is precisely in this direction that advancements have been made at the international level, as I referred to earlier.

From a rather historical and genealogical perspective, Brunkhorst's contribution highlights the double transition characterising human rights both *within* the birth of modern constitutional state and *after its collapse* into a globalised market, society and institutions. It has been only thanks to the nation state that civil and political freedoms have found their fully legal recognition and administrative implementation and that, as Brunkhorst says, a "dialectic of enlightenment" has flourished. Indeed, while all declarations of human rights in the eighteenth century affirmed the universal profile of rights, their progressive concretisations into legal norms during the nineteenth and the twentieth century limited their scope and inclusive capacity within national boundaries. Nation state in modernity underwent radical transformation since pluralism of societies shifted from being internal to individual states' affairs to being internal to one single global *basic structure*. The twentieth century meant not simply the emergence of some of the most cruel regimes, but also a crucial transition from constitutional to global human rights law. International law today has, in turn, undergone several transformative processes, for instance those from a law of coexistence to cosmopolitan rights. Additionally, this further transformation of the nation state is itself subject to a new dialectic of enlightenment, as in the case of global actors who escape constitutional control. Such new dichotomy between the local and the global, both at the structural and at the legal level, bears serious consequences at the economic, religious and power-structural levels, or as Brunkhorst puts it: "There will be Blood."

External conditions of international intervention are matched on the domestic side by a consideration of the several techniques deployed in achieving public consensus. Accordingly, the interest raised by the paper of Bellamy and Schönlau consists in addressing the case of disagreement on matters of principle and not simply on their application. The authors suggest a parallel between "constitutional" and "normal" politics by observing that, contrary to Rawlsian and normativist reading, agreement on constitutional essentials is more often than not the result of different forms of compromise such as bargaining, trading, segregation, trimming or third-party arbitration. Normally, forms of compromise are associated to low-level standards of interest bargaining, and the proposed solutions are generally oriented to second best options. Nevertheless, the justification provided for the role of compromise, besides practical effectiveness in factual circumstances of political mediation, is grounded on a distinct philosophical interpretation. The authors claim that Rawls'

notion of the burden of judgments does not apply only to the assessment of public goods, but also to the idea of the right. This means that the same abstention from publicly upholding a comprehensive conception of the good must be maintained also in the case of the search for a public consensus on the right. These strategies of interest and principle mediation are presented by the authors as optimally suited for obtaining an unanimous agreement which cannot be guaranteed through classically defended views based on the force of the "best argument." The strategic role of such techniques is then tested through the discussions characterising the Convention of the EU Charter of Fundamental Rights as approved in Nice in 2000. From the analysis of the preliminary debate over the Charter, it was shown how disagreement involved not only the substance of the rights discussed, but also the question on the addressed subjects and the pursued scope. Overall, from the points raised by Bellamy's and Schönlau's article, it can be said that Rawlsian views require further analysis and philosophical work. Nevertheless, what remains unclear is whether the authors target the point, since Rawls distinguished quite clearly constitutional agreements and a proper overlapping consensus of principles of justice, seeing the first as an inadequate instrument for achieving political stability. Also, in response to the authors it can be said that from the fact that the discussion of the EU Charter has not followed a normativist approach based on reasonability, it does not follow that interest-mediation should be pursued. On the contrary, one might argue that the deliberative process that occurred during the formulation of the EU Charter is invalid specifically from a normative perspective. As a corollary of such line of reasoning, one might consider whether Rawlsian notion of reasonability is in need of further elaboration and reformulation, as in the case of the recognition of the role of truth in the use of public reason. But, even if this were the case, one would remain anchored to a normativist model without this leading to a paradigm shift.

Bellamy's and Schönlau's contribution is complemented by Cedroni's and Marko's reflections into the process of democratisation through the politics of human rights and the role of minority rights. Cedroni's analysis adds insight into the philosophical understanding by depicting the institutional and legal framework required for the functional effectiveness of human rights. The latter are presented as prerequisites for democratic interplay so that, accordingly, violations of human rights diminish the degree of political legitimacy and democratic stability. The author suggests to consider human rights as a never-ending process which, by favouring cultural equality, contributes essentially to the democracy-building process. Human rights are the cornerstone for effective transitional justice processes. Nevertheless, the process of democratisation of transitional states does not and cannot depend on pure legalisation of human rights principles. For such reason, the author at the end of her essay indicates that the key concept in any politics of human rights rests on the recognition of "cultural equality," a concept which requires a deep structural transformation in any transitional (and non-transitional) society.

A further input regards which role should be assigned to ethnopolitics in respect to human rights implementation strategies. Marko's contribution into the ethnopolitics of human rights reconstructs some of the historically relevant steps that have contributed to defining the modern notion of the nation-state and its relation to

minorities. As long as minorities have been considered on an ethnic basis and on "naturally given" differences, only a certain (inadequate) model of state can follow. But since, as the author claims in coherence with a long established tradition, "ethnic differences" are to a large extent a "social construction of reality," the state model and its related politics should be reconceived along new strategic directions. In order to introduce either the ethno nationalist or the inclusive model of society, the author presents three binary criteria (identity/difference, equality/inequality and inclusion/exclusion), which emphasize identity-equality-inclusion criteria in the latter case or difference-inequality-exclusion in the former case. Such normative criteria are then matched by empirical examples taken from recent history, as well as from institutional designs aimed at favouring fair representation, reconciliation and dialogue among conflicting parties. One of the most crucial suggestions the author provides for the overcoming of ethnic divides is the shift in composition of political parties from a typically monoethnic to a multiethnic arrangement, so that the construction of "generalisable interests" begins from the bottom of the political will formation.

Sartor's essay concludes the collection. Sartor describes some of the forefront problems and transformations that states and democracies in particular are facing today. Indeed, Sartor introduces an interesting and innovative perspective concerning the relation between human rights and information society. He considers in particular the possibility to construct a humanistic information society by taking into account the advantages and disadvantages that Information and Communication Technologies (ICTs) provide for human development. For example, ICTs are changing processes of production from the physical to the informational. Such change of production affects, not surprisingly, also the production of culture through an ever closer connection between industry and culture. This new system of socio-productive arrangement provides, according to the author, both new opportunities and problems. It is clear how ICTs have sped up the process of economic and industrial production. Indeed, the processing of a very high amount of informational data has prompted the growth of computerised material production. Besides further areas of advancement, such as the improvement of efficiency in administration or even the formation of a virtual "unconstrained" global public sphere, ICTs have increased the risk of privacy intrusions and exposure to discrimination. Sartor's style is fascinating; he constructs his arguments through reference to those nightmares described in classical fiction books such as Asimov's, Dick's or Vonnegut's. By considering such potential (and in some cases real) threats to human security and social life, the author engages himself in the discussion of which role must be assigned to human rights, that is, whether they should be seen as legal constraints or simply as "threshold conditions." According to this latter view, endorsed also by Sartor, the ethical nature and function of human rights is more crucial than their positivisation, even if this does not elicit possible legal translation of ethical principles.

Sartor deals with rapidly developing issues and scenarios. Indeed, one of the breaking news stories nowadays regards the information disclosure made by WikiLeaks concerning secret communications among high state officials or state industrial espionage of foreign countries. What is even more interesting as a

socio-political phenomenon is that Assange, the founder of WikiLeaks, is now in the position to provoke an international political crisis. If it is not a novelty that massive informational storage can affect the life of citizens, what is new now is that informational power acquired by one citizen can affect the life of a world's state leader administration, not to mention the life of the international community. One should not be so naïve to underestimate the WikiLeaks phenomenon, nor its symbolic meaning. First of all, WikiLeaks has greatly contributed to increasing international awareness of gross human rights violations such as in the case of the documentation of extrajudicial killings in Kenya for which the Amnesty International New Media award was awarded in 2009. Secondly, WikiLeaks represents the first collaborative experiment of freely unconstrained collection of information. In its mission it is clearly stated that the main source of organisational inspiration is derived from Art. 19 of the Universal Declaration of Human Rights where the right to freedom of opinion and expression is defended. Furthermore, in accordance with the mission, it is made clear that the main organisational goal is to disseminate "original source material alongside our news stories so readers and historians alike can see evidence of the truth."

It seems to me that the political challenge raised by the WikiLeaks phenomenon consists precisely in the following: that global civil society has for the first time in history counter-reacted to state informational power control through the development of a systemic networking of information sharing. Whether or not such informational documents add more truth to the public awareness of global civil society depends on the evolution that current global public debate will generate. In light of such a rapidly evolving scenario, this book has the ambition of indicating some of the most crucial areas from which new political philosophical challenges will arise. It is my hope that the theoretical insights and political suggestions gathered here will help improve the understanding of our contemporary world.

Claudio Corradetti
University of Rome "Tor Vergata," Rome, Italy
Senior Researcher European Academy, Bolzano, Italy

# Part I
# Historical and Philosophical Perspectives on Human Rights

# Chapter 1
# Human Rights in History and Contemporary Practice: Source Materials for Philosophy

**Jeffrey Flynn**

How should philosophers define the concept of human rights, a concept with such a varied history and in such widespread use today? They are certainly free to simply stipulate a definition by drawing solely on philosophical resources. In fact, stipulating a relatively narrow definition might help address problems like rights inflation: the pervasive temptation to translate all important claims into the language of human rights, making all that is good, right, or even merely desirable into a human right. Rights inflation risks turning human rights into a meaningless term. But when philosophers respond to the danger of such indeterminacy by stipulating their own definition they risk putting forward a philosophical conception that is irrelevant to contemporary human rights practice. For what is the point of trying to clarify the meaning of a term so central to contemporary global political life if one's definition is in no way tied to the way the term is actually used? Clearly a philosophical conception of human rights must be bound in some ways to the way the term has been or is actually used. But how?

The history of human rights provides resources for thinking about what the term means, but the risk of irrelevance arises here too if one relies on past conceptions that no longer inform contemporary practice. We can pose this dilemma in terms of the contrasting notions central to two recent philosophical accounts: is it possible to develop a conception of human rights that captures the dynamic elements of an "emergent global practice" (Beitz) without losing sight of the "historical notion" (Griffin) of human rights?[1] This essay highlights recent work by discourse theorists, such as Jürgen Habermas and Rainer Forst, that points in the right direction. Building

[1] Beitz (2009, 212, see also 13); Griffin (2008, 4).

J. Flynn (✉)
Department of Philosophy, Fordham University, New York, NY, USA
e-mail: jeflynn@fordham.edu

C. Corradetti (ed.), *Philosophical Dimensions of Human Rights: Some Contemporary Views*, DOI 10.1007/978-94-007-2376-4_1,

on their work, I argue that giving pride of place to actual social and political struggles for human rights is a way of connecting a theory of human rights with their meaning in both past and present practice.[2]

I begin in Section One with stories by two historians about when human rights were invented. Lynn Hunt dates their origins to the rise of the "rights of man" in the revolutionary era of the late eighteenth century while Samuel Moyn maintains that the specific connotations that "human rights" have for us today are of far more recent vintage. Moyn warns historians and philosophers of human rights that focusing on earlier episodes in the rights tradition runs the risk of missing what is novel about contemporary human rights. I conclude this section with some reflections on what these historical accounts tell us about connections between humanitarianism and human rights.

Section Two begins with Charles Beitz's recent practical conception of human rights, which is the philosophical counterpart to Moyn's history since Beitz focuses solely on the recent history of human rights in depicting human rights practice. Beitz has heeded Moyn's warning, but I maintain that philosophical conceptions can still be in a position to appreciate the full contemporary meanings of human rights while maintaining contact with earlier episodes in the rights tradition. To show this, I look first at James Griffin's work, which grounds human rights in the idea of human dignity, but then I turn to Habermas and Forst for a more dynamic approach to human dignity that makes struggles for human rights central. In this way, human dignity is used not as a philosophical concept for deriving the content of human rights, but as part of a framework for understanding the moral dynamic of human rights in practice.

## 1.1 When Were "Human Rights" Invented?

Lynn Hunt's *Inventing Human Rights: A History* (2007b) and Samuel Moyn's *The Last Utopia: Human Rights in History* (2010) could not be more at odds in what they identify as the central episode in the history of human rights. Moyn goes against the grain of most recent scholarship on the history of human rights by focusing on the 1970s as the locus for the roots of the contemporary resonance of human rights. Hunt, on the other hand, relies on the more standard narrative in telling us how human rights were "invented" in the revolutionary period of the late eighteenth century. Focusing on the revolutionary era is not at all surprising since the political declaration of the "rights of man" would be one of the central episodes in almost anyone's history of human rights. But she does more than just trace human rights to the declarations themselves. She also provides a fascinating account of how the

[2]Two of the recent essays on which I focus – Habermas (2010b) and Forst (2010) – are reprinted in this volume along with another significant recent contribution to a discourse theory of human rights: Benhabib (2008).

*psychological* foundations for human rights were laid through new forms of art and reading, accounts of torture, and new views of pain. One of Hunt's central arguments is that new forms of novel reading that developed in the eighteenth century led to new kinds of experience. This made possible robust forms of empathy, transformed views about pain and a sense of equality across difference. In particular, epistolary novels such as Richardson's *Pamela* (1740) and *Clarissa* (1747-8) and Rousseau's *Julie* (1761) generated passionate psychological identification with characters who did not share the background of many readers. This made it possible to "imagine equality" across various differences. Readers of these novels

> empathized across traditional social boundaries between nobles and commoners, masters and servants, men and women, perhaps even adults and children. As a consequence, they came to see others – people they did not know personally – as like them, as having the same kinds of inner emotions. Without this learning process, 'equality' could have no deep meaning and in particular no political consequence.[3]

Although novel reading was not the only way in which this ability to identify with others in this way was acquired, Hunt thinks it significant that the surge in the genre of the epistolary novel coincides with the rise of the "rights of man."

Hunt's history of human rights is one interesting version of what has become a fairly standard story about the historical roots of human rights. Moyn's revisionist account, on the other hand, stresses how human rights became a powerful utopian ideal that gave rise to a "set of global political norms providing the creed of a transnational social movement" (11) only in the 1970s. The popular consciousness forged during that period is what defines what human rights mean today, a point that has been missed entirely, or at least deeply obscured, by those histories of human rights that seek their deeper origins in earlier historical episodes.

In contrast to Hunt and others, Moyn distinguishes the "revolutionary rights" of the late eighteenth century from contemporary human rights. The former were about founding new states, not about external criticism of them. Drawing on Hannah Arendt, Moyn argues that

> the *droits de l'homme* that powered early modern revolution and nineteenth-century politics need to be rigorously distinguished from the "human rights" coined in the 1940s that have grown so appealing in the last few decades. The one implied a politics of citizenship at home, the other a politics of suffering abroad. If the move from the one to the other involved a revolution in meanings and practices, then it is wrong at the start to present the one as the source of the other. (12–13)

Moyn draws our attention here to the kind of politics that followed in the wake of or was made possible by invocations of the "rights of man" versus "human rights." In telling the story of the "rights of man," much like the earlier history of natural rights, one must be clear about the extent to which they were bound up with the rise of the very same powerful state that human rights were later supposed to transcend (22). The "rights of man" were supposed to be achieved

[3] Hunt (2007b, 40). Henceforth cited parenthetically in the text.

> through the construction of spaces of citizenship in which rights were accorded and protected. These spaces not only provided ways to contest the denial of already established rights; just as crucially, they were also zones of struggle over the meaning of that citizenship, and the place where campaigns for new rights took place. In contrast, human rights after 1945 established no comparable citizenship space, certainly not at the time of their invention – and perhaps not since. If so, the central event in human rights history is the recasting of rights as entitlements that might contradict the sovereign nation-state from above and outside rather than serve as its foundation. (13)

Finally, Moyn stresses the central role of the human rights movement in recasting their meaning:

> the most glaring difficulty in placing the French Revolution at the origins of human rights today is that… it gave rise to nothing like the international human rights movement so central to the contemporary moral imagination. …There simply was no "rights of man movement" in the nineteenth century – or if there was, it was liberal nationalism, which sought to secure the rights of citizens resolutely in the national framework.
>
> (Moyn 2007)

Thus, the many historians who have looked primarily at much earlier episodes in history in order to trace the continuity between natural rights or revolutionary right and human rights risk missing what is new about the latter. They end up obscuring what actually needs explaining: when exactly and why did human rights come on the scene in the form we take for granted today.

Having dispelled the "myth of deep roots" (12), an obvious place to look next would be the 1940s and the Universal Declaration of Human Rights of 1948. But Moyn debunks this starting point as well, calling the commonplace idea that human rights arose as a response to the horrors of the Holocaust perhaps "the most universally repeated myth about their origins." (6)

> If there is a pressing reason to concentrate on human rights in the 1940s, it is not because of their importance at the time but because doing so provides precious insight into why they could and did not take off until decades later. It matters what human rights, at the time, were not. They were not a response to the Holocaust, and not indeed focused on the prevention of catastrophic slaughter. Only rarely did they imply principled dissent from modern state sovereignty… What they were in this era helps isolate what changes later allowed for their eventually broad popular appeal. (47)

Moyn highlights the many ways in which human rights in the 1940s, including their enumeration in the UDHR (81), were still essentially bound up with the politics of the nation-state. Moreover, he maintains that "Holocaust memory" simply was not a powerful force at the time and only really achieved widespread prominence decades later at the point at which human rights finally did make their breakthrough as a "larger popular language" and inspiration for a movement (47).[4]

Moyn cites 1977, the year in which Jimmy Carter declared a commitment to human rights at his inauguration and Amnesty International received the Nobel peace prize, as "the breakthrough year." He argues that "the startling spike in cultural prestige [human rights] began to enjoy after decades of irrelevance" needs to be

[4] See Moyn (2010), 82–3, and 307 n15, where he cites historical work on when exactly and how "Holocaust memory" came to be a powerful force in popular consciousness.

explained and asks "why, at this moment, human rights broke through so substantially on the terrain of idealism, for ordinary people, and in public life" (122). The explanation Moyn unfolds is that the comparatively minimal moral utopianism of human rights provided a platform for idealists and activists in the wake of crises for various forms of more comprehensive political utopianism. Essential to the story are North American and Western European activists seeking a "new venue for idealism" and Eastern European dissidents and Latin American opponents to authoritarian governments. For example, Moyn identifies the striking parallel between the aims of Peter Benenson (founder of Amnesty International) who, as early as 1961, was attempting to find some common ground on which idealists could cooperate after the "eclipse of Socialism" (130) and Czech dissidents who, after the Soviet invasion in 1968 and the end of hopes for "Socialism with a human face," took up the language of human rights as a form of moral struggle in the face of closed political possibilities. "One of the distinctive features of human rights consciousness in the crucial years of the 1970s was that appeal to morality could seem pure, where politics had shown itself to be a soiled and impossible domain" (170). Struggles for "human rights" came to dominate the global political landscape and the domain of idealism because they were portrayed as a moral struggle or an "antipolitics" in place of various forms of political utopianism that aimed at more radical transformation. They constituted a "pure alternative in an age of ideological betrayal and political collapse" (8).

Thus, the central shift that has to be taken into consideration in order to understand the meaning of human rights today is "the move from the politics of the state to the morality of the globe, which now defines contemporary aspirations" (43). The reason the language of human rights resonates so strongly for us today has less to do with their deep roots in history and more to do with how they exploded on the global scene at a particular time and in a particular way. We cannot easily separate their current meaning from this definitive episode in our recent past, and bypassing this recent history to look at earlier episodes in the history of human rights risks misunderstanding the contemporary meaning of human rights entirely.

Both of these stories about when human rights were invented, Hunt's and Moyn's, illuminate central episodes in the development of the Western moral and political imagination. And both end up drawing our attention, though in different ways, to the relation between human rights and humanitarianism. This is important because distinguishing the two is critical for not only historical reasons but also, as we shall see, normative reasons. Hunts tells us about how the rise of the humanitarian sentiment was crucial in making it possible to "imagine equality" across differences, which laid the psychological foundations for "human rights". But Moyn challenges this, arguing that even if humanitarian concern played some part in the rise of the rights of man, the two elements quickly diverged into the "politics of suffering abroad" (humanitarianism) and the "politics of citizenship at home" (extending the rights of man).[5] Only much later, sometime in the latter half of the twentieth century do the two traditions – humanitarianism and rights – come back together in various ways.

[5] See Moyn (2010, 220 and 243n17) , and Moyn (2007) which is, among other things, a trenchant critique of Hunt's book.

Thus, there was no simple fusion of humanitarianism and human rights in the late eighteenth century that was then carried up to the present. There was in fact a very large gap. Failing to acknowledge that gap means failing to acknowledge that one of the things that needs to be explained *is* the more recent fusion of humanitarianism and human rights.

Whether Moyn is right about this or not, I would criticize Hunt's account for another reason. Hunt admits that there were limits to the extension of equal rights based on the newfound springs of empathy. "Learning to empathize opened the path to human rights, but it did not ensure that everyone would be able to take that path right away" (68). Most significantly, it did not lead to full equality for women, even though women's struggles for greater personal independence were central to so many of the popular novels Hunt highlights. "Readers empathizing with the heroines learned that all people – even women – aspired to greater autonomy, and they imaginatively experienced the psychological effort that struggle entailed" (59–60). But this was not enough to overcome the dominant view of women as dependents. Thus, insofar as equal rights were extended to women at all at the time, it was restricted to expanding the sphere of personal autonomy (the rights of a "passive citizen") but not to the arena of political autonomy (the political rights of "active citizens").

It seems Hunt may have identified a necessary condition for the idea of human rights, but not a sufficient one. What, then, is the missing ingredient for making it possible to "imagine equality" in the more robust sense of what it means to be a bearer of a full set of equal rights? What made it possible for eighteenth century novel-readers to so strongly identify with the plight of female heroines while not extending full civil and political rights to women? Hunt may have hit on the answer herself in an article in which she first set out the theses further developed in her book. There she cites Charles Taylor: "to talk of universal, natural, or human rights, is to connect respect for human life and integrity with the notion of autonomy. It is to conceive people as *active cooperators in establishing and ensuring the respect which is due them*".[6] Taylor is highlighting here the kind of respect that one owes another insofar as the other has an equal status as a rights-bearing individual. What Hunt fails to fully incorporate into her view is the extent to which it is possible to empathize with another as an *object* of suffering and yet not identify them as a *subject* of rights. It is one thing to acknowledge that others can suffer in the very same way as yourself, and so deserve your sympathy or pity, but it is another thing to recognize others as deserving equal respect. Think for example of the degree to which it is possible to be moved by the suffering of non-human animals; certainly it does not follow from that empathetic feeling alone that one must also feel obliged to respect them as full-fledged moral equals or think they have the capacity for moral autonomy. Seeing others as deserving sympathy does not necessarily entail

[6]Taylor (1989, 12), as cited in Hunt (2007a, 3–20).

seeing them as deserving respect. This is one element that distinguishes the logic of human rights from the logic of humanitarianism.[7]

With this distinction in mind, we can also ask whether Moyn gets the connection right. He sees the fusion between humanitarianism and human rights as a relatively recent phenomenon involving "the slow amalgamation of humanitarian concern for suffering with human rights both as a utopian idea and a practical movement," to the point that "today, human rights and humanitarianism are fused enterprises, with the former incorporating the latter and the latter justified in terms of the former" (221). But he stresses how this was not central at the breakthrough moment in the 1970s, which

> occurred in striking autonomy from humanitarian concern, particularly for global suffering. In their explosive moment, human rights were pursued for dissidents under Eastern European totalitarianism and victims of Latin American authoritarianism, not those in miserable circumstances in general. (220–1)

Moyn may be drawing this contrast too starkly, however, by putting the anti-totalitarianism of "human rights" on one side and the "humanitarian" concern for "global suffering" and generally "miserable circumstances" on the other. This runs the risk of obscuring the extent to which the rise of the human rights movement in its heyday was in many ways driven by a form of humanitarian concern for suffering. Indeed, in Moyn's own account of the "new style of mobilization" that Amnesty International almost single-handedly invented, he stresses the way their personalized accounts of victims' persecution provided "a direct and public connection with suffering" (130). Does this not already involve some degree of fusion between humanitarianism and human rights?[8]

In fact, there do appear to have been powerful humanitarian motifs present at the moment of breakthrough for contemporary human rights. For example, Jeri Laber, one of the founders of Human Rights Watch, recounts in her memoir, *The Courage of Strangers*, how she entered human rights work in the first place. She recalls how she read an essay entitled "Torture" by Rose Styron in the December 1973 issue of the *New Republic*. The account of the savage torture of a young Greek girl is what led to Laber's initial involvement in the human rights movement: "It was my daughter's face I saw on that tearful Greek girl as I thought of her, constantly, in the weeks that followed" (Laber 2002, 8, see also 229). This ultimately inspired the "successful formula" that Laber used in her subsequent op-ed pieces published in the *New York Times* throughout the mid-1970s. She "began with a detailed description of a horrible form of torture, then explained where it was happening and the political context in which it occurred; [and] ended with a plea to show the offending government that

[7] For more on the ways in which humanitarian sentiment can fail and its complicated relation to human rights, see the fascinating recent account in Festa (2010).

[8] At another point Moyn challenges the connection between natural rights and human rights by stressing that "the founding natural rights figures were… anything but humanitarians" (2010, 21), implicitly acknowledging that the contemporary commitment to human rights is by contrast more bound up with humanitarianism.

the world was watching" (Laber 2002, 73). Although Laber may be credited with developing the contemporary version of this model, it relies on many of the central features of the new genres of the eighteenth and nineteenth century, such as novels, medical case histories, and parliamentary inquiry reports that Thomas Laqueur has identified as part of the rise of the "humanitarian narrative." This genre included detailed descriptions of the "suffering bodies of others" oriented toward "the production of humanitarian sentiment and reform" (Laqueur 1989, 176, 197). It seems that this form of detailed description of the suffering victim – the humanitarian narrative – was integral to the rise and success of the contemporary human rights movement very early on.[9]

This predates what Moyn refers to as the recent fusion between humanitarianism and human rights. Thus, he may not have adequately accounted for the relation between humanitarianism and human rights. And Hunt is right to draw our attention to the role of humanitarian sentiment in the Western rights tradition, even if her account is incomplete. A more complete history of the relation between modern humanitarianism and human rights remains to be written, and would have to identify the points at which each arose, when they separated or came together, and the respective politics and programs each has inspired. I return to the relationship between human rights and humanitarianism at the end of this essay, but will first return to the question I began with: whether and to what extent philosophers should pay more attention to the recent history of human rights. Moyn is right to draw our attention to more proximate causes of the rise of a genuinely global human rights movement. But how big a role should that play in our philosophical analysis of the meaning of human rights?

## 1.2 How Should Philosophers View the History of Human Rights?

Of course there are *some* connections between our contemporary use of the term "human rights" and earlier episodes in the rights tradition. But what exactly are they? Philosophers may be prone to look to the distant past partly because they often know much more about the philosophical notions that are thought to be predecessors of contemporary human rights – natural rights or the "rights of man" – than they do

[9] A full assessment of this point would certainly require more research. But for another indication of the connection, see the presence of humanitarian motifs in David Kennedy's (2004) candid reflections on his work as a human rights lawyer and activist. "At its most effective," he writes, "human rights portrays victims as passive and innocent" (14) and makes the activist into an "heroic agent for an authentic suffering elsewhere" (150). He admits that the more passive the victim, the more motivated he was to help. The more politically active prisoners he worked with in Uruguay he saw as "equals" who "needed no rescue." The "passive victim," on the other hand, "awakens my indignation and motivates me to act" (66). Admittedly, he is writing about his work in the mid-1980s, but one can imagine that this also accurately reflects much human rights work in the 1970s.

about all of the intricacies and developments within contemporary practice. If there are significant disjoints between those earlier ideas and contemporary human rights then this poses a problem. The question is, what gets lost when we start with ideas like natural rights and the "rights of man" and treat contemporary human rights as if they are just contemporary variants of those older ideas?

Although some contemporary philosophers do view human rights as essentially another name for natural rights or the rights of man, a number of philosophers have recently stressed the discontinuities between contemporary human rights and older conceptions of rights.[10] For instance, James Nickel argues that the contemporary conception, as laid out in the UDHR and subsequent treaties and charters, differs from earlier ones in three ways. Human rights today are both more egalitarian (with stronger emphasis on legal protection from discrimination and inclusion of social rights) and less individualistic (conceiving human beings not as isolated individuals, but more as members of families, groups, and communities). Most importantly, Nickel highlights one of Moyn's main points: "today's human rights differ from eighteenth-century natural rights in being internationally oriented and promoted." They are now seen as "appropriate objects of international action and concern" (Nickel 2007, 13–14).

But if any single account of human rights can be said to do within the philosophy of human rights what Moyn does for the history of human rights, it is Charles Beitz's. In his recent book, *The Idea of Human Rights*, Beitz develops what he calls a "practical" conception of human rights, which "takes the doctrine and practice of human rights as we find them in international political life as the source materials for constructing a conception of human rights."[11] Beitz essentially makes a philosophical version of Moyn's argument: when philosophers draw on the history of political thought about natural rights or the rights of man, they miss what is novel about contemporary human rights practice (44–5). He maintains that "this does not mean that there is no point in investigating other conceptions of human rights such as those that might be inspired by various ideas found in the history of thought; only that we ought not to assume that this would be an investigation of human rights in the sense in which they occur in contemporary public discourse" (11).

In developing this "practical" conception of human rights, Beitz attempts to keep human rights theory in touch with contemporary human rights practice, aiming at a theory that does not "stand outside the practice" but is "continuous with it" (212). He contrasts this with approaches that conceive of human rights "as if they had an existence in the moral order that can be grasped independently of their embodiment

[10]Moyn states that, "the essential novelty of human rights… still goes unmentioned in histories of human rights penned by philosophers today" (2010, 215). This may have been more or less true for a while, but there are quite a few philosophers today who take seriously the novelty of contemporary human rights. Aside from the ones I discuss here, see also Pogge (1995, 103–20) and (2000, 45–69). For a contrasting account that does view human rights as another name for natural rights, see Simmons (2001).

[11]Beitz (2009, 102), henceforth cited parenthetically.

in international doctrine and practice" and that draw on historical or contemporary versions of "natural rights," the "rights of man" or fundamental moral rights. "For those who accept some version of this kind of view, the task of the theorist of international human rights is to discover and describe the deeper order of values and judge the extent to which international doctrine conforms to it" (7). Beitz's alternative starts with contemporary human rights practice as we find it and tries to "interpret the normative discipline implicit in the practice" (212). This results in a decidedly different task for the theorist, namely, "to clarify the uses to which [human rights] may be put in the discourse of global political life and to identify and give structure to the considerations it would be appropriate to take into account, in light of these uses, in deliberating about their content and application" (212).

Above all, what distinguishes contemporary human rights from earlier conceptions of rights, according to Beitz, is the idea that "each person is a subject of global concern" (1). More specifically, he maintains that human rights should be understood in terms of "a public normative practice with global scope whose central concern is to protect individuals against the consequences of certain actions and omissions of their governments" (14). Other novel elements of contemporary human rights doctrine and practice that could be missed by focusing on earlier conceptions of rights include the normative breadth of provisions included in the various postwar human rights documents and the heterogeneous strategies of implementation they prescribe, some of which I describe below (on this and the following, see 29–31). In that sense, they differ from earlier conceptions of fundamental rights as preemptory. Moreover, contemporary human rights are conceived not as "timeless" but as protections against distinctively modern threats, the kind that arise in modern or modernizing societies. A related, and final point is that contemporary human rights doctrine is not static but continues to evolve.

In addition to these distinctive features of contemporary human rights doctrine, Beitz highlights the various mechanisms or "paradigms of implementation" that are part of contemporary practice (33–40). These include reporting and auditing processes associated with UN agencies, incentives and disincentives associated with a whole range of sanctions, forms of assistance to increase institutional capacities within states, forms of compulsion including armed intervention, and modifications of "external" policies by states or multinational actors that make human rights protection difficult within certain states. Finally, and most important for capturing the centrality of the human rights movement that Moyn points to, Beitz stresses that various forms of domestic contestation and engagement are typically supported by outside agents such as transnational nongovernmental organizations.

The point is not that Beitz gives a wholly descriptive account of contemporary human rights, but that he starts with a highly detailed account of that practice and uses this as a guide for developing the normative conception. Not just any human rights claim made within the contemporary practice is automatically valid. Rather, Beitz develops a schema for justifying such claims according to whether (1) the interest at stake is sufficiently important, (2) there are means available to states to protect the interest, and (3) that when states fail to protect such interests that what is at stake counts as a "suitable object of international concern" (137). My aim here

is not to develop a comprehensive evaluation of Beitz's approach, but instead to highlight it as the philosophical account of human rights that has most systematically engaged with the contemporary practice of human rights.[12] Thus, I think Beitz sets a standard and poses a challenge to philosophers of human rights similar to the one that Moyn poses to historians of human rights. We do need a theory of human rights that can be connected in relevant ways to contemporary human rights practice. That does not mean a theory wholly uncritical of that practice. But it does mean that a philosophical account needs to provide a framework that can actually capture the novelties of contemporary practice, while at the same time opening up space for internal criticism of the contemporary meaning and practice of human rights.

With this challenge in mind, I now want to ask whether it is still possible to draw on past episodes in the rights tradition as "source materials" for a philosophical conception of human rights. Can we do so and still capture the novel aspects of the contemporary meaning and practice of human rights? I consider two different ways of trying to do this, both of which focus on the concept of human dignity though in different ways. I begin with James Griffin, who shares Beitz's antipathy toward "top-down approaches" that attempt to derive human rights from "highest-level moral principles" such as the principle of utility, the Categorical Imperative, or decision procedures.[13] Not unlike Beitz, Griffin thinks that those approaches are often "changing the subject" (3), and prefers a "bottom-up approach" that

> starts with human rights as used in our actual social life by politicians, lawyers, social campaigners, as well as theorists of various sorts, and then sees what higher principles one must resort to in order to explain their moral weight, when one thinks they have it, and to resolve conflicts between them. (29)

But unlike Beitz, Griffin maintains that we can still draw on the "historical notion of human rights," specifically the one that "emerged by the end of the Enlightenment" (13). That notion, he argues, "is still our notion today, at least in this way. Its intension has not changed since then: *a right that we have simply in virtue of being human*" (2). He allows that the "extension" has changed and in that sense the meaning of human rights has changed, but by this he basically means changes in international law that have modified the content of the list of what are now considered human rights.

Griffin identifies the ground for human rights within the historical tradition in the idea of "the dignity of the human person" (5). The basic idea is that human rights are a way of securing and protecting the high value we place on "human standing" or "personhood" (33). The "dignity of our status" as human beings is tied to our capacities for reason and freedom, an idea with obvious Kantian resonance, but which Griffin traces back to the late medieval work of William of Ockam and the early Renaissance philosopher Pico della Mirandola (31). While Griffin draws on

[12]For more critical analysis of Beitz, and Rawlsian approaches more generally, see my "Two Models of Human Rights: Extending the Rawls-Habermas Debate" (2010).

[13]Griffin (2008, 2, 29), henceforth cited parenthetically.

this historical notion, he maintains that it still suffers from indeterminacy and needs further criteria for determining its correct use. A better understanding of how dignity functions as the ground for human rights, he argues, will "increase the intension of the term 'human right'" (6) and so give us a better and more determinate understanding of its meaning. He ultimately defines personhood in terms of the need to protect our autonomy, liberty, and welfare, and then derives further specific rights from these highest-level values.

How then does Griffin meet the challenge of relating theory to contemporary practice? On the one hand, Griffin claims – in striking contrast to Beitz – that human rights is basically a "theorist's term": "because it is the introduction of philosophers and political theorists, they have the responsibility, not yet discharged, of giving it a satisfactorily determinate sense" (210). On the other hand, Griffin does try to maintain a balanced approach between theoretical stipulation and being bound both by the tradition and present needs: "The account that we need will…turn out to have a measure of stipulation. That gives us freedom, though freedom under constraints. There is the constraint of the tradition and the constraints of meeting practical needs and of fitting well with the rest of our ethical thought" (30). When it comes to evaluating legal practice by using his philosophical theory, he argues that the "personhood account, even if it is indeed the best substantive account, should stay quietly in the background" (192, see also 202). Griffin essentially aims to maintain a balance between improving the actual discourse of human rights and asserting heavy-handed philosophical authority over that discourse. He raises questions about whether all the things found in human rights treaties today should really count as human rights – distinguishing between "unacceptable" and "debatable" cases – but in the end insists on the need for philosophical modesty with regard to human rights practice.

As with Beitz, I am not interested in developing a comprehensive evaluation of Griffin here. When it comes to evaluating contemporary human rights practice, Beitz and Griffin come to different conclusions about what should and should not count as a human right. But with the right amount of philosophical modesty with respect to the contemporary practice of human rights, a theory developed along the lines of Griffin's need not be the wholly externally imposed conception that Beitz is rightly worried about. But another element of Griffin's account is problematic: his relatively flat account of the changes in human rights practice over time. To take one characteristic remark, when Griffin refers to such changes, he merely says: "over time, … the rights and privileges on the lists began to be applied to increasingly broader groups" (12–13). Certainly this is true. But the question I want to raise is whether this dynamic element of human rights practice – the ways in which changes in the doctrine and practice of human rights have been primarily the result of social and political struggles – can be better captured within human rights theory. Griffin tends to view changes in the meaning of human rights almost solely in terms of the content of various lists of human rights. But with Moyn's analysis in mind, it is clear that the meaning of human rights is also embodied in political projects and programs, social movements and struggles, and the changing terrain of idealism. Thus, the continuities in meaning that Griffin highlights are broken up by the discontinuities in the politics of human rights. In order to better capture the dynamic nature of these

struggles, throughout history and up to the present, I turn to recent work by Jürgen Habermas and Rainer Forst, paying particular attention to the points at which they invoke the history of human rights, how, and to what end.

In earlier work, Habermas primarily stressed the dual nature of human rights, maintaining that they are Janus-faced with one side facing law and the other side morality.[14] The latter introduces the element of universality (all human beings bear these rights), while the former presupposes some particular legal context (even if at its broadest this could be a cosmopolitan legal order including all human beings). Of course one could simply stipulate this as a definition, and Habermas does provide systematic reasons for developing such a conception of human rights, but he also makes a historical case by arguing that the late eighteenth century revolutions were defining moments in establishing the meaning of modern human rights:

> Human rights in the modern sense can be traced back to the Virginia Bill of Rights and the American Declaration of Independence of 1776 and to the *Declaration des droits de l'homme et du citoyen* of 1789. These declarations were inspired by the political philosophy of modern natural law, especially that of Locke and Rousseau. It is no accident that human rights first take on a concrete form in the context of these first constitutions, specifically as basic rights that are guaranteed within the frame of a national legal order. However, they seem to have a double character: as constitutional norms they enjoy positive validity, but as rights possessed by each person qua human being they are also accorded a suprapositive validity.[15]

Thus, Habermas stresses that the concrete form in which human rights first arose was within the context of founding constitutional democracies, when they took the form of basic constitutional rights. This leads him to argue that "the concept of human rights does not have its origins in morality, but rather bears the imprint of the modern concept of individual liberties, hence of a specifically juridical concept. Human rights are juridical *by their very nature*".[16] This talk of the "origins" of the concept, or of the "imprint" the modern concept bears, seems to be an attempt to draw on particular episodes in the history of human rights to lend credence to conceiving human rights in strongly legalistic terms.

The potential problem with this conception is how strongly it ties our contemporary notion of human rights to the rise and revolutionary founding of the constitutional state in the eighteenth century. Viewing human rights in these terms privileges a "juridical paradigm". Beitz argues that although this paradigm "has been realized in some parts of human rights practice" – primarily at the regional level, with the European Court of Human Rights as the most successful example – alternative "paradigms of action" (33) have also developed and are central to contemporary human rights practice. Habermas could reply that the ideal should still be that human

[14] For a more comprehensive account of Habermas's position, see Flynn (2003).

[15] Habermas (1998, 189). For the full account of the relation between law and morality and how this plays out in the system of basic rights at the heart of a constitutional democratic state, see Habermas (1996).

[16] Habermas (1998, 190).

rights be implemented within some legal order (national, regional, or global), but the question remains how to capture the idea of human rights as a language of moral protest and grounding for transnational activism within the broader normative practice of human rights today.

In a more recent essay, however, Habermas extends his account of human rights to go beyond the defining historical moment of the late eighteenth century. With a new focus on the concept of human dignity, he identifies elements of the idea of human rights that are both conceptually and historically prior to the dualistic conception he has long championed.[17] Specifically, Habermas now stresses the "catalytic role" (466) of the concept of human dignity in constructing the modern idea of human rights. He maintains that the notion of human dignity served as a "conceptual hinge" (469) that made possible the "improbable synthesis" (470) between, on the one hand, a morality of equal respect and, on the other hand, subjective rights established by positive law. There is the same stress here on the duality in the concept of human rights, but the account of human dignity now fills in some of the prehistory and conceptual underpinnings for the constitutional revolutionary moment. In fact, Habermas now acknowledges that his earlier work did not account for the way that "the cumulative experiences of violated dignity constitute a source of moral motivations for entering into the historically unprecedented constitution-making practices that arose at the end of the eighteenth century" (470, n.10).

The central move Habermas makes here is to posit human dignity as a unifying concept in the historical and continuing development of human rights: "The appeal to human rights feeds off the outrage of the humiliated at the violation of their human dignity. … [it is] the "moral 'source' from which all of the basic rights derive their meaning" (466). That is, the specific meaning of human dignity, and so the need for particular human rights, only becomes apparent through violations of dignity in particular cases, as experienced by, for instance, marginalized social classes, disparaged and discriminated against minorities (based on gender, culture, religion, race, etc.), illegal immigrants and asylum seekers, and so forth.

> The features of human dignity specified and actualized in this way can then lead both to a *more complete* exhaustion of existing civil rights and to the discovery and construction of new ones. Through this process the background intuition of humiliation forces its way first into the consciousness of suffering individuals and then into the legal texts, where it finds conceptual articulation and elaboration (468).[18]

Habermas refers to this as the "inventive function" (467) played by the concept of human dignity in relation to human rights. He certainly does not think there is some kind of "logic of rights" that makes this inevitable. Rather, it is only social and political struggles that make such violations of human dignity visible: "Increasing

[17] Habermas (2010b), henceforth cited parenthetically.

[18] This shows how significant Axel Honneth's recognition theory has become for Habermas's discourse theory of human rights. See Honneth (1995). Habermas's recent focus on human dignity is certainly not a complete departure from earlier work either, with regard to the formulation of rights documents or the role of struggles for recognition. See Habermas (1996, 389 and 426).

the protection of human rights within nation-states or pushing the global spread of human rights beyond national boundaries has never been possible without social movements and political struggles, without courageous resistance to oppression and degradation" (475–6). This is the key point of contrast with Griffin's use of the concept of human dignity primarily in the service of the traditional philosophical project of deriving the content of human rights from a single authoritative source or underlying concept. By contrast, Habermas uses the concept of human dignity in a way that links up with concrete struggles for human rights. This makes use of the concept of human dignity not merely as a philosophical tool for deriving the content of human rights, but instead as part of a conceptual framework for understanding the moral dynamic of human rights in practice.

This approach also has the potential to provide a convincing point of continuity between earlier episodes in the rights tradition and contemporary human rights practice. Habermas claims that the concept of human dignity was the vehicle for bringing universalistic moral content to bear within the particular contexts of individual nation-states and that this opens up a "utopian gap" (475) within the system of basic constitutional rights. In this way, there is always a tension between basic rights in positive form and the "moral surplus" generated by the idea of human dignity, which can be viewed as the source of the struggles over basic rights *within* constitutional states (Habermas 2010a, b). If that were all there is to it, this approach could be criticized for simply not going beyond the "politics of citizenship at home," as Moyn puts it. In fact, Habermas argues that the same utopian surplus is also what points beyond the particular contexts in which human rights have thus far been realized and so to the need to *transcend* the nation-state. According to Habermas, fully addressing this tension would ultimately require a "constitutionalized world society," one in which the legal status of all individuals was more closely aligned with their equal moral status.[19] This provides a way of not only maintaining some degree of fidelity with the actual usage of the term "human rights" in history, legal texts, and contemporary institutions and practices, but also of tying earlier to more recent episodes in the history of human rights. Habermas has not done all of the historical legwork needed to justify this proposal. But the promising idea here is that, beginning with the explicit use of the concept of human dignity found in many domestic constitutions and international law, it might be possible to systematically tie the historical notion of human rights to the social and political struggles that have generated their content from before the eighteenth century declarations all the way up to contemporary domestic and global struggles for human rights.

Rainer Forst has similar aspirations for his theory of human rights and has recently put forward an approach that also stresses the role of struggles for human rights (Forst 1999, 2010). Like Habermas, he also rejects the idea of a philosophical derivation of the substantive content of human rights in favor of an approach that stresses the equal right of everyone to participate in the political determination of a

[19]For his account of global constitutionalism, see Habermas (2006, 2008a, b).

full set of rights.[20] Forst calls this fundamental right the "right to justification" and explains it in terms of the reflexive character of human rights:

> they are rights that protect against an array of social harms the infliction of which no one can justify to others who are moral and social equals, thus presupposing the basic right to justification – but above that, they protect against the harm of not being part of the political determination of what counts as such harms.[21]

Like Habermas, Forst seeks some historical support for this conception and finds it by focusing on social and political struggles. Forst maintains that it is helpful to keep this "historical dimension" of human rights in mind in order to understand the "deeper normative grammar of human rights" (716).

> [Human rights] first appeared as "natural" or "God-given" rights in early modern social conflicts and, quite often, revolutions, as, for example, in seventeenth-century England, when the Levellers claimed as a "birthright" a form of government that would wield power only if explicitly justified and authorized to do so by those affected. … The language of these rights was a socially and politically emancipatory language, directed against a feudal social order and against an absolute monarchy that claimed "divine" rights for itself. …the essential political message of human rights [is] the claim to be not just a fully integrated member of society, but to be a social and political subject who is, negatively speaking, free from arbitrary social or political domination and who is, positively speaking, someone who "counts," who is seen and recognized as someone with "dignity," that is, with an effective right to justification. (716–17)

Forst then goes on to identify elements of the "essential political message of human rights" in the French Declaration of 1789 and in the Universal Declaration of Human Rights of 1948, both of which stress the importance of political participation.

This historical focus on the way in which human rights have been invoked in social and political struggles not only lends support to a political understanding of human rights but also to a methodological point about understanding the meaning of human rights: "when we think about human rights," Forst argues, "the proper perspective is the one in tune with that of the participants in social struggles" (729). That is, we should give precedence to the "internal perspective of those who fought or fight for such rights" (725) rather than a more external perspective:

> the primary perspective of human rights is *from the inside*. … The main perspective is not that of the outsider who observes a political structure and asks whether there are grounds for intervention. In thinking about human rights and their justification, one must be careful not to assume the role of an international lawyer or judge who presides over certain cases of human rights violations and who at the same time wields global executive power. (727)

It seems reasonable, although Forst does not make this point, to extend this idea of an external perspective to include the perspective of international human rights activism.

[20] On the differences between Habermas and Forst, see Forst (2011).

[21] Forst (2010, 737), henceforth cited parenthetically.

The distinction between internal and external perspectives can now be used to challenge Moyn's account as one-sided. For when Moyn identifies what is novel about contemporary human rights, he is primarily focused on the external perspective. For example, he says the "'rights of man' were about a whole people incorporating itself in a state, not a *few foreign people* criticizing another one for its wrongdoings." And human rights involve recasting rights in terms of "entitlements that might contradict the sovereign nation-state *from above and outside* rather than serve as its foundation." Ultimately, human rights are about the "politics of *suffering abroad*." Even when he brings in the importance of dissidents in the 1970s, Moyn still stresses the external perspective: "In their explosive moment, human rights were pursued *for* dissidents under Eastern European totalitarianism and victims of Latin American authoritarianism."[22] Thus, what Moyn identifies as the meaning of human rights today is primarily bound up with the perspective of international activists using human rights as a language of external criticism.

Of course, the reverse point could be posed with regard to both Forst and Habermas. That is, to the extent that they focus on the internal perspective they run the risk of missing something essential about the contemporary meaning of human rights: the external perspective that captures the idea that "the world is watching." Do Habermas and Forst give enough credence to the extent to which the global human rights movement is central to the meaning and practice of human rights today and that this global movement is defined as much (if not more) by struggles *on behalf of the rights of others* as it is by those struggling for their own rights?[23] Surely one cannot simply disregard this fact if one wants to maintain a connection between human rights theory and practice. For a philosophical theory of human rights to accurately capture the nature of various struggles for human rights – in the remote and recent past as well as into the future – it must account for both perspectives, internal and external. I cannot develop a comprehensive approach to this question in the space remaining. Instead I conclude with some brief reflections on how we might try to avoid a tension between the two perspectives in practice and tie this back to the need to distinguish humanitarianism from human rights.

[22] Moyn (2010, 26, 13, 12, 220, italics added). Thus, he sees the shift from "revolutionary rights" to "human rights" as "the move from the politics of the state to the morality of the globe." See also 135, where Moyn highlights how the "homegrown and domestic sources of dissident strategy" make it an unlikely candidate for a "human rights movement at all." This implies that the former is not very well subsumed under the latter.

[23] My critical question deliberately parallels Volker Heins's critique of Honneth's theory of recognition in Heins (2008). Heins builds on Honneth's tripartite theory of recognition to analyze how NGOs have focused on the needs of others, the rights of others, and the denigration of ways of life (10). But one of the significant flaws Heins identifies is that Honneth neglects "*other-regarding* modes of political action" (31). Honneth stresses how experiences and feelings of disrespect are the moral engine of progress. And his examples hearken back to the labor movement and to some extent struggles against colonialism as the "moral templates," as Heins puts it, for modern emancipatory social movements. But this misses the form of activism oriented toward the "liberation of distant strangers" (66), the moral template for which is the abolition of slavery and the slave trade and which is central to the contemporary human rights movement.

On the one hand, we can see how the meaning of human rights has historically been bound up with certain conceptions of human dignity and struggles for a legal and political order that protects that status. This has led to the (often revolutionary) foundation of a status order of equal citizens and then the extension of this status in novel ways and to new groups as a result of struggles for recognition. It is true that this is essentially the revolutionary rights tradition as Moyn defines it, and it has long been bound up with the internal politics of powerful nation-states. But this also captures something that is central to the meaning of human rights when they are viewed from the internal perspective of those challenging an unjustifiable system or fighting to extend their rights as citizens. On the other hand, the defining aspect of the international human rights movement has indeed been a form of global concern for individuals everywhere. This expresses the meaning of human rights as embodied in the external perspective, which by necessity has been less bound up with the idea of founding a legal order since there has been no real cosmopolitan legal order in which to ground the status of equal citizenship, and the totalitarian and authoritarian states that have traditionally been the most prominent human rights violators have always left little or no room for a politics of citizenship. Perhaps not surprisingly, it is within this context that humanitarian-style narratives of suffering individuals have come to prominence. For that has been the most effective way of drawing attention to human rights violations. But from a normative perspective, we have good reasons for distinguishing the logic of humanitarianism from that of human rights. Viewing human rights strictly through a humanitarian lens runs the risk of viewing others merely as objects of suffering and not as subjects of rights. In that sense, there is reason to worry that what Moyn has identified as the contemporary meaning of human rights is essentially a form of *humanitarian* anti-politics that is problematic when mixed with human rights.

Even so, the process of making distant strangers into objects of concern has been essential to the human rights movement. Perhaps it has been human rights reporting like this that has made it possible for so many people to "imagine equality" with distant strangers in a way that has laid the psychological foundations for contemporary human rights. Rather than proposing that we try to purify human rights practice of these humanitarian motifs then, I propose that we simply keep in mind their limitations and potential underside. Rather than criticize the "politics of suffering abroad" as a distortion of the aims and meaning of human rights, we should maintain the importance of always taking the next step toward a politics of respect for rights-bearing subjects. This requires that human rights activism, particularly as it emanates from the Global North, combine external with internal perspectives. For example, I mentioned above Jeri Laber, one of the founders of Human Rights Watch, which began as Helsinki Watch and involved her in work with various Helsinki committees in the Eastern bloc. This involved countless trips to stay in contact with dissidents in order to get them information from the outside and get their stories out and make people aware of their situation. This is but one example; but human rights activism at its best has been about such outside agents cooperating with internal dissenters and in the process forming a dynamic unity that further empowers local activists. When the status of those internal agents is taken seriously, this form of

activism keeps in view the idea that the ultimate aim must be to go beyond viewing others as merely objects of concern or pity to viewing them as subjects of rights.

**Acknowledgment** I want to thank the students in my Honors Ethics class at Fordham University in Spring 2010 for stimulating discussion of many of the texts discussed here (by Hunt, Moyn, Beitz, Griffin, and Laber), and Sam Moyn for making his book manuscript available to our class prior to publication.

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# Chapter 2
# Philosophy and Human Rights: Contemporary Perspectives

**David Reidy**

## 2.1 Introduction

There is today a great deal of talk about human rights. Philosophers, lawyers, legal theorists, political scientists, diplomats, activists, anthropologists, politicians and everyday citizens all talk about human rights. If they were all talking about the same thing, this multi-disciplinary situation would be messy enough. But as it happens they are not usually all talking about the same thing. Sometimes the talk is about human rights as positive legal rights existing by treaty within existing international law. Sometimes it is about human rights as the sort of moral rights that must belong to any system of international law able to generate *prima facie* moral obligations to obey. Sometimes it is about human rights as a main currency of international relations, diplomatic and otherwise. Sometimes it is about human rights as universal moral rights independent of any reference to international law or international relations. Sometimes it is about human rights as aspirational goals toward which both morality and law ought to move. Sometimes it is about human rights as minimal or threshold moral standards. And so on. It is almost impossible, then, to have a meaningful conversation about human rights without assigning determinate values to two variables: Human rights in what sense? And in that sense as understood by or within which discipline?

Over recent decades, philosophers have increasingly turned their attention to human rights, or, more accurately, to philosophical issues raised by human rights. At first blush, it may seem that human rights raise few philosophical issues. After all, as positive, treaty-based rights within international law, they may seem of no more philosophical interest than, say, the positive legal right in most legal systems

D. Reidy (✉)
Department of Philosophy, University of Tennessee, Knoxville, TN, USA
e-mail: dreidy@UTK.edu

C. Corradetti (ed.), *Philosophical Dimensions of Human Rights: Some Contemporary Views*, DOI 10.1007/978-94-007-2376-4_2,

of an employee to be paid her contractual wage. Lawyers may take a special interest, but philosophers?[1]

Of course, even as positive, treaty-based rights within international law, human rights may raise the philosophical issues raised by rights of any kind. For example, we might wonder what it is that distinguishes Sally having a right (of any kind, whether moral, constitutional or legal) not to be tortured by her government from it simply being wrong for her government to torture her (which it surely is). And if we are told that the difference is that the latter notion does not express the idea that were Sally's government to torture her it would not only do something wrong but it would also *wrong her*, then we might wonder why this is more than a difference in mere verbal expression, why it is a difference that makes a difference. This is a philosophical issue about the nature of rights generally.[2]

Another philosophical issue raised by rights generally and so by human rights in particular concerns the internal structure of rights. It seems clear, for example, that many rights (e.g., those referred to a "claim rights") entail specific correlative duties. If Sally has any kind of right not to be tortured by her government, then her government has some kind of duty not to torture her. But some rights seem to entail no specific correlative duties. Consider Sally's right to enter into a contractual agreement with another person subject to the law of contract within her state. Her right, or power, to enter into contractual agreements may seem to entail no specific correlative duty. Certainly, no one is under a duty to enter into any such agreement with her, and she is under no duty to seek such agreements with others. But this suggests that we are not likely to arrive at a clear philosophical account of the nature of rights generally without having first taken account of the internal structural diversity of rights.[3]

For the most part, the philosophers working in recent decades on human rights have not concerned themselves with the sorts of philosophical issues illustrated above, issues concerning the nature of rights generally. They have concerned themselves instead with philosophical issues that seem to be raised only by human rights taken as a distinct class of rights. And typically they have focused not on human rights as positive, treaty-based rights within international law, but rather on human rights as universal moral rights, typically claim rights, possessed by all persons apart from and prior to any positive legal enactment or undertaking within any legal system, international or otherwise. This is not to say that they have ignored human rights as positive, treaty-based rights within international law, or that in taking up human rights as universal moral rights they have done so always from a non-institutional or pre-political point of view. It is rather just to say that they have focused on human rights as the universal moral rights that increasingly inform our

[1] For a good introduction to human rights law, with some attention paid to philosophical issues, see Moeckli et al. (2010).

[2] For discussion of philosophical issues associated with rights generally, see Waldron (1984), Edmundson (2004), Rainbolt (2008) and Ivison (2008).

[3] For an instructive discussion, see Wenar (2005).

moral evaluations and proposed reforms of existing legal orders and political relations, both international and domestic.[4]

Recent philosophical work on human rights, so understood, has tended to center on three questions. The first concerns the nature and function of human rights. The second concerns their ground and justification. The third concerns their determinate specification and enumeration, or what is sometimes described as "the list question." Below, in Sect. 2.3, I sketch and briefly examine a small, but I think representative, sampling of recent philosophical work on human rights, taking care to highlight both substantive and methodological disagreements. But before doing so, I want to address some familiar skeptical challenges to the very idea of human rights as universal moral rights. I do so not because I think any of these skeptical challenges succeed, but rather because I think that they arise out of considerations that must be adequately addressed by any philosophical theory of the nature and function, ground and justification, and specific content and number, of human rights as universal moral rights. Attending to them puts on the table some considerations that should be in view when we turn to survey some prominent recent attempts at theorizing human rights.

## 2.2 Skeptical Challenges

### *2.2.1 Positivist Skepticism*

One skeptical challenge to the idea of human rights may be traced back to Jeremy Bentham.[5] For Bentham, the paradigmatic case of a right was the institutionally embodied legal right. Whether a legal right exists or not is, on Bentham's positivistic orientation toward law, an empirical matter that may be determined objectively by inquiring into the relevant social facts (Did Parliament in fact pass the relevant statute? Does the statute in fact establish the relevant right? Is the right enforced?). As universal moral rights, human rights are but mere shadows of paradigmatic (legal) rights. Their existence is not an empirical matter that can be determined objectively by inquiring into social facts. They are, Bentham concludes, little better than pretend rights. Bentham characterized talk of "natural rights," or human rights as universal moral rights, as found for example in the French Declaration of the Rights of Man and of the Citizen (1789), as little more than "nonsense on stilts."

As a legal positivist Bentham had good reason to be skeptical about human rights as positive legal rights within international law. For international law was in its infancy, arguably still *in utero*, during his time. But did he have good reason to be skeptical about human rights as universal moral rights? From a positivist point of view the question would seem to be whether their existence can be determined as an

[4]For example, see Nickel (2007) and Griffin (2008).

[5]See "Anarchical Fallacies"; in Bentham (2010).

empirical matter by objective inquiry into social facts. But which facts? What sorts of observable behaviors indicate or constitute the existence of human rights as universal moral rights? This is a difficult question. But no matter how we answer it, it seems likely that careful observers of behaviors worldwide during Bentham's time would not have found enough to indicate or constitute the existence of human rights as they are commonly understood today. Of course, we might say that this is irrelevant, that the only thing that matters is whether there is a sound moral justification for these rights. If there is, then they exist – in Bentham's time and in our own – regardless of observable behaviors. But this is just the sort of "nonsense on stilts" to which Bentham objected. On Bentham's view a sound moral justification may be sufficient to having a valid moral claim. But having a valid moral claim is not the same thing as having a human right, even as a universal moral right. If it were there would be virtually no limit to the range, content and number of human rights and so nothing distinctive abut them or their purpose or function in moral life. If saying that someone has a human right, as a universal moral right, is no more than saying that they have, in the speaker's view, a valid moral claim, then talk of human rights is really no more than a rhetorical way of insisting on the validity of the moral claim in question.

From an entirely different moral perspective, Kant too recognized that there was something problematic about holding that a human right, or in the language of the time a natural right, exists just in case there is a sound moral justification for it.[6] Working from the idea that each person has a natural right to freedom from being constrained by the private or personal choices of others, Kant worked out a system of natural rights understood as universal moral rights and so as comparable to what we today call human rights. But Kant noted that apart from the background legal institutions of civil society, these rights remained in various ways defective as rights. While it was possible to understand a great deal about the nature and structure of natural rights prior to and independent of any positive legal order, as natural rights or universal moral rights they did not in fact fully exist as rights, as the embodiment of determinate right relations between particular persons each possessed of a "natural right" to freedom. The problem was that in the absence of any common public mechanism to govern their specification, adjudication and enforcement, natural rights left each person to judge for her – or himself the content of each right, its correlative duties and the persons to whom they are assigned, its relationship to other rights, and the proper response to its alleged violation. But this is just to leave each person standing in a relationship to others that is defective from the point of view of right, for each has a "natural right" to be free of constraint arising out of the private will or personal choices of others, and yet where there is no common public authority to specify, balance, and secure "natural rights," this can be accomplished only through the assertion of someone's private will or personal choice. Accordingly, Kant maintained, natural rights could be realized fully as rights only within the context of a positive legal order publicly established by a body politic publicly understood as if

[6] See "The Doctrine of Right" in Kant (1996).

constituted through an original contract of free equals; that is, natural rights could be realized fully as rights only where there was a genuine public will. Civil society and the rule of law were not merely instrumentally desirable in order to overcome certain material obstacles to the vindication of natural rights, as Locke seemed to suggest. Rather, they were conceptually necessary (and so part of the "metaphysics of morals").[7] On Kant's view, then, the realization of human rights as full-fledged rights within the international order presupposes something like an international civil society itself subject to the rule of law.

Sympathetic to the broad thrust of Kant's position but inclined to allow, following Hegel, that the realization of a public system of rights (as full or genuine rights) is often achieved as much through a society's historically realized and culturally embedded form of life as through its positive legal order, many later thinkers have worked Kant's insight up into what is sometimes today identified as the "social recognition thesis."[8] According to this thesis, whether human rights exist fully or completely as universal moral rights depends on whether they have achieved the relevant sort of social recognition within the global or international moral community. Spelling out what is meant by social recognition is no easy matter. But the general idea is that the full or complete existence of human rights as universal moral rights depends on more than the ability of any one individual person to identify, even if correctly, a sound moral justification for them. The full or complete existence of human rights as universal moral rights depends also on some form of social recognition such that, for example, those who have duties correlative to the rights said to exist recognize or at least are in a position to recognize and so be moved by their duties. In the absence of some such recognition there can be no normative ordering of the relations and expectations between the relevant persons. And in the absence of such a normative ordering, there is no right to be claimed.

### *2.2.2 Relativist Skepticism*

Some human rights skeptics argue that because there are in general no universally shared moral norms there can be no universal moral rights.[9] This is an implausible argument. First, setting aside the need to clarify what is meant by "universally shared," it is not at all obvious that there are no universally shared moral norms. The widespread acceptance of core human rights, evidenced by both international treaty commitments and domestic laws, suggests that there are at least some very widely,

[7] See Ripstein (2009) and Waldron (1996).

[8] See, e.g., Martin (1993) and Gaus (2006). For a critical discussion of the rights recognition thesis, especially as developed by Martin, see Lyons (2006).

[9] For brief discussion of relativist skepticisms with respect to human rights, see Nickel and Reidy (2008). For a full treatment attentive to the important distinction between relativism and pluralism, see Corradetti (2009).

and so perhaps universally, shared moral norms. But, second, even if there were no universally shared moral norms, this fact would entail only the claim that if there are in fact human rights then they are, as yet, not universally acknowledged and honored by all moral communities. But this may tell us no more than what we already know: namely that human rights are sometimes systematically violated.

To be sure, we ought not be misled by the fact that international treaty commitments and domestic legal systems very often affirm core human rights. States often give the appearance of embracing core human rights for reasons that have nothing to do with the moral commitments of their officials or citizens or the moral shape of their society's historically and institutionally realized form of life. Further, while the facts of widespread and persistent moral disagreement and diversity do not by themselves entail that there are no human rights as universal moral rights, these facts do need to be explained. And one possible explanation, favored by relativists, is that there are no universal, cross-cultural standards for the rational adjudication of moral disagreements and so no human rights in the form of universal moral rights. The problem with this line of reasoning is that it is not at all obvious that the absence of universal, cross-cultural standards for the rational adjudication of moral disagreements is the best explanation of the facts of widespread and persistent moral disagreement and diversity, whatever those facts turn out to be. It is not difficult to identify other explanations at least as plausible that do not entail that there are no human rights (as universal moral rights). For example, widespread and persistent moral disagreement may simply reflect the complexity of our moral experience, the plurality of objective values, the fact that each of us must ultimately reason from a point of view informed by our own unique experience, and so on. These considerations may tell in favor of a liberal commitment to tolerating moral diversity and in favor of a constrained conception of human rights as universal moral rights. But they don't entail that there are no human rights as universal moral rights.

### *2.2.3 Realist Skepticism*

Some skeptics about human rights argue that the international or global context is one within which the only rule is, or should be, that each state or nation pursue its own interests. They doubt that the international or global order can, or should, be one governed by shared moral commitments and aims, whether in the form of human rights or otherwise. But this is not a compelling position.[10] As a matter of descriptive fact the international or global context is today one within which states or nations at least sometimes, to some degree, pursue common moral goals and respect shared moral standards, even at some cost to their own interests. And as a

[10]For a critique of realist skepticism with respect to human rights as well as other norms of international relations, see Beitz (1999a).

matter of normative assertion, it seems implausible to claim that states ought not affirm and secure human rights. Even if we accept the doubtful moral claim that states ought to advance or act for the sake of only their own national interest (what argument would justify that claim?), we would need to give content to the idea of a state's national interest. But it seems that as the corporate agent through which its citizens act collectively as moral persons, every state will incorporate into its interests many of the interests, including the moral interests, of its citizens. So the realist's normative claim presupposes either that persons, or at least persons in their role as citizens, have no moral interest in affirming and securing human rights or that this interest is one they cannot reasonably hope to advance collectively as citizens through state action. But each of these alternatives seems doubtful.

To be sure, like positivist and relativist skeptics, realist skeptics are right to challenge some of the most ambitious and far reaching claims sometimes made about or in the name of human rights as universal moral rights. The nature and structure of the international order as well as the reasonable interests of states as the dominant actors within that order likely must be taken into account in any sound theory of human rights as universal moral rights. But there is no reason to think that taking these matters into account puts one inevitably on a path to skepticism about human rights.

### *2.2.4 Theological Skepticism*

One form of skepticism about human rights often, but not always, overlooked by philosophers is theological. Within the Judeo-Christian tradition, for example, there is a significant strand of thought – associated with natural law and given contemporary expression by Stanley Hauerwas, among others – that conceives of justice in terms of a rightful order of obligation and responsibility benevolently established by God.[11] On this view, human beings have no inherent rights, no rights that are not derived from the rightful order of obligation and responsibility benevolently established by God or conventionally established by other persons within and subject to this divine order. If there are human rights, then, they are not inherent rights. They are derivative. To think otherwise is to misunderstand the structure and theological basis of the moral order. On this line of thinking, those inclined to defend human rights as inherent rights must either offer an alternative understanding of the Judeo-Christian tradition or show that human rights can be theorized completely and adequately outside of that tradition.

Some within the Judeo-Christian tradition hold that the latter path is a dead end. A complete and adequate theory of human rights as inherent rights must explain

[11] See Hauerwas (1991). For a careful critical discussion of theological skepticisms regarding human rights, see Wolterstorff (2010).

what it is about all and only human beings that constitutes the dignity, value or worth that grounds their human rights. But this cannot be done in secular terms, or so the argument goes. Proposed explanations lead inevitably to problems of either under- (some human beings have no human rights) or over- (some non-humans have human rights) inclusion. The conclusion drawn is that the worth, dignity or value of human beings presupposed by human rights is explicable only within a Judeo-Christian theological framework. This, of course, raises two problems. The first is that, as noted in the previous paragraph, it is not evident that the Judeo-Christian theological framework supports human rights as inherent rights. Second, there are obvious problems with the idea that human rights stand or fall with Judeo-Christian, or even only generically theistic, religious commitments. The challenge, then, is either to provide a compelling non-theistic account of the dignity, value or worth of all and only human beings sufficient to ground their inherent human rights, or to somehow theorize human rights in a manner adequate to our practical interests while simply ignoring the question of what it is about human beings that grounds their human rights as inherent rights. Of course, given the apparent permanence of religious belief worldwide, it would be good to know that human rights can be theorized adequately from within the Judeo-Christian, or any broadly theistic, tradition, even if they can be theorized adequately also from other, non-religious points of view.

## 2.3 Recent Philosophical Work on Human Rights

Recent decades have seen a significant increase in (non-skeptical) philosophical work on human rights, no doubt reflecting developments with respect to the role played by human rights, not just as positive, treaty-based legal rights, but also as universal moral rights, within international relations and international law. While methodologically and substantively diverse, (non-skeptical) philosophical work on human rights as universal moral rights tends to focus on three inter-related sets of questions. The first concerns their nature and function or purpose. The second concerns their justification. And the third concerns their specification and relationships one to another. While these questions are distinct, to answer any one of them is to set a constraint on the available answers to the others. To take a position with respect to the nature and function or purpose of human rights is to constrain, at least indirectly, one's position with respect to the content or specification of human rights. To take a position with respect to the justification of human rights is to constrain, at least indirectly, one's position with respect to the nature and function or purpose of human rights. Rather than taking up each of these three sets of questions, one after the other, and sketching various views, I propose to set out a representative sampling of relatively complete and unified philosophical treatments of human rights. So doing should serve to indicate the diverse ways in which, taken together and in relationship to one another, these three main sets of questions may be addressed.

### 2.3.1 John Rawls

John Rawls is best known for his theory of social or distributive justice for constitutional liberal democracies and the privileged position assigned within that theory to the conception of social or distributive justice he named "justice as fairness" (See Rawls 1999a, b, 2001). There are within "justice as fairness" two, lexically ordered, fundamental principles of justice. From these follow the system of constitutional and civic rights and liberties, including nondiscrimination rights, democratic political participation rights, and social and economic rights, familiar from contemporary constitutional liberal democracies.

Though Rawls is best known for his theory of justice at the level of a single state, he recognized that constitutional liberal democracies interact with one another, and with other states of various sorts. In order to ensure that they do so on terms mutually intelligible and justifiable to the states with which they interact, constitutional liberal democracies need sound and reasonable normative principles to guide, justify and assess their international interactions on the world stage. Rawls comes to the issue of human rights by way of his inquiry into these principles.[12]

This inquiry he pursues in two stages. He first identifies eight principles that all constitutional liberal democracies may reasonably be expected to affirm and honor in their relations with one another as free and independent bodies politic. Among these is the principle that "peoples are to honor human rights." He then argues that these eight principles could be reasonably affirmed also by bodies politic either nonliberal and/or nondemocratic but nevertheless well-organized as systems of social cooperation for the common good of all who participate in them and institutionally embodied as corporate artificial persons able to act on the world stage rationally and reasonably and so, he conjectures, properly recognized and respected as free and independent polities within the international order. Constitutional liberal democracies may draw on these principles, then, to guide, assess and justify their relations not only with one another but with these other sorts of "decent peoples" too. These eight principles Rawls refers to as "the law of peoples."

To understand what Rawls has in mind by "human rights," it is important to understand his idea of a "people." "Peoples" are bodies politic that are effectively and publicly organized as systems of social cooperation between and for the common good of natural human persons and that are institutionally embodied in such a way as to be capable of acting as corporate or artificial moral agents – that is, are capable of acting rationally and reasonably – within international relations on the world stage. Peoples merit recognition and respect as persons within the context of international relations and they are the proper or basic subjects of and agents within international law. Constitutional liberal democracies – organized as fair systems of social cooperation between free and equal citizens – constitute one type of "people." But they do not necessarily constitute the only type. It is at least possible for a

[12] See Rawls (1999a). For a sympathetic exposition of Rawls's position, see Reidy (2010).

population of natural human persons, say as members of particular social groups rather than as free equals, effectively and publicly to organize itself into a system of social cooperation for the common good of all, again say as members of particular social groups, and to be institutionally embodied in such a way as to be able to act rationally and reasonably as a body politic within international relations on the world stage. A body politic of this sort would not be just; it would not be a fair system of social cooperation between free equals; certainly it would not be liberal and democratic. But it may nevertheless merit recognition and respect from constitutional liberal democracies as a "decent people," a corporate or artificial person capable of acting rationally and reasonably within international relations on the world stage. It would not be so unjust internally as to fail to merit standing as a free and independent polity within the international order.

On Rawls's view, then, human rights as universal moral rights, basic human rights or human rights proper, are those rights that all peoples, both liberal democratic and decent, secure as constitutional or civic rights within their own borders and commit to as setting a necessary condition to be met by any state seeking full standing as a free and independent polity within international law and international relations. These are the rights essential to well-ordered social cooperation between and for the common good of persons institutionally embodied as a body politic capable of rational and reasonable corporate agency. They include the rights covered by Articles 3–18 of the UDHR as well as the conventions on genocide and on apartheid. They include the rights to life (subsistence, to physical and psychological security, etc.), to liberty of thought and conscience (including freedom of religion), to personal property, to the rule of law, and so on. They do not include the full panoply of rights essential to liberal democracy. They do not include the full range of non-discrimination and equality rights, political participation rights, and social welfare rights common to liberal democracies. Of course, bodies politic that honor the rights Rawls identifies as human rights proper and merit full standing within international law and international relations may and hopefully will by way of treaty or other voluntary undertaking expand the range of human rights within positive international law so that they more closely approximate the rights essential to liberal democracy. But as universal moral rights, human rights proper mark a precondition to their moral standing as bodies politic to be able to do so. Human rights proper or basic human rights mark, as universal moral rights, an essential condition of moral standing within international law. In order for there to be free and independent polities capable of generating through their voluntary undertakings positive international law to which would attach even a prima facie moral duty to obey, there must be polities in full compliance with human rights proper or basic human rights in Rawls's sense.

Rawls identifies three ways, each of which implicates human rights, in which a society or state might be defective with respect to its claim to this moral standing as a free and independent polity. Consider first societies or states organized as systems of social coordination rather than cooperation. Absolutist states are an example. Social relations and institutions are coordinated by the ruler, perhaps even for the benefit of the ruled if the ruler is benevolent. But ruler and ruled are not reciprocally

bound within a common system of social relations and institutions by a shared system of public principles and rules aimed at the common good of all. Coordination, even benevolent coordination, is not cooperation. And so when the leader(s) of an absolutist state act, they act as if something like parents of small children acting for the family, even though their adult subjects are not, in fact, small children. Constitutional liberal democracies and other "decent" peoples have good reason, then, to withhold from absolutist states the recognition and respect they afford one another as free and independent bodies politic within the international order. And they have good reason to encourage the transformation of absolutist states into bodies politic within which ruler and ruled are bound one to another, as ordinary competent adult persons, within a shared and public system of rule-governed social cooperation. But populations living as subjects within absolutist states that are both peaceful and internally benevolent, populations that enjoy the content of all basic human rights except for the political participation rights, have a right to defend their way of life against coercive efforts by outsiders to transform it. History suggests that those living within absolutist states, even peaceful and internally benevolent absolutist states, will prove disinclined to exercise this right when their state comes under pressure to transform itself into, typically, some form of decent body politic. And if a subject population disinclined to fight in order to resist such pressure finds itself facing human rights violations orchestrated by an angry ruler, then liberal democratic and other decent peoples have a right and duty to take appropriate steps to secure basic human rights. But if a subject population within an internally benevolent and externally peaceful absolutist state inclines of its own accord, perhaps moved by love of the benevolent ruler, to defend its form of life against external pressure to transform, even at the cost of its state being denied full recognition and respect within the international order as a free and independent body politic, then there is no compelling reason, neither a human rights reason nor an international stability reason, for liberal democratic or other decent peoples to intervene coercively. Where other basic human rights are secure, the political participation rights essential to well-ordered social cooperation and institutional embodiment as a "people" are human rights best secured by those whose rights they will be. And the evidence suggests that when other rights are secure persons demand them in due course.

A second way in which a society might fail to have a valid claim to moral recognition and standing as a free and independent polity within international relations and law concerns the failure to respect the moral foundations of international law, the eight principles that constitute Rawls's "law of peoples." These principles include the principle that "peoples shall honor human rights." And so human rights violations at home or abroad, especially systematic, sustained, institutionally entrenched human rights violations, defeat a state or society's claim to moral recognition and standing within the international order. Liberal democratic and other decent peoples have good and compelling reasons to take the steps necessary to bring so-called "outlaw states" into compliance with the law of peoples, and so into compliance with human rights.

So-called "burdened societies" constitute a third case. These are well-defined populations (occupying common territory, sharing some sense of shared identity, etc.).

that seem, through no fault of their own, to lack the material or cultural resources needed to build and maintain the institutions essential to a body politic publicly and effectively organized internally as a system of social cooperation for the common good and capable of acting rationally and reasonably within international relations on the world stage. Within burdened societies human rights are very often not secure. Liberal democratic and other "decent" peoples have good reasons to refuse to recognize "burdened societies" as free and independent bodies politic in good standing within the international order. But they also have a duty to aid these societies in their struggle to realize themselves as free and independent bodies politic. If human rights are not secure, they have duties to provide the assistance needed to secure them. Their efforts in this regard should be properly informed by and responsive to the non-culpability of the burdened society and its members and should be aimed only at bringing the population to the point at which it would merit recognition and respect as a free and independent polity within the international order. Aid should not be a soft form of coercively pushing a population into liberal democracy or particular forms of "decency."

There are several distinctive features of Rawls's approach to human rights. First, he does not approach human rights as a component of a comprehensive moral theory of interpersonal relations. Rather, he approaches them as part of a moral theory of international relations. Second, he does not approach them as part of a moral theory of international relations taken up from some purely theoretical point of view oriented toward moral truths in some Platonist or moral realist sense. Rather, he approaches them as part of a moral theory of international relations taken up from the practical and political point of view of existing constitutional liberal democracies that seek to honor their own commitment to reciprocity in their relations with other polities on the international stage. Third, as part of a moral theory of international relations taken up from the practical and political point of view of existing constitutional liberal democracies intent on honoring their own commitment to reciprocity in their international relations, human rights function on Rawls's view as shared threshold criteria of recognition and respect of free and independent polities with a right to self-determination and against coercive interference in their domestic affairs. While the struggle for human rights is part of the struggle for justice, it is not coextensive with it. Each polity properly recognized as free and independent has a right to pursue justice within its own borders, and in its voluntary relations with other polities, in the manner and at the pace it judges for itself to be most appropriate. Finally, while a polity must comply with all the basic human rights, including political participation rights (which fall short of democratic political participation rights), in order to merit recognition and respect as a free and independent polity with a right against coercive interference in its domestic affairs, a population that enjoys all its basic rights save the political participation rights has a right to defend itself against unwelcome coercive interference. Thus, the struggle for political participation rights is especially morally complex, at least in principle.

Rawls does not address the question of how to justify human rights beyond noting that liberal democratic and other decent peoples would agree to honor them. Presumably, the parties to this overlapping consensus (liberal democratic and other

decent peoples as well as the citizens within them) will justify human rights in different ways, appealing to the basic interests of all persons, to their capacities for moral agency, and to various more or less comprehensive moral, religious or philosophical doctrines. There are, perhaps, good reasons to avoid staking a flag in any of these justificatory strategies to the exclusion of others, at least within the context of public political justification within international relations and international law. Nevertheless, the idea of an overlapping consensus can do only so much justificatory work. More must be said, even within the context of public political justification within an international order marked by significant diversity, both international and intra-national.

Perhaps the most promising path here for Rawls is to appeal to the natural duties. All persons have a number of familiar natural duties to any and all other persons. These duties are inseparable from moral personality. They include the duty not to inflict gratuitous harm on other persons, to render aid to other persons in need if aid can be rendered without great risk or loss, to acknowledge and respect the status of others as persons, and so on. These duties need not be taken to entail natural rights. Invoking them in order to justify human rights does not necessarily involve invoking a controversial theory of natural rights. Taken simply as duties, the natural duties contribute to the justification of human rights in the following way. One of the natural duties is the natural duty of justice. Persons who find themselves within a social world structured by institutions that acknowledge and reflect their moral status as persons and that plausibly and visibly organize them into cooperative activity aimed at their common good have a natural duty (of justice) to accept and act in a manner consistent with the fact that those institutions (and their voluntary conduct within those institutions) give rise to obligations, entitlements and forms of authority of at least prima facie moral force. The natural duty (of justice) morally binds those who find themselves in a common social world structured by institutions of the foregoing sort both to one another and to the institutions of their common social world. To be sure, it binds them only through prima facie moral duties. And these may be overridden by other moral duties. But it binds them nonetheless. In this way, the natural duty of justice transforms determinate populations of persons into peoples, into particular, institutionally embodied, moral communities with their own historical trajectories.

In order to fulfill their natural duty to acknowledge and respect the status of all persons as persons, persons belonging to or living within different peoples must acknowledge and respect the fact that in one important respect they stand in an asymmetric moral relationship: each is morally bound by prima facie moral duties to a different system of obligations, entitlements and forms of authority arising out of the well-ordered cooperative institutions of a social world they share with their compatriots only rather than all persons generally. By recognizing and respecting free and independent polities within the international order, persons recognize and respect the fact of their asymmetric moral relationships to one another when they find themselves belonging to distinct social worlds structured by institutions that satisfy the conditions necessary to trigger the natural duty of justice.

Further, it seems plausible to say that all persons have a natural duty, whether a duty of aid or of justice, to take steps to ensure that any persons not members of a determinate people are made members of an existing people or are enabled with others to constitute themselves into their own people.

If we wish to justify the overlapping consensus at the international level between liberal democratic and other decent peoples over basic human rights or human rights proper as criteria of recognition and respect for diverse free and independent bodies politic with a right to self-determination and against coercive intervention, and with the capacity to generate positive international law through their voluntary undertakings, an appeal to the natural duties (without any assumption that they entail natural rights) along something like the lines just sketched (in very rough outline only) is likely the most promising path available to Rawls.

### *2.3.2 William Talbott*

William Talbott distinguishes between what he calls "shock the conscience," "overlapping consensus," and "minimal legitimacy" accounts of human rights.[13] On shock the conscience accounts, human rights constitute institutional safeguards against only those wrongs or harms to persons that so shock the conscience of humankind that the international community properly takes a zero tolerance stance toward them. On overlapping consensus accounts, human rights give expression to the wider moral ground shared by civilized peoples around the world, whatever it happens to be. On minimal legitimacy accounts they set the standard that a state must meet in order for its officials legitimately to exercise coercive power in its name. Talbott takes Rawls to be offering a minimal legitimacy account, which, in Talbott's view, is the right sort of account to offer. But Talbott rejects the substance of Rawls's account as too thin. Talbott argues that if the purpose or function of human rights is institutionally to set minimal legitimacy standards applicable to coercive state action, then basic human rights must more closely approximate the rights essential to constitutional liberal democracy than Rawls allows. They must include, for example, a wider range of liberty rights, non-discrimination or equality rights, political participation rights, and social welfare rights than Rawls allows.

Talbott argues that over time human beings have discovered various universal moral truths about the nature and interests of persons and thus the ways in which they must be treated by states that claim legitimately to exercise coercive power over them. These truths are discovered through experience. They are not derived through *a priori* reflection. And we may always find ourselves mistaken about them. Nevertheless, they are truths about which we can be as certain as anything else we

[13] See Talbott (2005). For critical discussion of Talbott's position, with a reply from Talbott, see the essays in the book review symposium in *Human Rights Review* (2008).

are certain of in the empirical realm. Human rights express and express a demand for institutions consistent with these truths.

What are these truths? The most basic of them is the truth of first-person authority. Talbott's idea here, expressed by John Stuart Mill and others, is that it is a universally true empirical fact that over the long haul and given favorable background conditions normally competent adult humans know best when it comes to judgments regarding their own good or well-being. Their "first-person" judgments are authoritative. This is not because they are infallible. It's rather a comparative judgment of reliability. Since a necessary condition of a state legitimately exercising coercive power over its members is that it aim at the common good of those members, each and all, no state can legitimately exercise coercive power over its members unless it respects their first-person authority with respect to judgments regarding their own good. Accordingly, on Talbott's view, human rights, as universal moral rights, are just those rights a state must secure in order to facilitate and support the development and exercise of individual autonomy by each and all of its members. A state that aimed to promote the interests or common good of its members in any other way would be acting in ways that each and all of its members would have a compelling reason to reject, given the empirical, universal truth of first-person authority. Were it to exercise coercive force over its members, it would do so illegitimately. This, Talbott argues, is a moral fact.

Given every normally competent adult's first-person authority over matters concerning her own good or well-being, every polity must cultivate the ability of its members to exercise good judgment as competent adults and then solicit and reliably respond to those judgments in the formulation (and ongoing reformulation) of government policies. Where individuals can be left free to act on their own judgments regarding their good or well-being, they should be so left. Where collective decisions are necessary and unavoidably constrain individual liberty those making them must receive democratic input and be subject to democratic accountability. So all persons have basic human rights to the material, social and institutional conditions necessary to the development and exercise of their capacity for good judgment regarding their own good and to a government reliably responsive to those judgments as feedback regarding government policy. This broadly consequentialist argument for human rights depends fundamentally on only the fact of our capacity for rational judgments regarding our own good and the empirical truth of our first-person authority with respect to those judgments.

The universal human rights Talbott identifies are:

1. A right to physical security.
2. A right to subsistence (including the right to earn subsistence).
3. A right to that which is necessary for normal physical, cognitive, emotional and behavioral development during childhood.
4. A right to an adequate education, including a moral education (which includes cultivating moral sensitivity and the capacity for empathetic understanding).
5. A right to a free press.
6. A right to freedom of thought and expression.

7. A right to freedom of association.
8. A right to privacy or personal autonomy and hence against paternalistic government policy.
9. A right to democratic government and an independent judiciary empowered to enforce rights against majoritarian decision-making (Talbott 2005, 178).

This list is more expansive than that given by Rawls. Nevertheless, like Rawls's list, it falls short of the full list of rights we might think required by justice. It is, Talbott insists, a list for a "minimal legitimacy" conception of human rights, even if it entails that states cannot be minimally legitimate unless they are also broadly democratic and liberal. The truth is, Talbott argues, that states that do not secure these rights have no moral claim to coerce their members.

It is instructive to set Talbott's view against Rawls's. Like Rawls, Talbott approaches human rights not as part of a comprehensive moral theory of interpersonal relations, but rather as component of political morality. But unlike Rawls, Talbott does not focus on international relations or, more particularly, on reciprocity between well-ordered polities within international relations. Rather, he focuses on the moral conditions that must be satisfied if coercive state action is to be justified to those subject to it. This he takes up not from the practical or political point of view of those exercising and subject to such action and eager to find shared ground of mutual intelligibility and justification. Rather he takes the matter up from a general theoretical point of view informed by the empirically certain universal moral truth of first-person authority with respect to judgments persons make regarding their own good. On Talbott's view, the truth is that states either nonliberal or nondemocratic, regardless of whether they are "decent" in Rawls's sense, are no more than systems of unjustifiable coercion, of mere might or force masquerading as right. In contrast to Rawls's view, Talbott's view entails that the democratization of states not yet democratic and the liberalization of states not yet liberal is a fundamental component of the human rights agenda. Of course, liberal democracies may, for prudential reasons, refrain from coercing the democratization or liberalization of "decent" states not now democratic or liberal when coercion seems likely to generate more costs than benefits. For prudential reasons, soft forms of coercion – e.g., aid conditioned on democratization or liberalization – are likely to be favored. But apart from prudential considerations, states either nondemocratic or nonliberal (or both) have no principled claim, no matter how "decent" they are, to be free from coercive democratization or liberalization. If liberal democratic states find force to be a necessary and morally efficient (in terms of costs and benefits) means to securing an international order comprised of only liberal democracies, then the use of force is morally justifiable on Talbott's view, even if directed against those polities Rawls characterizes as "decent." Talbott does not consider the likely effects within the international order of publicly establishing this as a governing normative principle. But given his broadly consequentialist orientation, these are effects that he cannot ignore. And they seem likely to be destabilizing. If nondemocratic or nonliberal peoples, no matter how "decent," have no principled claim to nonintervention, if their only way to ensure nonintervention is by altering the cost/benefit calculations

liberal democracies must confront when deciding whether to coerce them into democratization or liberalization, then they are likely to devote substantial resources to altering that cost/benefit calculation by building military capacity, acting aggressively within international trade relations, and so on. This seems especially likely in the case of decent peoples who will, quite properly, have a certain national pride as a people (justified by their historically realized and maintained decency) and thus be inclined to guard their capacity for meaningful self-determination. This is not in itself an objection to Talbott's view. But it does raise questions about the nature and desirability of the incentives his view is likely to put in play within international relations were it to succeed in establishing itself there as the public conception or theory of human rights. And it highlights the methodological divide between Rawls and Talbott, with Rawls taking up human rights in the first instance in terms of liberal democracies seeking sound principles of international relations and Talbott taking them up in terms of a general philosophical and moral inquiry into universal moral truths regarding legitimate state action.

### *2.3.3 James Griffin*

James Griffin takes a different tack.[14] Rawls works out a conception of human rights as universal moral rights by way of an ideal theory account of a certain kind of familiar and existing political practice (international relations between liberal democratic peoples and between liberal democratic and other decent peoples). Rawls does not attempt to identify and justify human rights as universal moral rights in the more traditional fashion of abstract moral reasoning from a conception of the person as a moral agent or a conception of the weighty fundamental interests all human persons have simply as persons. His focus is on arriving by way of a contractualist and constructivist interpretation of international relations at a conception of human rights able to perform certain functions within that practice. And his view seems to be that given this focus the less said the better with respect to the traditional issues (though, to be sure, there are ways of raising these issues from within the Rawlsian approach – e.g., as noted above, through talk of the relationship between social cooperation, on the one hand, and the natural duties and fundamental interests of persons, on the other). In contrast to Rawls, Griffin takes up human rights in a more traditional fashion, focusing straightway on the more traditional issues.

That said, Griffin's approach is still in certain respects non-traditional. For Griffin does not approach human rights from the foundations or first principles of a well-worked out and systematic moral view. He does not reason from a general theory of value, first principles of morality, or a conception of the moral law as such to his conception of human rights. Rather, focusing on one important historical line of

[14]Griffin (2008). For critical discussion see my review essay Reidy (2009.) For a wider critical discussion, with Griffin's reply, see the essays in the book review symposium in *Ethics* (2010).

human rights talk that continues to resonate, even as its focus and determinacy deteriorates, within contemporary discussions, namely the tradition of human rights as natural rights, Griffin asks what it might look like if we were, as persons living in the twenty-first century, to render it more determinate and compelling with an eye toward including it within our best overall and comprehensive ethical theory. This, our best overall and comprehensive moral theory, Griffin seems to think we pursue best through piecemeal theorizing. We work out determinate and compelling accounts of bits of our moral experience one by one assembling them into a larger systematic whole as we move along in the process. Not only is there no need to seek first principles straightway, but seeking first principles straightway is likely to get in the way of progress. For whether we will need them at all is something we will discover only as we work out piecemeal our best overall and comprehensive ethical theory (and even if we find that we need them there remains the question of whether we will find ourselves able to identify them or even whether they exist). In this regard, there may be more methodological common ground between Rawls and Griffin than first meets the eye. For Rawls too seems inclined toward a piecemeal approach, seeking for each practice its own regulative principles without any antecedent conviction as to whether the comprehensive moral theory that results from stitching these principles together in a practically consistent and coherent fashion will turn out to be best understood in terms of or otherwise to require appeal to a single moral taproot in the form of a master principle or unifying moral conception. So what divides Rawls from Griffin is not Griffin's piecemeal approach, but rather the fact that Rawls takes up human rights from the very start as part of a moral theory of the political practice of international relations.

Griffin takes the basic task of theorizing human rights to be set by the fact that as universal moral rights human rights are the clear descendants of what used to be called natural rights, but they exist now within a larger philosophical, moral and religious context very different from that which accompanied their natural rights ancestors. Having been untethered from that larger context, which served to constrain and regulate claims about natural rights, human rights talk is now increasingly anarchic and chaotic. And not just because those participating in human rights talk do so from different disciplinary perspectives; the problem is deeper than that. The problem is that those participating in human rights talk are either talking about different things or, more likely, talking about something too vague and indeterminate to sustain meaningful and productive conversation. Given this circumstance, Griffin argues, we should not be surprised by the recent proliferation of human rights claims, with every injustice, every unfairness, every wrong, every failure to realize a significant good, being offered up as a human rights violation. But we should be worried. This proliferation of human rights claims threatens, if unchecked, to trivialize human rights, dispossessing them of their special, typically overriding, moral weight or force.

Griffin argues that all persons have a fundamental interest in developing and exercising their capacities for normative agency, for considering, evaluating, choosing and revising their own course in life. Other things equal, persons lives go better

to the extent that they develop and exercise this capacity, and not merely because it is a means to their good, but because it is an ingredient in their good. From this weighty and universal interest common to all persons, Griffin undertakes to justify and to render more determinate and compelling human rights as universal moral rights.

He analyzes this interest in or the good of normative agency into three component parts. The first concerns the capacity to make choices (autonomy). The second concerns the capacity to act on choices (liberty). The third concerns the material conditions necessary to any reasonable prospect of succeeding in acting on one's choices (material welfare). Autonomy, liberty and material welfare, then, are three very great goods; all persons have a fundamental interest in them.

Griffin takes a broadly teleological view according to which our reasons for acting derive fundamentally from the good. Accordingly, we all have strong reasons to secure, protect and promote autonomy, liberty and material welfare. Griffin proposes these reasons, conjoined with general practical facts about the human condition, as the normative underpinnings of human rights, which in turn serve as the conventional expression of our shared orientation toward, and an efficient conventional means to furthering, these weighty goods. Persons have human rights, then – to autonomy, liberty and material welfare, each of which ranges over a small family of rights – just to the extent necessary for them to secure the good of normative agency. In this way, Griffin proposes to make human rights talk more determinate and compelling.

Griffin settles on a list of human rights different from those given by Rawls and Talbott. Like Rawls, but unlike Talbott, he argues that there is no human right to democracy, even if as a moral matter democracy has a privileged position among political forms. Like Talbott, but unlike Rawls, he argues that there is a human right to same sex marriage. Unlike both Rawls and Talbott, he maintains that there is a right to die, i.e., a right to the material resources necessary to bring about one's own death when so doing would constitute an exercise of one's normative agency.

Griffin's account of the role or function of human rights is also different from the accounts given by Rawls and Talbott. While human rights embody and express universal moral claims tied to weighty and important goods that all persons and states have compelling reasons to promote, there are, on Griffin's view, additional weighty and important goods not involving human rights that all persons and states have compelling reasons to promote. And both persons and states may sometimes be forced to chose between promoting these other goods and the goods advanced through human rights. Then they must simply balance the relevant goods against one another. To be sure, within a sound moral economy human rights claims properly have a special weight or force. But they do not have an across the board overriding weight or trumping force. We ought not set them aside for the sake of other goods in the absence of clear and convincing evidence that the balance tips in favor of those other goods. But if the balance clearly so tips, even if only slightly, then we ought to so act for the sake of those other goods. The duties correlative to human rights

are, then, once all things are considered, only prima facie duties. And so whatever Griffin achieves by way of rendering the content and justification of human rights more determinate and compelling, he puts at risk by rendering their role and function within moral life less determinate and compelling.

This is seen clearly within the context of international relations. On Griffin's view, while every state has a compelling reason to promote human rights at home and abroad, securing human rights at home is not in itself sufficient to establish legitimacy or a principled claim to non-interference within international relations, and securing human rights abroad is just one weighty good to be balanced within international relations against other weighty goods. Thus, within international relations there is no straightforward linkage between human rights and the rightful exercise of coercive force. Indeed, on Griffin's view the only principled constraint on the rightful exercise of coercive force in international relations is that given by the ad hoc balancing of the relevant goods in play in any particular case.

To illustrate: consider a world within which there exist just three states. The first is a largely benevolent absolutism in full compliance with Griffin's human rights, but without popular sovereignty or effective institutions of corrective justice. It is, on Griffin's view, an illegitimate state. The missing components of legitimacy – popular sovereignty and corrective justice – are themselves great goods that all persons and states have compelling reasons to promote, even through force, if all things considered the overall balance of reasons so tips. The benevolent absolutism has no principled claim to non-interference. The second state is a state in full compliance with Griffin's human rights and also otherwise legitimate. It sustains non-democratic institutions that realize popular sovereignty and corrective justice (torts are redressed at law, etc.). But it is not a democracy and it fails to deliver distributive justice as seen from a democratic point of view. Democracy and distributive justice as seen from a democratic point of view are also very great or weighty goods that all persons and states have compelling reasons to promote, even through force, if all things considered the overall balance of reasons so tips. This second state has no principled claim to non-interference. The third state is a constitutional liberal democracy with a weak record of honoring its treaty commitments within international trade relations. An international system within which fidelity to treaty commitments is the norm is a great and weighty good that all persons and states have a compelling reason to promote. And....well…the familiar refrain returns: a constitutional liberal democracy has no principled claim to non-interference. This should not surprise: where all moral reasoning comes to promoting a plurality of distinct goods that must often be weighed one against another in particular cases there can be no general principled constraint on the rightful exercise of coercive force, whether in international relations or otherwise. Coercive force is rightfully exercised whenever all things considered it promotes the balance of good overall. Human rights have no special role or function within this moral economy, except that we ought not set them aside in the absence of clear and convincing evidence that the balance of reasons favors so doing. But this is something we might just as easily say of the claims arising out of any great and weighty good.

## 2.4 Conclusion

Rawls, Talbott and Griffin each take a different position with respect to the content, justification, and nature or function of human rights as universal moral rights. But they do so in large part because they approach the issues raised by human rights from different substantive moral orientations, respond to different sorts of problems, and work within different methodological traditions. And yet not withstanding these differences and the disagreements they underwrite, they converge in their non-skeptical embrace of human rights as universal moral rights and in their affirmation of a handful of increasingly noncontroversial basic human rights – e.g., to subsistence, security, basic liberties. If one conducted a more expansive survey of recent philosophical work on human rights – attending to the work of Gewirth (1996), Beitz (1999b), Morsink (2009), Pogge (2002), Nickel (2007), Shue (1996), Buchanan (2007), Fagan (2009), Donnelly (2002), Ignatieff (2003), Raz (2010) and others – one would, I think, arrive at more or less the same place. My suspicion is that our making further progress in our philosophical understanding of human rights will depend to a large degree on our making further progress in assessing the relative merits of not only competing substantive moral orientations, but also in distinguishing and ordering the various sorts of problems that motivate philosophers to theorize human rights and better understanding what is at stake between the various methodological traditions within which that work is undertaken. One can only hope that political progress with respect to more complete global compliance with human rights, at least with respect to those rights non-controversially thought of as basic or core, need not wait on our achieving this further philosophical progress.

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# Chapter 3
# Reconsidering Realism on Rights

**William E. Scheuerman**

International Realism hardly seems like a sensible place to turn to gain constructive insights about human rights. According to the conventional scholarly wisdom, Realists endorse amoral *Realpolitik*, which crudely posits that individual states can legitimately pursue their vital power interests even when doing so conflicts with both legality and morality.[1] Following Hobbes, Realists allegedly believe that shared ideas about justice presuppose a system of overarching sovereignty. Because no such sovereignty is achievable at the global level, interstate affairs are characterized by a perilous "state of nature" in which no common moral or legal framework operates. Binding law requires sanctions backed up by a coercive state apparatus. Yet interstate affairs necessarily remain characterized by anarchy. Consequently, regular enforcement of law at the global level is always plagued by massive deficits. More often than not, international law and human rights – like many appeals to a shared moral code – serve as little more than the political instruments of powerful global interests. When international morality or international law seems to obtain, it does so only because Great Powers happen to decide that allowing it to do so is in their prudential interest.

So Realism allegedly suffers from institutional conservatism: the unalterable dynamics of an international system in which rival states compete for power and security render utopian any attempt to establish ambitious varieties of global governance along the lines, for example, of "cosmopolitan democracy" as advocated by Daniele Archibugi (2008) and David Held (1995). This is supposedly why Realists even today remain committed to maintaining the primacy of the nation-state, despite

[1] What follows is a compendium drawn from Beitz (1979), Caney (2005), Doyle (1997), and Habermas (2006), but this critical view can be found among countless others as well.

W.E. Scheuerman (✉)
Department of Political Science, Indiana University, Bloomington, IN, USA
e-mail: wscheuer@indiana.edu

C. Corradetti (ed.), *Philosophical Dimensions of Human Rights: Some Contemporary Views*, DOI 10.1007/978-94-007-2376-4_3,

evidence that globalization is undermining it. As a result, Realism presumably cannot make sense of the rapid growth of international organizations, appearance of new political systems like the European Union, or the emergence of a global system of human rights, all of which have arguably transformed so-called international anarchy.

Elsewhere I have challenged this commonplace yet badly misleading reading of an intellectual tradition whose resources remain significantly richer than critics acknowledge (Scheuerman 2009, 2011). The standard account distorts the theoretical contributions of so-called mid-century "classical" Realists like E.H. Carr (1892–1982), John Herz (1908–2006), Hans Morgenthau (1904–1980), Reinhold Niebuhr (1892–1971), Frederick Schuman (1904–1981), and Georg Schwarzenberger (1908–1991), representatives of a vibrant body of work whose roots were located in the complex and contradictory –but indisputably fruitful – intellectual universe of the interwar German political left. Niebuhr, for example, was closely linked to the socialist German theologian Paul Tillich, as he struggled in the 1930s and 1940s to synthesize a somewhat liberalized Augustinian Christian ethics with radical currents in social thought. Carr was a great admirer of the work of the left-wing sociologist Karl Mannheim, while Morgenthau drew on a diverse collection of voices, including his Realist ally Niebuhr, but also Hans Kelsen, Carl Schmitt, Max Weber, and his main mentor, the left-wing Weimar legal sociologist and labor lawyer Hugo Sinzheimer. Herz was a lifelong social democrat who began his career as one of Kelsen's students. Forced to flee Germany because of his Jewish background and leftist views, Schwarzenberger was a protege of the German socialist jurist Gustav Radbruch (Scheuerman 2011). Contemporary international political theory simply ignores international Realism's politically progressive mid-century roots as well as the numerous ways in which those roots decisively shaped its political and intellectual agenda.

Not surprisingly, Realist ideas about human rights also turn out to be more complex and nuanced than generally recognized. In what follows, I try to retrieve what I take to be their lasting kernel, while explaining how and why contemporary Realist thinkers (i.e., Danilo Zolo) have abandoned the more valuable intuitions of their mid-century ancestors. However, I hope to offer more than a mere historical retrieval of some increasingly neglected Realist thinkers. Recent Cosmopolitan defenders of human rights make things too easy for themselves by simply ignoring the significant – albeit potentially constructive – challenges posed to their views by mid-century Realist authors.

## 3.1 Against Cosmopolitan Caricature

In his widely praised *Justice Beyond Borders: A Global Political Theory* (2005), the Cosmopolitan political theorist Simon Caney provides a brief yet all-too-typical survey of Realist criticisms of civil and political human rights. Drawing on a narrowly circumscribed range of texts, Caney interprets Realism as evincing fundamental

hostility to global human rights. After quickly summarizing Realist views, Caney – not surprisingly – easily counters them. Cosmopolitanism, it seems, need not worry itself too much with Realism or its critical ideas about human rights. In the final analysis, Caney provides yet another example of the unfortunate shadow boxing presently widespread in international political theory.

First, Caney notes that Realists typically "object that human rights policies inevitably tend to be selective and biased" (2005, 93). Realists have identified what we might describe as a *selectivity lacuna*, according to which global human rights tend to be applied and enforced in inconsistent and irregular ways. Unfortunately, Caney makes no real effort to explain this thesis adequately. Rather than properly investigate its sources, he simply declares that problems of legal selectivity can be overcome by nation-states striving for greater consistency and embodying a more fervent commitment to human rights (2005, 93). In short, he offers moral exhortation: "Try harder!" The possibility that deeply rooted features of political life might keep them from doing so – the underlying source of Realist worries – is simply ignored. Even if states fail to advance human rights in an impartial way, Caney observes, their selective enforcement can be justified since "it is better that they do something rather than nothing" (2005, 94). Apparently, the prospect that such selectivity might point to the existence of potentially more far-reaching weaknesses in the global status quo need not worry us.

Second, Caney accuses Realists of believing that a universal human rights regime somehow requires states "to adopt an identical response in all circumstances" (2005, 93). In other words, universal human rights allegedly demand not only consistent but identical applications and policies. Since the necessity of "different policies in different contexts" is inconsistent with the universality of human rights, their defenders suffer from what we might describe as a *contextualist or culturalist lacuna.* Realists supposedly posit that human rights fail to do justice to the ways in which legal aspirations (and, more specifically, universal rights) can and should be pursued in potentially divergent ways depending on the specific idiosyncrasies of political and cultural context (2005, 93). Not surprisingly, Caney criticizes this view for presupposing an unnecessarily mechanical legal universalism. In his alternative account, the pursuit of universal rights is consonant with attention to the demands of culture and context: "those who favored military intervention against Yugoslavia in 1999 were not thereby necessarily contradicting themselves if they did not call for the same response to Russia's treatment of the Chechens" (2005, 94).

Third, Caney refers to a 1979 lecture by Morgenthau to argue that Realists assert "that it would be wrong for a state consistently to promote human rights" since doing so might counteract other legitimate goals (2005, 94). For Realists, the *national interest* potentially conflicts with human rights-oriented policies. Since pursuit of universal rights for Realists presumably is either an all-or-nothing affair, any concession to the necessity of sometimes pursuing national interests fundamentally violates the idea of universal human rights. As Caney notes, however, recognizing that human rights "are not the sole determinant of our actions does not entail that they should not be determinant at all," a view which he associates with Realism (2005, 95), along with a fourth critical thesis that the best way to further human

rights is by setting "a good example by having an internally just regime" (2005, 95). According to Caney, Realism is principally committed to non-intervention in foreign and military affairs: Realists promulgate what we describe as *positive exemplarity rather than foreign intervention*.

By now, even those unsympathetic to Realism will have perhaps begun to sense that something must be awry here. Despite their opposition to the Vietnam War (and, more recently, the US invasion of Iraq), have not many Realists endorsed the employment of military power by the US and other western powers? Were not Morgenthau and Niebuhr hugely prominent postwar "cold war liberals" who energetically defended a militantly anti-communist foreign policy which demanded significantly more of the US globally than that it simply proffer a positive political example to others? Those familiar with cold war foreign policy debates might also recall that Morgenthau was an outspoken defender in the 1970s of the view that the liberalization of trade relations with the Soviets should be made conditional on the acceptance of basic human rights protections, including the right of Russian Jews to emigrate (1973). So at least at some junctures he obviously endorsed human-rights oriented foreign policies without worrying too much about the fact that he also made so much of the need for foreign policy to cohere with the so-called national interest.

Unfortunately, Caney has caricatured Realist views of international human rights. To see why this is so, we need to dig a bit deeper than he and most other Cosmopolitans bother to do.

## 3.2 Will the Real Realists Please Stand Up?

Caney's most telling oversight is his failure to acknowledge the existence of substantial common ground between his own Cosmopolitan preferences and at least some variants of classical Realism. Many mid-century Realists unabashedly subscribed to what Cosmopolitans have recently described as *legal (and political) cosmopolitanism*, defined by Thomas Pogge as a "commitment to a concrete political ideal of a global order under which all persons have equivalent legal and duties – are fellow citizens of a universal republic" (Pogge 2004, 90). They envisioned the eventual establishment of a unified global political order – a world state or global federation – as a desirable long term institutional goal, seeing its construction as essential to peace and security in a dangerous world haunted by the specter of nuclear warfare (Craig 2003; Scheuerman 2011). Although deeming proposals for a world state premature, E.H. Carr considered the nation-state in crucial respects anachronistic; during the 1940s, he favored locating significant powers of economic and security policy making at postnational decision making levels. As Andrew Linklater has correctly noted, for Carr "the evolution of common military and economic policy" was necessitated by the changing spatial contours of social and economic organization, as well as the fact that recent military innovations rendered the whole concept of strategic frontiers obsolescent. Their necessary transnationalization "would involve

a radical break with the moral parochialism of the nation-state" (2000, 236). Sharing Carr's skepticism about *immediate* attempts to set up world government, Niebuhr nonetheless conceded that our modern "technical civilization," whose "instruments of production, transport and communication reduced the space-time dimensions of the world to a fraction of their previous size and led to a phenomenal increase" in social interdependence, pointed directly to the realization of an intermeshed "world community" and eventually a corresponding world state (1944, 158; also, Craig 2003).

Although oftentimes ignored by both Cosmopolitan critics and his own normatively numb Neorealist offspring, Morgenthau concluded his famous *Politics Among Nations* with the claim that the horrors of contemporary (and especially atomic) warfare rendered the existing state system obsolete, declaring that only a novel reorganization of state sovereignty at the global level could protect humankind from the horrific prospects of nuclear war. Even though presently unattainable, the world state represented a long term goal towards which anyone sensibly committed to the preservation of the human species would have to work (1954, 469–502). In a key but typically neglected section of the text, he endorsed David Mitrany's innovative *functionalist* model of international reform and applied its tenets to the problems of European integration, which Morgenthau described with ever growing enthusiasm in many subsequent editions of *Politics Among Nations* (1954, 492–93; also, Mitrany 1946). In this, he followed Carr, whose *Nationalism and After* had previously discussed the potential virtues of the functionalist model of piecemeal international reform, centered pragmatically in concrete nuts-and-bolts policy matters nation-states could best tackle by cooperating intimately with their peers, as a politically sensible starting point for building an alternative order. Neither Carr nor Morgenthau was a principled opponent of far-reaching global reform *per se*, though both did of course harshly criticize *some* unduly naïve models of it. Other Realists – including Herz and Schuman – similarly endorsed the move towards a new supranational polity, like Morgenthau emphasizing the ways in which especially the looming possibility of nuclear warfare made the existing state system not only risky but potentially cataclysmic. Schuman joined forces with the "one-world" movement and endorsed a global federal union as an ultimate goal, while Herz devoted many of his writings to an analysis of what he described as the growth of a "universalist" orientation that challenged the international status quo (Herz 1959, 1976; Schuman 1952).

Like more recent Cosmopolitans, Realists evidently hoped that a future global order would take a basically liberal-democratic form and thus rest on a system of universal rights, though they generally said little about its likely institutional attributes in light of its temporally far-off character. Positing that far-reaching social change was inextricably linked to the establishment of new and ambitious forms of postnational decision making, some (i.e., Carr, Herz, and Schuman) also sympathized with demands for egalitarian social and economic global reforms. They thereby anticipated another major strand in contemporary Cosmopolitan thinking which similarly links postnational political reform to the quest for social justice and global economic redistribution. Like many recent Cosmopolitans, Realists married global political reform to identifiably social democratic – and sometimes more radical – policy preferences (Held 2004).

So prominent Realists were by no means in principle opposed to the eventual establishment of global government and binding universal rights. They did not, in short, share the fundamentalist hostility evinced by some contemporary Realists (and others), who see in global human rights little more than an ideological veil for western –and especially – US imperialism (Zolo 1997, 2002, 2010). On the contrary, they might have sympathized with recent Cosmopolitan aspirations to deepen and strengthen global human rights. Not surprisingly, what they had to say about human rights said was by no means unequivocally critical. Although Carr, for example, doubted that social and economic rights could be interpreted as mere extensions of liberal civil and political liberties, he described the 1948 Declaration of Human Rights as a problematic and paradoxical yet nonetheless "great turning point in history," an important attempt to update the idea of the rights of man in accordance with contemporary social conditions (2003 [1949], 11). Always best attuned among the Realists to ongoing trends in international law, Schwarzenberger considered it "urgent to lay down generally valid standards making at least articulate the gap between present-day reality and the minimum requirements of civilized world community" (1964, 464). He pictured efforts at building regionalized human rights legal regimes – e.g., the European Convention on Human Rights – as worthwhile undertakings more likely to succeed than parallel initiatives at the global level because of West Europe's comparatively high level of political and social integration. On the international plain, where rights were supposed to be binding on a panoply of heterogeneous as well as antagonistic political and social units, the prospects of achieving consistently enforceable human rights was less certain. Even in the less-than-ideal political conditions of the cold war, however, global human rights declarations performed some vital law-inspiring and law-promoting functions, with national courts already basing their rulings on the 1948 Declaration and other international agreements despite their vague and legally ambivalent character (1964, 464–66). Even the Great Powers were sometimes forced to obey norms which they otherwise would have preferred to violate: powerful "[g]overnments must at least outwardly conform to the standards which they have invoked for their own benefit" (Schwarzenberger 1951, 227). Realists took the normative character of international law and rights seriously, cautiously anticipating the ways in which human rights might serve as a fruitful starting point for "complex processes of public argument, deliberation, and exchange" in which they "are contested and contextualized, invoked and revoked" by civil society actors hoping to employ them to counter injustice (Benhabib 2009, 698).

To be sure, the Realists also made a number of disparaging comments about international human rights and human rights-oriented foreign policies, along the lines found in Morgenthau's 1979 talk (and subsequent publication) about which Caney makes so much. For Cosmopolitans who interpret evidence of growing respect paid even by powerful nation states to regionally-based as well as international universal rights declarations as a major step towards an identifiably cosmopolitan legal system, such apparent hostility understandably raises red flags.

However, their critical comments should be interpreted as motored chiefly by anxieties about what we might describe as the necessarily *ambivalent* character of

efforts to advance human rights in a divided and terribly unequal global order. Only if we acknowledge Realism's fundamental sympathy for global rights can we properly understand as well as appreciate its reservations about existing human rights practices. What they had to say turns out to be far more sensible than readers might otherwise expect. In this spirit, let us revisit Caney's brief summary of the Realist critique of human rights.

## 3.3 Realism on Rights: A Second Look

Classical Realists indeed worried that human rights suffer from a *selectivity lacuna* to a greater extent than domestic-level rights and legal institutions. Yet they did so for sound reasons.

First and foremost, theirs was chiefly an argument about global *power inequality*, and particularly the ways in which it threatens to undermine otherwise admirable legal and normative aspirations. Under contemporary global conditions, privileged states and power interests too often can effectively determine the meaning of the relevant legal clauses and rights, whereas longstanding mechanisms at the national level typically mitigate the advantages enjoyed there by the politically and socially privileged. Powerful states are able more easily to circumvent even seemingly unambiguous legal institutions to a greater degree than achievable by powerful groups on the domestic arena. In short, the generality of law (and rights) is vastly more vulnerable at the global than the national level because power inequalities – be they military, economic, or otherwise – are so much more far-reaching there. Predictably, even when nation-states claim that their foreign policies can be placed under the mantle of human rights, they will tend to do so in self-interested and narrowly egoistical ways: the United States, for example, has regularly advanced an interpretation of human rights reflecting its own idiosyncratic anti-statist national political traditions.[2]

In the context of a deeply divided and socially unequal international society, the decentralization of legislation, adjudication, and enforcement too often renders international law subject to "vicissitudes of the distribution of power between the violator of the law and the victim of the violation" (Morgenthau 1954, 270). To be sure, parallel dilemmas can be readily identified at the domestic level, where law can also prove subject to inconsistent application and enforcement. Yet important differences remain[3]: such trends are badly aggrandized in the international system since it lacks what Carr aptly described as "the unity and coherence of communities of more limited size." Unable to fulfill basic integrative functions accomplished more-or-less automatically by successful nationally-based polities, international society remains embryonic and underdeveloped. The requisite "world community," Carr admitted, was increasingly a concrete lived social reality in our globalizing era

[2]Think, for example, of longstanding US political hostility to social and economic rights.

[3]Many contemporary Cosmopolitans, I should add, still tend to downplay them.

(1964 [1939], 162). Yet he legitimately thought it was still plagued by troublesome fragilities that had been minimized at least to some degree at the national level. Chiefly because of the existence of military, political, and economic inequalities vastly more troublesome than those found nationally, international society was unable to operate as effectively as its domestic corollary, where privileged political and social interests generally followed even burdensome moral and legal norms. Consequently, when Great Powers like the USA decide in favor of circumventing international law, they very well may get away with doing so, whereas powerful groups at the national level generally cannot get away with brazenly doing so.

Not surprisingly given mid-century Realism's socialist background, this view echoes some familiar elements of conventional leftist legal thinking.[4] Even when international law appears to treat all parties equally, de facto power inequalities means that it favors those possessing superior power resources. Legal generality, in short, presupposes a modicum of *de facto* power equality. To be sure, the socialist and especially Marxist tradition too long prescribed an ambivalent conception of law: while emphasizing the virtues of the rule of law and civil liberties *within* capitalism, many Marxists thought that a postcapitalist social order could simply expend with basic rights and fundamental legal protections. Fortunately, most classical Realists acknowledged law's admirable normative aspirations *along with* its tendency to mirror power inequalities. They underscored law's normative potential, even if they were forced to admit that a model of it as chiefly serving the interests of the powerful and privileged provided a more fruitful analytic starting point for making sense of global than domestic legal realities. In this account, the nearest domestic analogy to interstate conflict between "have" and "have not" powers, and thus "by far the most instructive," is found between and among representatives of labor and capital (Carr 1964[1939], 212; also, Schwarzenberger 1951, 202). That social conflict, Carr and others observed, is an exceptionally explosive one and thus poses major challenges even to well-integrated national communities. While the explosiveness of tensions between labor and capital makes them something of an *exception* in domestic politics, it arguably illustrates the *normal* state of affairs in international affairs, where inequalities between "have" and "have not" states regularly threaten international society's legal devices.

Such Realist reservations hardly constitute a principled attack on the quest to strengthen global human rights. On the contrary, they implicitly highlight the limitations of human rights in the context of a Westphalian system, Realists regularly argued, which humankind should work gradually yet systematically towards transcending. Such failures, they believed, underlined the virtues of a more mature postnational polity in which basic rights could finally gain sufficiently impartial application and enforcement. In any event, significantly more is at work than the flawed orthodox "Marxist trope that views the discourse of human rights as the ideological veneer enabling the spread of free commodity relations" (Benhabib 2009, 694). In fact, the

[4]It does, however, quite correctly dispense with traditional socialist theory's economistic view of power.

Realist position provides a useful corrective to a naïve legal cosmopolitanism which one-sidely celebrates our emerging human rights regime while downplaying its ambiguities and incongruities –most obviously: so-called humanitarian military intervention now undertaken under the auspices of the UN or NATO. Too much empirical evidence simply confirms the Realist expectation that powerful global actors – and especially the Great Powers – still tend to make a mockery of international human rights when doing so happens to serve core power interests (Posner 2009). Even if we would do well not to ignore the impressive normative and political resources now provided by international human rights, we simultaneously need to heed the ways in which they are still interpreted and enforced amid a troublesome constellation of unequal power forces. Seyla Benhabib is probably right, for example, to envision global rights as serving as a potentially fruitful basis for "democratic iterations" consisting of "complex processes of public argument, deliberation, and exchange" (2009, 698). Yet Realism also correctly recalls that such exchanges too often occur in political and social contexts plagued by stunning inequalities: not surprisingly, their results are at least as likely to mirror such inequalities as challenge them.

To be sure, present-day Cosmopolitan writers are well aware of the horrendous inequalities and injustices plaguing the global political economy. Yet their otherwise sober assessment of global inequalities tends to get left at the wayside in many normative discussions of global human rights. Because Realists avoided this oversight, they would also rightly have criticized Caney's view that it always remains better for nation states to "do something rather than nothing" when it comes to human rights-based policies (2005, 94). As Realists might have noted, "it depends." Only careful attention to a host of contingent and difficult to calculate power factors about which political actors will need to make complex judgments can help us determine whether the proposed policies in fact advance human rights, or instead perhaps counterproductively and inadvertently undermine them. The fact that the key carriers of such policies sometimes are rich and powerful nation states whose interests conflict with those of the vast mass of humanity, at the very least, raises complicated legal, moral, and political questions.

What then of Realism's notion of a *contextualist and culturalist lacuna* plaguing human rights discourse? Unfortunately, Caney's discussion of this vital matter transforms another legitimate anxiety into a theoretical straw man.

In fact, there is little textual evidence – revealingly, none is provided by Caney – that classical Realists endorsed a mechanical legal universalism or rigid interpretation of human rights along the lines he attributes to them. On the contrary, they famously emphasized the ways in which policy makers should pay close attention to the particularities of foreign culture and history. They worried deeply that politicians and their foreign policy advisors – and especially those at the helm of the Great Powers who, by no means coincidentally, regularly occluded the views and perspectives of weaker rivals – might fail disastrously to do so. To be sure, as Morgenthau and others noted, even apparently uncontroversial universal human rights could suddenly mean "something different to an American, a Russian, and an Indian" since they were still "perceived by, assimilated to, and filtered through

minds conditioned by different experiences" (Morgenthau 1954, 240; also Niebuhr 1953, 28–29). Writing in the immediate aftermath of the Second World War, classical Realists aptly worried that modern total war was destroying both international law and international morality. A terribly dangerous "nationalistic universalism," driving individual political units arrogantly to identify "the standards and goals of a particular nation with the principles that govern the universe," was working to weaken those features of international morality and law which mitigated the familiar dangers of global politics (1946, 198). Given disparities in social existence and especially the national frameworks within which moral and political experience was still digested, nation states continued to fill the "hearts and minds of men everywhere" with narrow "standards of political morality" (Morgenthau 1954, 244).

So Realists grasped that the modern "fact of pluralism" poses major challenges for the quest to develop a more-or-less consistent human rights regime. People everywhere should and increasingly do condemn genocide and torture, for example. Yet global pluralism still opens the door to explosive political disagreements. Realists also accurately worried that at least some social and political trends – e.g., growing global material inequality, as well as the ascent of reactionary nationalistic ideologies – risked further exacerbating the sizable difficulties of reaching some sort of rough agreement about the meaning of fundamental legal rights and norms.

So the Realist argument here is more plausible than Caney acknowledges. Although I cannot adequately defend this point here, at their best classical Realists aimed to do justice to the deep challenges posed by global pluralism and heterogeneity *without* succumbing to a problematic moral or political relativism. Firmly committed to liberal democracy and the prospect of its *ultimate* extension to the global arena, they probably would have rejected the increasingly fashionable view that "human rights thinking is peculiar to western thinking" and thus represents little more than the latest version of old-fashioned western legal imperialism (Caney 2005, 86). At the same time, they would have been rightly concerned with the ways in which Cosmopolitans tend to downplay the significance of political and cultural differences which enormously complicate any attempt to interpret and enforce basic rights at the global level to a far greater degree than at the national level. Within the confines of the nation-state, one could typically discern some rough working consensus about basic legal values: "What justice means in America I can say; for interests and convictions, experiences of life and institutionalized traditions, have in large measure created a consensus which tells me what justice means under the conditions of American society" (Morgenthau 1949, 210–11). Of course, even then legal consensus was subject to challenge and political renegotiation, and during extreme situations fundamental questions of political identity might be dramatically reshuffled. Yet on the global scale, where a shared system of sovereignty was missing and power inequalities typically ran amok, the exceptional situation was closer to the normal state of affairs: the meaning even of seemingly uncontroversial norms and rights (e.g., the prohibition on torture or genocide) could suddenly be up for grabs. Supranational law and rights were typically more controversial than their domestic corollaries, and appeals to them more likely to constitute ideological veils for privileged power interests eager to mask particularistic pursuits in universalistic language.

Here again, the immediate consequence of the argument was hardly to discount human rights or national policies based on them altogether, but instead to provide a more complex and nuanced account of the practical difficulties facing conscientious attempts to achieve them. In fact, precisely because they believed that too many defenders of human rights missed this side of the equation, Realists excoriated well-meaning but naïve "Idealists" for downplaying the centrality of prudence, compromise, and tragic choices in moral and political life. Too often, they believed, defenders of human rights policies joined arms with a crude political ethics. In countering this danger, Morgenthau and others turned to Weber's ethic of responsibility, which they interpreted – in some contradistinction to its original architect – as consonant with a rigorous moral universalism (Scheuerman 2009, 40–69). In foreign policy making, for example, a crude moral vision motivated actors who irresponsibly believed that (US-style) democracy and US ideas about human rights could be pursued everywhere, with equal fervor, despite the potential costs, and the fact that it was less likely to be productively advanced in some regions than in others: "If universal democracy is the standard of political action, Korea is as important as Mexico, China is as worthy an objective to Canada, and there is no difference between Poland and Panama" (Morgenthau 1949, 210). A politically naïve pursuit of otherwise admirable human rights-oriented policies – *this* was in part the crude "moralism" they famously decried – was blind to concrete power relations and downplayed the fact that even powerful global actors necessarily operate with limited political resources. Such aims could never be achieved without discrimination. Even the soundest political ideals posed difficult practical and political questions, in part because their pursuit might require acts – e.g., political violence – that otherwise were rightly condemned.

As we saw above, Caney is also puzzled by Morgenthau's apparently quirky 1979 assertion that once policy makers correctly admit that the national interest sometimes necessarily trumps human rights, they have given up on pursuing them in a minimally principled fashion:

> once you fail to defend human rights in a particular instance, you have given up the defense of human rights and you have accepted another principle to guide your actions. And this is indeed what has happened and is bound to happen if you are not a Don Quixote who foolishly but consistently follows a disastrous path of action. (1979, 7)

Yet even this claim should now appear somewhat less peculiar than first was the case. In a global system characterized by power rivalry and deep inequalities, Realists argued, a principled defense of human rights by national governments cannot consistently mesh with the pursuit of narrow national interests. Reasonable interpretations of the national interest can easily conflict with a strict human rights-oriented foreign policy; policy makers will be forced to make unfortunate compromises and tragic choices. Even if morality requires of us that we vigorously advance universal human rights, the best that can be reasonably expected of nationally-based political leaders given existing global conditions is that they *minimize* unfortunate but unavoidable moral compromises. How can one fairly expect of present-day national leaders that they give up power and privilege for humanitarian aims which

might prove costly to their own constituents? Any political leader who does so will get unceremoniously dumped by an angry electorate.

Easily misunderstood, Morgenthau was not assailing the admirable quest for a strengthened human rights regime, but instead the naïve view that nationally-based leaders can readily and indeed consistently do so in an existing international system that places significant structural restraints on such efforts. He presciently grasped that the idea of universal human rights eventually demanded that they be applied and enforced in a fair and impartial manner: in other words, that parochial national interests ultimately *not* be allowed to trump them. The problem, however, was that existing political and social conditions manifestly clashed with this noble moral and legal aspiration. Here again, the crucial implication was that Realists should support sensible efforts at global reform; not surprisingly, they consistently did so over the course of many decades (Scheuerman 2010). To his credit, Morgenthau was unsatisfied with the eclectic view –apparently endorsed by Caney (2005, 95) – that one might somehow claim to be a principled defender of human rights while simultaneously admitting that they can occasionally be sacrificed at the altar of national interests. In part because he took human rights more seriously than many of their so-called "idealistic" defenders, Morgenthau saw this position as resting on a series of unfortunate concessions to an international status quo badly in need of radical overhaul.

Caney's attribution of a preference for *positive exemplarity rather than foreign intervention* to Realism need not detain us for long. During the Vietnam War, which Realists vehemently opposed, they indeed argued that the United States would have done better at trying to live up to its own liberal democratic aspirations domestically than by trying to force them militarily on underdeveloped countries. The sound intuition here was that especially when powerful countries attempt to force feed otherwise admirable humanitarian aspirations to weaker rivals, the results can prove disastrously counterproductive. In Morgenthau's view, for example, not only did US military intervention in Vietnam set back the aspiration for deepening human rights in South East Asia, but it eviscerated basic liberal and democratic rights at home as well (Scheuerman 2009, 165–69). Having supported US military intervention against Nazi Germany and other authoritarian powers, however, Realists were no principled opponents of military intervention as a way of protecting and potentially advancing human rights. Their position was a more nuanced and politically sensible one: because attempts to protect human rights always occur amid a pluralistic force field in which unequal powers compete ruthlessly, political actors should follow the outlines on an ethic of responsibility and thus pay careful attention to context and possible consequences. Obviously, not all military interventions promising to advance human rights are likely to prove successful at doing so. As with the case of US involvement in Vietnam, humanitarian rhetoric sometimes serve as little more than a flimsy ideological cover for retrograde and indeed ultimately criminal acts of violence.

Of course, it is difficult to know what mid-century Realists might have said about recent examples of so-called humanitarian military intervention. At the very least, they would have worried about its dangers much more so than those Cosmopolitans who have sometimes quite fervently endorsed them. And there are many reasons for

believing that they would have unequivocally opposed the disastrous US-led invasion of Iraq (Mearsheimer 2005).

## 3.4 Realism Against Human Rights or: How Realism Went Wrong

Perhaps the most striking feature of the story I have tried to recount here is its relative unfamiliarity. Contemporary Realists, at the very least, seem uninterested in developing a sufficiently nuanced analysis of both the prospects and perils of global human rights. Caney and other Cosmopolitans perhaps misrepresent the superior views of mid-century *classical* Realists in part because *recent* Neorealists indeed evince a dismissive attitude – if not downright hostility – to human rights. Their reasons for doing so, however, are unsatisfactory.

The decisive role in this shift was probably played by the influential US political scientist Kenneth Waltz, who exploded into the ranks of Realist theory in the late 1950s and 1960s, and who subsequently played a huge role in reorienting it away from some of the normative and reformist preoccupations of classical Realism (WAltz, 1979). In striking contrast to his mid-century Realist predecessors, Waltz dogmatically accepts "the existence of an anarchical international structure as a fact of political life" (Craig 2003, 129). Unlike Carr, Morgenthau, Niebuhr and other earlier Realist thinkers, he simply excludes the possibility of far-reaching transformations to the existing state system. The most obvious basis for this move is his embrace of a strict positivist delineation of scientific from normative inquiry. This move – which has been widely and astutely criticized (Ashley 1981) – has driven anxieties about the pathologies of the existing state system out of the proper confines of Realist inquiry.[5] Waltz has also always been more sanguine than his Realist predecessors about the political and institutional implications of the nuclear revolution. While especially Morgenthau and Herz believed that nuclear weapons constituted a radical novelty in human affairs that pointed the way towards the establishment of a new global order, Waltz instead has repeatedly emphasized the stabilizing role of nuclear weapons in interstate affairs (Sagan and Waltz 2003).

Not surprisingly, Neorealism distorts the complex ways in which "ought" and "is" are mutually constitutive, and in particular the dynamic fashion in which normatively ambitious views of human rights have begun to gain an empirical footing even in the harsh soil of global politics. While classical Realists readily entertained the possibility that human rights might at least point the way towards a radically transformed global order, Waltz and his followers dismiss them as nothing more

[5] As Craig (2003) perceptively shows, however, Waltz's theory rests implicitly on many normative – and oftentimes institutionally conservative – preferences of its own. Because Craig misses some of the ways in which Realists tried to theorize supranational or world society, his view of the Waltzian revolution remains incomplete.

than wishful and potentially unscientific "idealistic" thinking inconsonant with the historically unchanging laws of international anarchy. In their view, human rights fundamentally function as nothing more than an ideological superstructure in an international system in which states are destined to compete eternally for power and especially military superiority. Although of course attuned to the manner in which liberal Great Powers effectively mobilize human rights language and discourse to serve political needs, Neorealists necessarily occlude their full normative potential, as well as the way in which the idea of universal human rights potentially anticipates a novel – and potentially improved – global order.

The most outspoken present-day Realist critic of human rights, the Italian political philosopher Danilo Zolo, builds directly on the problematic Neorealist legacy of Waltz, openly endorsing it over the purportedly obsolete views of classical Realists like Morgenthau, Niebuhr, and Carr (1997, xv). To be sure, Zolo tends to repeat many of the arguments made about human rights by mid-century Realists. Yet his critique is ultimately both more radical and unduly undialectical.

Like Waltz, Zolo considers world or cosmopolitan government a recipe for political disaster. Any attempt to realize it would merely exacerbate the violent character of international politics, as supposedly demonstrated by the sad record of so-called humanitarian military intervention under the auspices of the UN. A worldwide polity could only entail a brutal totalitarian nightmare given limited global political and cultural integration. Again following Waltz, Zolo simply declares the possibility of a mature and effectively integrated world community to be unrealistic (1997, 153). His position is proudly indebted to Machiavelli and Hobbes: international anarchy constitutes an unchangeable fact of political life (1997, xv, 82). Unfortunately, his critique of global reform tries to get too much mileage out of the (admittedly) ambivalent record of recent humanitarian military intervention: even if Zolo's criticisms of such actions are sometimes sound, it is unclear that they can ground his far-reaching hostility to political and legal cosmopolitanism (Scheuerman 2011).

Revealingly, Zolo radicalizes the anti-normative thrust of Waltz's positivist and scientistic reworking of Realism. Insisting that the subjectivity and contingency of all moral values constitutes an essential feature of the modern condition, he discards even a minimal universalistic morality (1997, 64). However, Zolo's moral skepticism generates deep internal tensions, not the least of which derives from the fact that he continues to make powerful moral arguments. Outraged by the abuse of human rights norms by Great Powers like the US, he has repeatedly chided them for employing universalistic normative language and the dream of cosmopolitan reform to veil the deadly pursuit of narrow power interests. Refurbishing familiar Realist attacks on the self-righteousness and moral hypocrisy of liberal foreign policy, Zolo has at times undoubtedly been an eloquent critic of so-called humanitarian military intervention undertaken with the UN's seal of approval (1997, 2002, 2010). Unfortunately, he possesses no real normative basis from which to justify his occasionally astute criticisms: his acceptance of the contingency and subjectivity of moral values provides at most a weak foundation from which to launch his attack. In the final analysis, Zolo throws the baby out with the bath water and offers no real

moral basis for opposing hypocritical and incomplete attempts to extend global human rights.[6]

## 3.5 Conclusion

Notwithstanding the ubiquitous tendency particularly among Cosmopolitan political theorists to caricature Realism, so-called "classical" Realism constitutes a supple attempt to come to grips with what by an account can only be described as a transitional historical moment: even as the nation state is undergoing decay and new global political and legal forms are beginning to emerge, they remain in many ways precarious and underdeveloped. Cosmopolitans understandably tend to focus on the exciting potentials latent in emerging global political and legal forms; mid-century Realists would have correctly pointed out that many dangers accompany them as well. A complete global political theory – and accompanying theory of human rights – will have to do justice to both intuitions.

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[6]See also Coates (2000) for a critique of Zolo.

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# Part II
# The Validit-(ies) of Human Rights

# Chapter 4
# The Concept of Human Dignity and the Realistic Utopia of Human Rights

**Jürgen Habermas**

Article 1 of the Universal Declaration of Human Rights, which was adopted by the United Nations on December 10, 1948, begins with the statement: "All human beings are born free and equal in dignity and rights."[1] The Preamble to the Declaration also speaks of human dignity and human rights in the same breath. It reaffirms the "faith in fundamental human rights, in the dignity and worth of the human person."[2] The Basic Law for the Federal Republic of Germany, which was enacted some 60 years ago, begins with a section on basic rights. Article 1 of this section opens with the statement: "Human dignity is inviolable." Prior to this, similar formulations appeared in three of the five German state constitutions enacted between 1946 and 1949. Today "human dignity" features prominently in human rights discourse and in judicial decision making (Denninger 2009a).

The inviolability of human dignity commanded the attention of the German public in 2006 when the Federal Constitutional Court declared the Aviation Security Act to be unconstitutional. When it was enacted, the German Parliament had in mind the scenario of 9/11, the terrorist attack on the Twin Towers of New York's World Trade Center and the Pentagon; the intention of the bill was to authorize the armed forces in such a situation to shoot down a passenger aircraft that had been transformed into a living missile in order to avert the threat to an indeterminately large number of people on the ground. However, the Court took the view that the killing of passengers by agencies of the state under such circumstances would be unconstitutional. It argued that the duty of the state (according to Article 2.2 of the

[1] The first sentence of the Preamble calls at the same time for recognition of the "inherent dignity" and the "equal and inalienable rights of all members of the human family."

[2] "[…] faith in fundamental human rights, in the dignity and worth of the human person […]."

J. Habermas (✉)
Emeritus of Philosophy, J.W. Goethe-University, Frankfurt, Germany

C. Corradetti (ed.), *Philosophical Dimensions of Human Rights: Some Contemporary Views*, DOI 10.1007/978-94-007-2376-4_4,

Federal Constitution)[3] to protect the lives of the potential victims of a terrorist attack is secondary to the duty to respect the human dignity of the passengers: "With their lives being disposed of unilaterally by the state, the persons on board the aircraft . . . are denied the value which is due to a human being for his or her own sake."[4] The echo of Kant's categorical imperative is unmistakable in these words of the Court. The respect for the dignity of every person forbids the state to dispose of any individual merely as a means to another end, even if that end be to save the lives of many other people.

It is an interesting fact that it was only after the Second World War that the philosophical concept of human dignity, which had already existed in antiquity and acquired its current canonical expression in Kant, found its way into texts of international law and recent national constitutions. Only during the past few decades has it also played a central role in international jurisdiction. By contrast, the notion of human dignity featured as a legal concept neither in the classical human rights declarations of the eighteenth century nor in the codifications of the nineteenth century (McCrudden 2008). Why does talk of "human rights" feature so much earlier in the law than talk of "human dignity"? Certainly the founding documents of United Nations, which drew an explicit connection between human rights and human dignity, were clearly a response to the mass crimes committed under the Nazi regime and to the massacres of the Second World War. Does this also account for the prominent place accorded human dignity in the postwar constitutions of Germany, Italy, and Japan, thus of the successor regimes of the countries that caused and participated directly in this twentieth-century moral catastrophe? Is it only against the historical background of the Holocaust that the idea of *human rights* becomes, as it were, retrospectively morally charged – and possibly overcharged – with the concept of *human dignity*?

The recent career of the concept of "human dignity" in constitutional and international legal discussions tends to support this idea. There is just one exception, from the mid-nineteenth century. In the justification of the abolition of the death penalty and of corporal punishment in §139 of the German Constitution of March 1849, we find the statement: "A free people must respect human dignity even in the case of a criminal" (Denninger 2009a, 1). However, this constitution, which was the product of the first bourgeois revolution in Germany, never came into force. One way or another, there is a striking temporal dislocation between the history of *human rights* dating back to the seventeenth century and the relatively recent currency of the concept of *human dignity* in codifications of national and international law, and in the administration of justice, over the past half century.

Contrary to the assumption of a retrospective moral charging of human rights, I would like to defend the thesis that an intimate, if initially only implicit, *conceptual* connection has existed from the very beginning. Our intuition tells us anyway that

[3] "Every person has the right to life and physical integrity."

[4] BverfG, 1 BvR 357/05 vom 15.02.2006, Absatz-Nr. 124. English translation available at: http://www.bundesverfassungsgericht.de/entscheidungen/rs20060215_1bvr035705en.html.

human rights have always been the product of resistance to despotism, oppression, and humiliation. Today nobody can utter these venerable articles – for example, the proposition "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment" (Article 5 of the Universal Declaration) – without hearing the echo of the outcry of countless tortured and murdered human creatures that resonates in them. The appeal to human rights feeds off the outrage of the humiliated at the violation of their human dignity. If this forms the historical starting point, traces of a conceptual connection between human dignity and human rights should be evident from early on in the development of law itself. Thus we face the question of whether "human dignity" signifies a substantive normative concept from which human rights can be deduced by specifying the conditions under which human dignity is violated. Or does the expression merely provide an empty formula that summarizes a catalogue of individual, unrelated human rights?

In Sect. 4.1, I present some legal reasons in support of the claim that "human dignity" is not merely a classificatory expression, an empty placeholder, as it were, that lumps a multiplicity of different phenomena together but the moral "source"[5] from which all of the basic rights derive their meaning. In Sect. 4.2, I then present, in terms of a conceptual history, an analysis of the catalytic role played by the concept of dignity in the construction of human rights out of the components of rational morality, on the one hand, and of the form of subjective rights, on the other. Finally, the origin of human rights in the moral notion of human dignity explains the explosive political force of a concrete utopia, which I would like to defend (in Sect. 4.3) against the blanket dismissal of human rights (as by Carl Schmitt), on the one hand, and against more recent attempts to blunt their radical thrust, on the other.

## I

Because of their abstract character, basic rights need to be spelled out in concrete terms in each particular case. In the process, lawmakers and judges often arrive at different results in different cultural contexts; today this is apparent, for example, in the regulation of controversial ethical issues, such as assisted suicide, abortion, and genetic enhancement. It is also uncontroversial that, because of this need for interpretation, universal legal concepts facilitate negotiated compromises. Thus, appealing to the concept of human dignity undoubtedly made it easier to reach an overlapping consensus, for example during the founding of the United Nations, and more generally when negotiating human rights agreements and international legal conventions, and when adjudicating international legal disputes between parties from different cultures. "Everyone could agree that human dignity was central, but not why or how" (McCrudden 2008, 678).

[5] As stated in the Constitution of the state of Saxony enacted in 1989.

In spite of this observation, the juridical meaning of human dignity is not *exhausted* by the function of erecting a smokescreen for disguising more profound differences. The fact that the concept of human dignity can also occasionally facilitate compromises when specifying and extending human rights by neutralizing unbridgeable differences cannot explain its belated emergence *as a legal concept*. I would like to argue that changing historical conditions have merely made us aware of something that was inscribed in human rights implicitly from the outset – the normative substance of the equal dignity of every human being that human rights only spell out. So judges appeal to the protection of human dignity when, for instance, the unforeseen risks of new invasive technologies lead them to introduce a new right, such as a right to informational self-determination. In a similar way, the Federal Constitutional Court has proceeded in its groundbreaking decision of 9 February 2010 concerning the assessment of what can be claimed as a subsidy for long-term unemployed.[6] For this reason, the Court has derived from Article 1 of the Basic Law for the Federal Republic of Germany, a fundamental right of "minimal subsidy," which makes it possible for the beneficiaries (and their children) to participate "decently in social, cultural and political life."[7]

Thus, the experience of the violation of human dignity has performed, and can still perform, an inventive function in many cases: be it in view of the unbearable social conditions and the marginalization of impoverished social classes; or in view of the unequal treatment of women and men in the workplace, and of discrimination against foreigners and against cultural, linguistic, religious, and racial minorities; or in view of the ordeal of young women from immigrant families who have to liberate themselves from the violence of a traditional code of honor; or finally, in view of the brutal expulsion of illegal immigrants and asylum seekers. In the light of such specific challenges, different aspects of the meaning of human dignity emerge from the plethora of experiences of what it means to be humiliated and be deeply hurt. The features of human dignity specified and actualized in this way can then lead both to a *more complete* exhaustion of existing civil rights and to the discovery and construction of new ones. Through this process the background intuition of humiliation forces its way first into the consciousness of suffering individuals and then into the legal texts, where it finds conceptual articulation and elaboration.

The 1919 Constitution of the Weimar Republic, which pioneered the introduction of social rights, provides an example of this. In Article 151 the text speaks of "achieving a dignified life for everyone." Here the concept of human dignity remains concealed behind the adjectival use of a colloquial expression; but as early as 1944 the International Labour Organization employs the rhetoric of human dignity without qualification in the same context. Moreover, just a few years later Article 22 of the Universal Declaration of Human Rights already calls for guarantees of economic, social, and cultural rights, so that every individual can live under conditions

[6] http://www.bundesverfassungsgericht.de/entscheidungen/ls20100209_1bvl000109.

[7] In this connection McCrudden speaks of "justifying the creation of new, and the extension of existing rights" (2008, 721).

that are "indispensable for his dignity and the free development of his personality." Since then we speak of successive "generations" of human rights. The heuristic function of human dignity is the key to the logical interconnections between these four categories of rights: fundamental rights can fulfill, politically, the moral promise of respecting the human dignity of every individual, only if all their categories *function holistically* (Lohmann 2005).

The *liberal rights*, which crystallize around the inviolability and security of the person, around free commerce, and around the unhindered exercise of religion, are designed to prevent the intrusion of the state into the private sphere. They constitute, together with the *democratic rights of participation*, the package of so-called classical civil rights. In fact, however, the citizens have equal opportunities to make use of these rights only when they simultaneously enjoy guarantees of a sufficient level of independence in their private and economic lives and when they are able to form their personal identities in the cultural environment of their choice. Experiences of exclusion, suffering, and discrimination teach us that classical civil rights acquire "equal value" (Rawls) for all citizens only when they are *supplemented* by social and cultural rights. The claims to an appropriate share in the prosperity and culture of society as a whole place narrow limits on the scope for shifting systemic costs and risks onto the shoulders of *individuals*. These claims are directed against yawning social inequalities and against the exclusion of whole groups from the life of society and culture. Thus policies such as those that have predominated in recent decades not only in the United States and Great Britain but also in Continental Europe, and indeed throughout the world – that is, those that pretend to be able to secure an autonomous life for citizens *primarily* through guarantees of economic liberties – tend to destroy the balance between the different categories of basic rights. Human dignity, which is one and the same everywhere and for everyone, grounds the *indivisibility* of all categories of human rights.

This development also explains the conspicuous role recently played by this concept in the administration of justice. The more deeply civil rights suffuse the legal system as a whole, the more often their influence extends beyond the vertical relation between individual citizens and the state and permeates the horizontal relations among individuals and groups. The result is an increase in the frequency of collisions that call for a balancing of competing claims founded upon basic rights.[8] A justified decision in such hard cases often becomes possible only by appealing to a violation of human dignity whose *absolute* validity grounds a claim to priority. In judicial discourse, therefore, the role of this concept is far from that of a vague placeholder for a missing conceptualization of human rights. "Human dignity" performs the function of a seismograph that registers what is constitutive for a democratic legal order, namely, just those rights that the citizens of a political

[8] The discussion concerning the so-called horizontal effect (*Drittwirkung*) of basic rights, which has been conducted in Europe over the past half century, has recently also found an echo in the United States; see Gardbaum (2003).

community must grant themselves if they are to be able to *respect* one another as members of a voluntary association of free and equal persons. *The guarantee of these human rights gives rise to the status of citizens who, as subjects of equal rights, have a claim to be respected in their human dignity.*

After 200 years of modern constitutional history, we have a better grasp of what distinguished this development from the beginning: human dignity forms the "portal" through which the egalitarian and universalistic substance of morality is imported into law. The idea of human dignity is the conceptual hinge that connects the *morality* of equal respect for everyone with positive *law* and democratic lawmaking in such a way that their interplay could give rise to a political order founded upon human rights. To be sure, the classical human rights declarations when they speak of "inborn" or "inalienable" rights, of "inherent" or "natural" rights, or of "*droits inaliénables et sacrés*" betray their religious and metaphysical origins: "We hold these truths to be self-evident, that all men are endowed . . . with certain unalienable rights." In the secular state, however, such predicates function primarily as placeholders; they remind us of the mode of a *generally acceptable justification* whose epistemic dimension is *beyond state control*. The American Founding Fathers, too, recognized that human rights, notwithstanding their purely moral justification, need a democratic "declaration" and must be applied in constructive ways within an established political community.

Because the *moral promise* of equal respect for everybody is supposed to be cashed out in *legal currency*, human rights exhibit a Janus face turned simultaneously to morality and to law (Lohmann 1998). Notwithstanding their exclusively moral *content*, they have the *form* of enforceable subjective rights that grant specific liberties and claims. They are designed to be *spelled out in concrete terms* through democratic legislation, to be *specified* from case to case in adjudication, and to be *enforced* in cases of violation. Thus, human rights circumscribe precisely that part (and only that part) of morality which *can* be translated into the medium of coercive law and become political reality in the robust shape of effective civil rights.[9]

[9] This implies not a revision of but a complement to my original introduction of the system of rights (in Habermas 1996, 118–31, and 2001, 766–81). Human rights differ from moral rights in that the former are oriented toward institutionalization and call for a shared act of inclusive will-formation, whereas morally acting persons regard one another without further mediation as subjects who are embedded from the start in a network of moral rights and duties (cf. Flynn 2003). But I did not originally take into account two things. First, the cumulative experiences of violated dignity constitute a source of moral motivations for entering into the historically unprecedented constitution making practices that arose at the end of the eighteenth century. Second, the status generating notion of social recognition of the dignity of others provides a conceptual bridge between the moral idea of the equal respect for all and the legal form of human rights. I leave aside at this point whether this shift in focus toward these issues has further consequences for my deflationary reading of the discourse principle "D" as part of the justification of basic rights (see my discussion of the objections of K.O. Apel in Habermas 2008, 77–97).

## II

In this entirely new category of rights, two elements are reunited that had first become separated in the course of the disintegration of Christian natural law, and had then developed in opposite directions. The result of this differentiation was on the one hand the internalized, rationally justified morality anchored in the individual conscience, which in Kant withdraws entirely into the transcendental domain; and on the other hand, the coercive, positive, enacted law that served absolutist rulers or the traditional assemblies of estates as an instrument for constructing the institutions of the modern state and a market society. The concept of human rights is a product of an improbable synthesis of these two elements. *"Human dignity" served as a conceptual hinge in establishing this connection*. This leads me to cast a brief look back on conceptual history, in the course of which the old Roman and Christian concepts of human dignity were themselves transformed in the process of this modern synthesis. Of primary interest is one further conceptual element, the notion of *social dignity* in the sense of an honor that had become associated with particular statuses in the stratified societies of medieval and early modern Europe.[10] Admittedly, the hypothesis which I am going to develop calls for more research, in terms both of conceptual history and of the history of European revolutions.

Here I would like to highlight just two genealogical aspects: (a) on the one hand, the mediating function of "human dignity" in the shift of perspective from moral duties to legal claims, and (b) on the other hand, the paradoxical generalization of a concept of dignity that was originally geared not to any equal distribution of dignity but to *status differences*.

(a) The modern doctrines of morality and law that claim to rest on human reason alone share the concepts of individual autonomy and equal respect for everyone. This common foundation of morality and law often obscures the decisive difference that whereas morality imposes *duties* concerning others that pervade all spheres of action without exception, modern law creates well-defined *domains* of private choice for the pursuit of an individual life of one's own. Under the revolutionary premise that everything is permitted which is not explicitly prohibited, subjective rights rather than duties constitute the starting point for the construction of modern legal systems. The guiding principle for Hobbes, and for modern law generally, is that all persons are allowed to act or to refrain from acting as they wish within the confines of the law. Actors take a different perspective when, instead of following moral commands, they *make use of* their rights. A person in a *moral relation* asks herself what she owes to another person independently of her social relation to him – how well she knows him, how he behaves, and what she might expect from him. People who

[10] On the evolution of the legal concept of human dignity through the generalization of status-bound dignity, see Waldron 2007.

stand in a *legal relation* to one another are concerned about potential *claims* they expect others to make on them. In a legal community, the first person acquires obligations as a result of claims that a second person makes on her.[11]

Take the case of a police officer who wants to extort a confession from a suspect through the illegal threat of torture. In his role as a moral person, this threat alone, not to speak of the actual infliction of the pain, would be sufficient to give him a bad conscience, quite apart from the behavior of the offender. By contrast, a legal relation is actualized between the police officer who is acting illegally and the individual under interrogation only when *the latter* defends herself and takes legal action to obtain her rights (or a public prosecutor acts in her place). Naturally, in both cases the person threatened is a source of normative claims that are violated by torture. However, the fact that the actions in question violate moral norms is all that is required to give an offender a bad conscience, whereas the legal relation that is objectively violated remains latent until a claim is raised that actualizes it.

Thus Klaus Günther sees in the "transition from reciprocal moral obligations to reciprocally established and accorded rights"[12] an act of "self-empowerment to self-determination." The transition from morality to law calls for a shift from symmetrically intertwined perspectives of respect and esteem for the autonomy *of the other* to raising claims to recognition for *one's own autonomy* by the other. The morally enjoined *concern* for the vulnerable other is replaced by the self-confident *demand* for legal recognition as a self-determined subject who "lives, feels, and acts in accordance with his or her own judgment" (Günther 2009a, 275f).Thus the legal recognition *claimed* by citizens reaches beyond the reciprocal moral recognition of responsible subjects; it has the concrete meaning of the respect *demanded* for a status that is *deserved*, and as such it is infused with the connotations of the "dignity" that was associated in the past with membership in socially respected corporate bodies.

(b) The concrete concept of dignity or of "social honor" belongs to the world of hierarchically ordered traditional societies. In those societies a person could derive his dignity and self-respect, for example, from the code of honor of the nobility, from the ethos of trade guilds or professions, or from the corporative spirit of universities. When these *status-dependent* dignities, which occur in the plural, coalesce into the *universal* dignity of human beings, this new, abstract dignity sheds the particular characteristics of a corporative ethos. At the same time, however, the universalized dignity that accrues to all persons equally preserves the connotation of a *self-respect* that depends on *social recognition*. As such a form of social dignity, human dignity also requires anchoring in a social status, that is, membership in an organized community in space and time.

[11] Lohmann (1998, 66): "A moral right counts as justified when a corresponding moral duty exists that itself counts as justified, a legal right when it is part of a positive legal order that can claim legitimacy as a whole."

[12] Which Lohmann (1998, 87), seems to misunderstand as a transition from traditional to enlightened morality.

But in this case, the status must be an equal one for everybody. Thus the concept of human dignity transfers the content of a morality of equal respect for everyone to the status order of citizens who derive their self-respect from the fact that they are recognized by all other citizens as *subjects of equal actionable rights*.

It is not unimportant in this context that this status can be established only within the framework of a constitutional state, something that never emerges of its own accord. Rather, this framework must be *created* by the citizens themselves *using the means of positive law* and must be protected and developed under historically changing conditions. As a modern *legal* concept, human dignity is associated with the status that citizens assume in the *self-created* political order. As addressees, citizens can come to enjoy the rights that protect their human dignity only by first uniting as authors of the democratic undertaking of establishing and maintaining a political order based on human rights.[13] In view of such a community of self legislating citizens the dignity conferred by the status of democratic citizenship is nourished by the republican appreciation of a corresponding orientation to the public good. This is reminiscent of the meaning that the ancient Romans associated with the word *dignitas*, namely, the prestige of statesmen and officeholders who have served the *res publica*. Of course, the distinction of the few outstanding "dignitaries" and notabilities contrasts with the dignity that the constitutional state guarantees *all* citizens *equally*.

Therefore, Jeremy Waldron draws attention to the paradoxical fact that the egalitarian concept of human dignity is the result of a generalization of particularistic dignities that must not lose the connotation of "fine distinctions" entirely: "Once associated with hierarchical differentiation of rank and status, 'dignity' now conveys the idea that all human persons belong to the same rank and that the rank is a very high one indeed" (Waldron 2007, 201). Waldron understands this generalization process in such a way that all citizens now acquire the highest rank possible, for example that which was once reserved for the nobility. But does this capture the meaning of the equal dignity of every human being? Even the direct precursors of the concept of human dignity in the philosophy of the Stoics and in Roman humanism (for example, with Cicero), do not form a semantic bridge to the egalitarian meaning of the modern concept. That same period developed well a *collective* notion of *dignitas humana*, but it was explained in terms of a distinguished ontological status of human beings in the cosmos, of the particular rank enjoyed by human beings vis-à -vis "lower" forms of life in virtue of species-specific faculties, such as reason and reflection. The superior value of the species might have justified some kind of species protection but not the inviolability of the dignity of the individual person as a source of normative claims.

[13] Thus human rights are not opposed to democracy but are co-original with it. The relation between the two is one of mutual presupposition: human rights make possible the democratic process, without which they could not in turn be enacted and concretized within the framework of the civil-rights-based constitutional state. On the discourse-theoretic justification cf. Günther (2008).

Two decisive stages in the genealogy of the concept are still missing. First, universalization must be followed by individualization. The issue is the *worth of the individual* in the horizontal relations between different human beings, not the status of "human beings" in the vertical relation to God or to "lower" creatures on the evolutionary scale. Second, the relative superiority of humanity and its members must be replaced by the absolute worth of any person. The issue is the *unique worth* of each person. These two steps were taken in Europe when ideas from the Judeo-Christian tradition were appropriated by philosophy, a process I would like to address briefly.[14]

A close connection was already drawn between *dignitas* and *persona* in antiquity; but it was only in the medieval discussions of human beings' creation in likeness to God that the individual person became liberated from a set of social roles. Everyone must face the Last Judgment as an irreplaceable and unique person. Another stage in the conceptual history of individualization is represented by the approaches in Spanish scholasticism that sought to distinguish subjective rights from the objective system of natural law (Böckenförde 2002, 312–70). The key parameters were finally set by the moralization of the concept of individual liberty in Hugo Grotius and Samuel Pufendorf. Kant radicalized this understanding into a deontological concept of autonomy; however, the price paid for the radicalness of this concept was the disembodied status of free will in the transcendental "kingdom of ends." Freedom on this conception consists in the capacity to give oneself reasonable laws and to follow them, reflecting generalizable values and interests. The relationship of rational beings to each other is determined by the reciprocal recognition of the legislating will of each person, where each individual should "treat himself and all others *never merely as means* but always *at the same time as ends in themselves*" (Kant 1998, 41 [4:432]).

This categorical imperative defines the limits of a domain that must remain absolutely beyond the disposition of others. The "infinite dignity" of each person consists in his claim that all others should respect the inviolability of this domain of free will. Yet the concept of "human dignity" does not acquire any systematic importance in Kant; the complete burden of justification is borne by the moral-philosophical explanation of autonomy instead: "Therefore autonomy is the basis for the dignity of human nature and of every rational being".[15] In order to understand what we mean by "human dignity", the "kingdom of ends" must first be explained.[16]

[14] On the theological background of the concept of human rights, see the analysis of history of ideas in Stein (2007, in particular chap. 7), also Huber (1996, 222–86).

[15] Kant (1998, Bd. IV, 69). [–Ed. Trans.].

[16] Again, Kant (1998, 42 [4:434]): "In the kingdom of ends everything has either a *price* or a *dignity*. What has a price can be replaced by something else as its *equivalent*; what on the other hand is raised above all price and therefore admits of no equivalent has a dignity."

In the *Doctrine of Right*, Kant introduces human rights – or rather the "sole" right to which everyone can lay claim in virtue of his humanity – by direct reference to the freedom of each "insofar as it can coexist with the freedom of every other in accordance with a universal law" (Kant 1996, 30 [6:237]). In Kant, too, human rights derive their moral content, which they spell out in the language of positive laws, from a universalistic and individualistic conception of human dignity. However, the latter is assimilated to an intelligible freedom beyond space and time, and loses precisely those connotations of status that only qualify it as the conceptual link between morality and human rights. Thus the point of the *legal character* of human rights gets lost, namely, that they protect a human dignity that derives its connotations of self-respect and social recognition from a status in space and time – that of democratic citizenship.[17]

We have collected three elements in relation to the conceptual history: a highly moralized concept of human dignity, the memory of a traditional understanding of social dignity and, with the development of modern law, the self-conscious attitude of subjects of rights to make claims to other subjects of rights. Now we would have to find a transition from conceptual history to social and political history. This will at least explain the process of unification of the content of moral reason with the form of positive law on the basis of the process of generalization of the notion of "dignity" as originally indicating a social status, to that of "human dignity." Thereto, a more illustrative than historically proven indication is as follows: the claiming and the enforcement of human rights have rarely happened peacefully. Human rights emerged from violent and sometimes even revolutionary struggles for recognition (see Honneth 1995). By hindsight we can imagine the militant situation in which the three conceptual elements could have been entangled in the heads of the first Levellers. Historical experience of humiliation and debasement, interpreted in the light of an understanding of human dignity influenced by a Christian-egalitarian perspective, was a motive to resist. But now the political outrage could articulate itself already in the language of positive rights as the self-conscious claim for universal rights. Maybe – in memory to the well-known concept of dignity as a status – this was the link to the expectation that fundamental rights would ground citizenship as a status in which individuals would acknowledge each other as worthy of equal rights.

[17] On the premises of Kant's own theory there is, of course, no need for any "mediation" between the transcendental realm of freedom and the phenomenal realm of necessity. As soon as the noumenal character of the free will is detranscendentalized, however, the conceptual gap between morality and law must be bridged. And it is the status-bound conception of human dignity that provides this connection.

## III

The violent origin of human rights explains only in part the controversial character they have maintained until today. Indeed, also, the moral charging of coercive rights explains why the foundation of constitutional states at the end of the eighteenth century gave rise to a provocative tension within modern societies. Of course, everywhere in the social realm there exists a difference between norms and actual behavior; however, the unprecedented event of a constitution-making practice gave rise to an entirely different, utopian gap in the temporal dimension. On the one hand, human rights could acquire the quality of enforceable rights only within a particular political community – that is, within a nation-state. On the other hand, human rights are connected with a universalistic claim to validity, which points beyond all national boundaries.[18] This contradiction would find a reasonable solution only in a constitutionalized world society (not necessarily with the characteristics of a world republic).[19] From the outset, a dialectical tension has existed between *human rights* and established *civil* rights that can trigger a mutual "dynamic of opening doors" (L. Wingert) under favorable historical conditions.

This is not to suggest a self-propelling dynamic that would supersede the dialectical tension between exclusion and inclusion. Increasing the protection of human rights within nation-states or pushing the global spread of human rights beyond national boundaries has never been possible without social movements and political struggles, without courageous resistance to oppression and degradation. The struggle to implement human rights continues today in our own countries as well as, for example, in China, in Africa, in Russia, in Bosnia, or in Kosovo. Whenever an asylum seeker is deported behind closed doors at an airport, whenever a ship carrying refugees capsizes on the crossing from Libya to the Italian island of Lampedusa, whenever a shot is fired at the border fence between the United States and Mexico, we, the citizens of the West, confront one more troubling question. The first human rights declaration set a

[18] Wellmer (1998, 265–91). For an astute analysis of the implications of the gap between human and civil rights for both citizens and alien residents within the nation state, see Denninger (2009b).

[19] On the constitutionalization of international law, see my texts: Habermas (2006, 115–93) and (2009,109–30). The contradiction between civil rights and human rights cannot be resolved exclusively through the global spread of constitutional states combined with the "right to have rights" demanded by Hannah Arendt (with the flood of displaced persons at the end of the Second World War in mind), because classical international law leaves international relations in a "state of nature". The need for coordination in world society that has arisen in the meantime could be satisfied only by a "cosmopolitan juridical condition" (in the contemporary, revised Kantian sense). In this context I must correct a grave misunderstanding in the introduction to the special issue of *Metaphilosophy* 40, no. 1 (2009), 2 (and in the article by Andreas Føllesdal in the same issue, 85ff.). I am, of course, defending the extension of collective political identities beyond the borders of nation-states and by no means share the reservations of liberal nationalists in this respect. Advocating a multilevel global system of a constitutionalized world society, I propose other reasons for why a world government is neither necessary nor feasible.

standard that inspires refugees, people who have been thrust into misery, and those who have been ostracized and humiliated, a standard that can give them the assurance that their suffering is not a natural destiny. The translation of the first human right into positive law gave rise to a *legal duty* to realize exacting moral requirements, and that has become engraved into the collective memory of humanity.

Human rights constitute a *realistic* utopia insofar as they no longer paint deceptive images of a social utopia that guarantees collective happiness but anchor the ideal of a just society in the institutions of constitutional states themselves (Bloch 1987). Of course, this context-transcending idea of justice also introduces a problematic tension into social and political reality. Apart from the merely symbolic force of human rights in those "façade democracies" we find in South America and elsewhere (Neves 2007), the human rights policy of the United Nations reveals the contradiction between the spreading rhetoric of human rights, on the one hand, and their misuse to legitimize the usual power politics, on the other. To be sure, the U.N. General Assembly promotes *the codification of human rights in international law*, for example by enacting human rights covenants. The *institutionalization* of human rights has also made progress – with the procedure of the individual petition, with the periodic reports on the human rights situation in particular countries, and above all with the creation of international courts, such as the European Court of Human Rights, various war crimes tribunals, and the International Criminal Court. Most spectacular of all are the humanitarian interventions authorized by the U.N. Security Council in the name of the international community, sometimes even against the will of sovereign governments. However, precisely these cases reveal the problematic nature of the attempt to promote a world order that currently is institutionalized only in fragmentary ways. For what is worse than the failure of legitimate attempts is their ambiguous character, which brings the moral standards themselves into disrepute.[20]

One need only recall the highly selective and short-sighted decisions of a non representative, and far from impartial, Security Council, or the halfhearted and incompetent implementation of interventions that have been authorized – and their catastrophic failure (as in Somalia, Rwanda, Darfur). These supposed police operations continue to be conducted like wars in which the military writes off the death and suffering of innocent civilians as "collateral damage" (as in Kosovo). The intervening powers have yet to demonstrate in a single instance that they are capable of marshaling the necessary energy and stamina for *state building* – in other words, for reconstructing the destroyed or dilapidated infrastructure in the not yet pacified regions (such as Afghanistan). When human rights policy becomes a mere fig leaf and vehicle for imposing major power interests, when the superpower flouts the U.N. Charter and arrogates a right of intervention, and when it conducts an invasion

[20] Moreover, the "gubernatorial human rights policy" prevalent today is increasingly destroying the connection between human rights and democracy; see footnote 20 above in connection with Maus (1999). On this trend, see also Günther (2009b, unpublished manuscript).

in violation of humanitarian international law and justifies this in the name of universal values, the suspicion is reinforced that the program of human rights *consists in* its imperialist misuse.[21]

The tension between idea and reality that was imported into reality itself as soon as human rights were translated into positive law confronts us today with the challenge to think and act realistically without betraying the utopian impulse. This ambivalence can lead us all too easily into the temptation either to take an idealistic, but noncommittal, stance in support of the exacting moral requirements, or to adopt the cynical pose of the so called "realists." Since it is no longer realistic to follow Carl Schmitt in entirely rejecting the program of human rights, whose subversive force has in the meantime permeated the pores of *all regions* across the world, today "realism" assumes a different form. The direct unmasking critique is being replaced by a mild, deflationary one. This new minimalism relaxes the claim of human rights by cutting them off from their essential moral thrust, namely, the protection of the equal dignity of every human being.

Following John Rawls, Kenneth Baynes characterizes this approach as a "political" conception (Baynes 2009a) of human rights in contrast to natural law notions of "inherent" rights that every person is supposed to possess by his very human nature: "Human rights are understood as conditions for inclusion in a political community" (Baynes 2009b). This first step is in line with the foregoing argument. The problematic move is the next one, which effaces the moral meaning of this inclusion, namely, that everyone is respected in his human dignity as a subject of equal rights. One has certainly to be conscious of the fatal errors of past human rights policies, even if they do not provide sufficient reasons to rob human rights of their moral additional value and to narrow down a priori their focus only to questions of *international* politics.[22]

[21] Cf. Schmitt (1988, 1994). Schmitt was the first to formulate this suspicion explicitly. He denounced human rights above all as the ideology that incriminates war as a legitimate means for resolving international conflicts. He already made the pacifist ideal of Wilsonian peace policy responsible for the fact that the distinction between just and unjust wars is giving rise to an ever deeper and sharper, ever more "total" distinction between friend and foe. In the brutish domain of international relations, he argued, the moralization of enemies constitutes a disastrous method for obscuring one's own interests; for the attacker barricades himself behind the apparently transparent façade of a purportedly rational, because humanitarian, abolition of war. The critique of a "moralization" of law in the name of human rights is otiose, however, because it misses the point, namely, the *transposition* of moral contents into the medium of coercive law. Insofar as the prohibition of war actually leads to the legal domestication of international relations, the distinction between "just" and "unjust" wars is abandoned in favor of that between "legal" and "illegal" wars. On this, see Günther (1994).

[22] Baynes (2009b, 7): "Human rights are understood primarily as international norms that aim to protect fundamental human interests and/or secure for individuals the opportunity to participate as members in political society." Charles Beitz starts his recent book (2009, 1), with the observation that "human rights has become an elaborate international practice."

Minimalism forgets that the constant tension *within* the state between universal human rights and particular civil rights, is the normative justification for international dynamics.[23]

From that narrow point of view, the global dissemination of human rights requires a separate justification. This is provided by the argument that in international relations moral obligations between states (and citizens) arise out of the growing systemic interconnectedness of an ever more interdependent world society (Cohen 2004); normative claims to inclusion first arise out of reciprocal dependencies in *factually* established interactions.[24] This argument has a certain explanatory force in view of the empirical question of how a responsiveness to the legitimate claims of marginalized and underprivileged populations to inclusion is awakened in our relatively affluent societies. However, these normative claims themselves are grounded in universalistic moral notions that have long since gained entry into the human and civil rights of democratic constitutions through the status-bound idea of human dignity. Only this *internal* connection between human dignity and human rights gives rise to the explosive fusion of moral contents with coercive law as the medium in which the construction of just political orders must be performed.

This investment of the law with a moral charge is a legacy of the constitutional revolutions of the eighteenth century. To neutralize this tension would be to abandon the dynamic understanding that makes the citizens of our own, halfway liberal societies open to an ever more exhaustive realization of existing rights and to the ever-present acute danger of their erosion.

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[23] For a forceful critique of this minimalist approach, cf. Forst (2010), [also in this volume. –Ed.]: "It is generally misleading to emphasize the political legal function of such rights of providing reasons for a politics of legitimate intervention. For this is to put the cart before the horse. We first need to construct (or find) a justifiable set of human rights that a legitimate political authority has to respect and guarantee, and then we ask what kinds of legal structures are required at the international level to oversee this and help to ensure that political authority is exercised in that way". Furthermore, this narrow view on international relations suggests the representation of a paternalistic export of human rights with which the West makes happy the rest of the world.

[24] Baynes (2009a, 382): "Rights and corresponding duties are created by the special relationship that individuals stand in to one another, rather than as claims individuals have simply in virtue of their humanity."

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# Chapter 5
# The Justification of Human Rights and the Basic Right to Justification. A Reflexive Approach*

**Rainer Forst**

*There is a crack in everything – that's how the light gets in*
Leonard Cohen, "Anthem"

## I

Human Rights are a complex phenomenon, comprising an array of different aspects. They have a *moral* life, expressing urgent human concerns and claims that must not be violated or ignored, anywhere on the globe; they also have a *legal* life, being enshrined in national constitutions and in lists of basic rights, as well as in international declarations, covenants, and treaties; and they have a *political* life, expressing standards of basic political legitimacy. Hence they are a perennial topic in the political realm, both nationally and transnationally, raising questions about whether they are

* I presented earlier versions of this article at the John F. Kennedy School at Harvard University, at Ludwig-Maximilians-University of Munich, Columbia University in New York, the Hessen Peace Research Institute in Frankfurt, in the Colloquium on Political Theory at Frankfurt University, Cardozo law school and the Legal Theory Workshop at University of California, Los Angeles. I am grateful for comments from audiences at these occasions, in particular to James Griffin and John Tasioulas. I am especially indebted to Jürgen Habermas for an exchange on these matters – as well as to Allen Buchanan, Henry Richardson and two anonymous referees for ethics to very valuable comments. Special thanks also to Ayelet Banai, Seyla Benhabib, Samantha Besson, Eva Buddeberg, Jean Cohen, Christopher Daase, Ronald Dworkin, Stefan Gosepath, Klaus Günther, Mattias Iser, Stefan Kadelbach, Andreas Kalyvas, Regina Kreide, Mathias Kumm, Charles Larmore, Philip Pettit, Mill Rorenfald, Martin Saar, Seana Shiffrin and Jim Tully for helpful questions and remarks. Amy Allen and Ciaran Cronin deserve special thanks for helping me to improve my English and my thoughts.

R. Forst (✉)
Institute of Political Science and Institute of Philosophy,
J.W.Goethe-University, Frankfurt, Germany
e-mail: Forst@em.uni-frankfurt.de

C. Corradetti (ed.), *Philosophical Dimensions of Human Rights: Some Contemporary Views*, DOI 10.1007/978-94-007-2376-4_5,

fulfilled or violated, and how violations could be avoided or sanctioned. Apart from these aspects, human rights also have a *historical* existence, though it is a matter of dispute as to when the idea materialized for the first time and what that means for us.

For a comprehensive philosophical account of human rights, all of these aspects are essential and need to be integrated in the right way. Yet when doing so one must not overlook the central *social* aspect of human rights, namely that when and where they have been claimed, it has been because the individuals concerned suffered from and protested against forms of oppression and/or exploitation that they believed disregarded their dignity as human beings. They viewed the acts or institutions that they opposed as violations of the basic respect owed to human beings (and hence, in principle, as a concern for the community of all human beings). Human rights are first and foremost weapons in combating certain evils that human beings inflict upon one another; they emphasize standards of treatment that no human being could justifiably deny to others and that should be secured in a legitimate social order.

My thesis in what follows is that if it is true that human rights are meant to ensure that no human being is treated in a way that could not be justified to him or her as a person equal to others, then this implies – reflexively speaking – that one claim underlies all human rights, namely human beings' claim to be respected as autonomous agents who have the right not to be subjected to certain actions or institutional norms that cannot be adequately justified to them. The reflexive argument has three dimensions I will try to unpack in what follows: First, human rights have a common ground in *one* basic moral right, the *right to justification*. Second, the legal and political function of human rights is to make this right socially effective, both substantively and procedurally. The substantive aspect consists in formulating rights that express adequate forms of mutual respect the violation of which cannot be properly justified between free and equal persons; and the procedural aspect highlights the essential condition that no one should be subjected to a set of rights and duties – to a political-legal rights regime – the determination of which he or she cannot participate in as an autonomous agent of justification. Thus, human rights do not just protect the autonomy and agency of persons, they also express their autonomy politically. Third, the reflexive argument claims that this way of grounding human rights is not open to the charge of ethnocentrism haunting so many justifications of human rights, for that charge itself demands a right to adequate justifications that do not exclude those affected. In sum, the reflexive approach interprets the very notion of justification in a normative way as a basic concept of practical reason and as a practice of moral and political autonomy – as a practice that implies the moral right to justification and that grounds human rights on that basis.

## II

In philosophical debates, we encounter a plurality of perspectives on human rights that accord priority to one of the above-mentioned aspects. I present these approaches here in a brief overview and will come back to them subsequently in more detail.

(a) A primarily *ethical* justification of human rights focuses on the importance of the human interests they are meant to protect. There are some, like James Griffin in his recent book *On Human Rights*, who argue that core values such as autonomy and liberty are essential to what it means to be a "functioning human agent," and that rights can be derived from the basic interests persons have in realizing these values (Griffin 2008, 35). There are others, like James Nickel and John Tasioulas, who defend a pluralist conception of such essential human interests.[1] What these ethical justifications of human rights share, however, is their focus on substantive notions of well-being or the "good life" and their view of human rights as means to guaranteeing essential minimal conditions for such forms of human life. The "human being" here is one who has an interest in leading, and the basic right to lead, a good life, and "rights" are means to make this possible for everyone.

There have been numerous debates over such ethical justifications, over whether their notion of the good life is inextricably context-bound, so that it cannot be universalized, or whether it might be too "thin" rather than too "thick," and thus lacks sufficient content. In addition, there are worries about the derivation of normative rights claims from basic human interests. There are many such interests in the first place – think of the interest in being loved; but how do we single out those that qualify for grounding human rights? Furthermore, how does a claim of subjective importance translate into a binding general claim to rights? What is the mediating factor which generates that kind of normativity?

(b) In recent discussions, a radical alternative to ethical views has been developed that stresses the *political-legal* aspect or function of human rights, though in a very specific sense. According to such accounts, the main role or function of human rights is the one that they play in the area of international law or politics, the basis being, as in Rawls, a philosophical account of "the law of peoples" or, as in Raz's or Beitz's view, international legal and political practice. And that role is, in Rawls's formulations, "to provide a suitable definition of, and limits on, a government's internal sovereignty" or "to restrict the justifying reasons for war and its conduct" and to "specify limits to a regime's internal autonomy" (Rawls 1999a, 27 and 79). Rawls draws a close connection between the questions of international peace and internal standards for the "decency of domestic political and social institutions" (Rawls 1999a, 80), such that a conception of human rights can be justified only as "intrinsic" (Rawls 1999a, 80) to a conception of the law of peoples acceptable to liberal as well as "decent hierarchical peoples." For Rawls, this is based on a reflection on the "reasonable pluralism" of peoples in the international arena. It suggests that there is not a single normative ground for a conception of human rights but that there are liberal grounds for liberal conceptions of human rights and others for other conceptions; and since the role of human rights is such that their violation places sovereignty in

[1] Nickel (2006); see also Tasioulas (2007), and (2010).

question and justifies an intervention, the result of that construction is a minimal list of human rights as part of an 'ecumenical' account of a law of peoples for an international order of peace.

Others have followed and radicalized this approach which, as I will explain below, introduced a major shift of perspective in political philosophy. Favoring a "practical" conception of human rights over an "orthodox" one which holds that "human rights have an existence in the moral order that is independent of their expression in international doctrine,"[2] Charles Beitz's view "takes the doctrine and discourse of human rights as we find them in international political practice as basic" (Beitz 2004, 197). Whereas Rawls relies on a philosophical "political" conception of the law of peoples, Beitz takes current doctrine as well as practice to be authoritative. He follows Rawls, however, in defining the function of human rights as "justifying grounds of interference by the international community in the internal affairs of states."[3] Although he takes a broad view of the forms that such interference may take (and of the agents of such interference),[4] he shares Rawls's idea that the content of human rights is determined by their role as grounds for external interference. Joseph Raz, finally, argues for a "political" approach to human rights "without foundations," such that human rights provide a "defeasibly sufficient ground for taking action against violators in the international arena."[5] Thus political reflections about the possibility and desirability of external intervention play a major role in judgments about human rights violations; the consequence is that human rights "lack a foundation in not being grounded in a fundamental moral concern but depending on the contingencies of the current system of international relations" (Raz 2010, 336).

(c) Whereas Raz is willing to pay the price of nonfoundationalism, others fear it may be too high and look for justifications for human rights that avoid the ethical assumptions of the aforementioned accounts. Taking its lead from Rawlsian concerns about liberal parochialism and the search for *political-moral* justifications which can be the focus of an international "overlapping consensus," a contest of modesty, so to speak, has developed about the most "minimal" but nevertheless sufficient normative justification for human rights. Some, like Michael Ignatieff, focus on rights that protect bodily security and personal liberty as the minimal core of human rights (Ignatieff 2001), and they presuppose only a "minimalist anthropology" that provides reasons for the avoidance of grave evils. Others fear that such a "lowest common denominator" approach (Vincent 1986, 48f) runs the risk of mixing, in Joshua Cohen's words, "justifi-

[2] Beitz (2004, 196). See also Beitz (2009, 7–12 and 102–106), where the idea of a "practical conception" is laid out in detail.

[3] Beitz (2004, 202 ff.). See also Beitz (2009, 41, f. 65 and 143).

[4] See Beitz (2009, 33–40).

[5] Raz (2010, 328). Jean Cohen also holds the view that the function of human rights is "to override, or set limits to the domestic jurisdiction of states"; thus she argues for a very limited "subset of legally institutionalized and enforceable international human rights." Jean Cohen (2008, 578–606, at 582 and 599).

catory minimalism" with "substantive minimalism" (Cohen 2004, 190–213, 192). While the former is seen as a justified "acknowledgement of pluralism and embrace of toleration" in the international realm, the latter is to be avoided, for, according to Cohen, "human rights norms are best thought of as norms associated with an idea of *membership* or *inclusion* in an organized political society" (Cohen 2004, 197, *emphasis in original*). And the latter requires, first and foremost, having the right "to be treated as a member," i.e., to "have one's interests given due consideration" politically (Cohen 2004, 197). Human rights claims, then, are essential for securing social and political membership, while the moral agnosticism – or "unfoundationalism" (Cohen 2004, 199) – which Cohen proposes leaves open the normative reasons for the claim to membership. The hope is that such a conception of rights can win support "from a range of ethical and religious outlooks" in "global public reason" (Cohen 2004, 210). From that angle, Cohen argues, no human right to democracy will be seen as justifiable, for an "acceptable political society" needs to respect certain membership rights, though not a right to democracy in a fuller sense (Cohen 2006, 226–248).

## III

How is it possible to navigate between these three ways of highlighting certain aspects of human rights, namely their normative core as protecting basic human interests, their role in international law and political practice, and their claim to be universally justifiable across cultures and ethical ways of life? No doubt, human rights have a certain substance, function, and justification; but have the three views addressed them in the correct way? I think not.

In order to prepare my reflexive argument for a fourth approach and to understand the deeper normative grammar of human rights that I want to highlight, it will be useful to keep their historical dimension in mind (which I can only allude to briefly).[6] They first appeared as "natural" or "God-given" rights in early modern social conflicts and, quite often, revolutions, as for example in seventeenth-century England, when the Levellers claimed as a "birthright" a form of government that would wield power only if explicitly justified and authorized to do so by those affected[7]; otherwise, "naturally" free persons would be subjected to "cruell, pitifull,

[6] I agree with Allen Buchanan's point that neglect of the historical dimension of human rights might be a reason for the inattention in recent human rights discourse to the status-egalitarianism expressed by human rights. See his "The Egalitarianism of Human Rights" (2010).

[7] It is important to note that this was often qualified as "well-affected," restricting the claim to political equality to persons with a certain degree of economic independence. On this, see the famous Putney Debates of 1647 documented in Woodhouse (1953). What I point to here is a certain logic of the historical argument for human rights that has also been used to criticize their concrete historical forms.

lamentable and intolerable bondage"[8] which they could rightfully resist. The language of these rights was a socially and politically emancipatory language, directed against a feudal social order and against an absolute monarchy that claimed "divine" rights for itself. That is a truism, yet an important one, for many of the views mentioned above, even some of those labeled as "political," tend to neglect the essential political message of human rights: the claim to be not just a fully integrated member of society, but to be a social and political subject who is, negatively speaking, free from arbitrary social or political rule or domination and who is, positively speaking, someone who "counts," who is seen and recognized as someone with "dignity," i.e., with an effective right to justification. This right implies that there can be no legitimate social or political order that cannot be adequately justified to its subjects; in that sense, the original meaning of human rights was a *republican* rather than a classic *liberal* one. For even when the Levellers argued for personal rights to "property, liberty and freedom" (Richard Overton), they referred to the means that would make them independent social and political agents, free from feudal domination or tyrannical rule.[9] Reflexively speaking, the main point of this rights discourse was to claim the right to participate in the political structures that determine which rights and duties those subjected to them have.

The classic eighteenth-century statement of the notion of human rights is, of course, the *Declaration des droits de l'homme et du citoyen* from 1789, and it is no accident that "homme" and "citoyen" are connected here. The declaration gives individual rights a political meaning in founding a free society and a sovereign state. Article 1 declares the natural liberty and equality of human beings, article 2 states that the preservation of human rights to freedom, property, security and, importantly, resistance is the final aim of a political association, and article 3 locates the source of sovereignty in the people as a whole, called "nation." Human rights, thus, are rights not to be subjected to tyrannical rule or to be deprived of one's liberty and social standing, and they are also constructive rights, rights to be part of processes of political justification or, as article 6 puts it (using Rousseauian language), to participate in the formation of the "general will." In other words, there is a basic right to be part of a political construction of a legitimate and generally acceptable basic structure through processes of public justification, ideally speaking. In his defense of the Declaration against Burke's criticism, Thomas Paine leaves no doubt that its main idea is the political autonomy of free and equal citizens: human rights are rights against unjustifiable social and political structures of domination (what Paine calls "despotism"), and they are most importantly rights to codetermine the laws that are to bind you.[10]

Leaping forward two centuries (and leaving a big part of the story out), the Universal Declaration of Human Rights of 1948 also stresses the political meaning of human rights, even though it came about in a very different context, being deeply

[8] Lilburne (1965, 303). See also Forst (2003, chs. 5 and 6).

[9] See Saage (1981).

[10] Paine (2008). The democratic point of human rights is also stressed by Claude Lefort's reading of the Declaration in Lefort (1986).

influenced by the experience of the most extreme and cruel forms of tyranny (to which it refers in the preamble). The declaration emphasizes strongly the connection between being safe from unjust and arbitrary rule and being a participant in political affairs. The "social and international order in which the rights and freedoms set forth in this Declaration can be fully realized" which each person is entitled to is not meant to be one where rights are received as goods handed down from some authority. Rather it is to be one where no set of legally binding rights is determined without the participation of those who are the subjects of these rights.[11]

What does this brief historical reflection mean for the issues of the normative substance, legal function, and moral justification of human rights? I will go into these questions in more detail in the following sections, but in a nutshell, using a distinction between morality and ethics as developed by Habermas and Dworkin, I believe that a conception of human rights needs to have an independent and sufficient *moral substance* and justification, though not one of an *ethical* kind that relies on a conception of the good. In the context at hand, an ethical justification rests on a notion of the good life, even if it is a very general one, while a moral justification is supposed to be neutral as to the question of the good or worthwhile life.[12] The moral basis for human rights, as I reconstruct it, is the respect for the human person as an autonomous agent who possesses a right to justification, i.e. a right to be recognized as an agent who can demand acceptable reasons for any action that claims to be morally justified and for any social or political structure or law that claims to be binding upon him or her. Human rights secure the equal standing of persons in the political and social world, based on a fundamental moral demand of respect.[13] This demand is not seen to depend on the claim that it contributes to the good life of either the person showing or receiving respect; rather, mutual respect is owed independently of that.

From this it follows that the main *function* of human rights is to guarantee, secure and express each person's status as an equal given his or her right to justification. The republican meaning of human rights I alluded to above locates their legal and political role in that protection and in the grounding of political autonomy – or "sovereignty," to use an earlier language that needs to be qualified, since there is no absolute sovereignty in the political realm.

A moral justification for human rights has to be a universally valid and, as I argue, reflexive one. "Reflexive" here means that the very idea of *justification* itself is reconstructed with respect to its normative and practical implications. The argument states that, since any moral justification of the rights of human beings must be able to redeem discursively the claim to general and reciprocal validity raised by

[11] Menke and Pollmann (2007), also stress the political character of the Universal Declaration as a reaction to totalitarian government, yet they see this as a historical break rather than a continuation.

[12] Habermas (1990, 43–115). Dworkin (1990, 9). I have adapted the distinction in Frost (2002).

[13] Larmore (2008, ch. 6), also argues for a norm of moral respect as the basis for a publicly justifiable basic structure; he restricts this, however, to the political realm of justification.

such rights, then such a justification presupposes the right to justification of those whose rights are in question. They have a qualified "veto right" against any justification that fails the criteria of reciprocity and generality and which can be criticized as one-sided, narrow, or paternalistic, as the case may be. Reciprocity means that no one may make a normative claim (such as a rights claim) he or she denies to others (call that reciprocity of content) and that no one may simply project one's own perspective, values, interests, or needs onto others such that one claims to speak in their "true" interests or in the name of some truth beyond mutual justification (reciprocity of reasons). Generality means that the reasons that are to ground general normative validity have to be shareable by all affected persons, given their (reciprocally) legitimate interests and claims.

Thus the reflexive approach manages to build the logic of the arguments against "false" (for example, ethnocentric) universalizations, as well as against false critiques of false universalizability, into its own structure. The very basis for the first critique – which says that ethnocentric definitions of human rights violate the rights of participants to live in a social structure they see as legitimate – as well as the basis for identifying illegitimate forms of such criticism, which might veil authoritarian cultural arguments, is taken up and identified as *the right to justification*. In the following, I will try to explain this by engaging with the theories mentioned above in more detail.

## IV

I shall start with a discussion of James Griffin's view, for his book *On Human Rights* is one of the clearest and most comprehensive statements of an ethical justification for human rights within a teleological framework. I call it "ethical" because Griffin views human rights as "protections of our normative agency" (Griffin 2008, 4) and he defines this kind of agency as a precondition for "deliberating, assessing, choosing, and acting to make what we see as a good life for ourselves" (Griffin 2008, 32). Hence, a substantive notion of the good informs this view, one which breaks down into the three components of "autonomy" (i.e. choosing one's own path through life), the "minimum provision" (i.e. having adequate resources for choosing the good and acting on it), and the component of "liberty" (i.e. having the freedom to pursue the good) (Griffin 2008, 33 and 51). Human rights are grounded in, or "derived from" (Griffin 2008, 35), the "high value" we attach to our individual personhood as beings who have a higher-order interest in choosing and pursuing the good – in being "self-deciders" (Griffin 2008, 46 and 49). Moreover, what Griffin calls "practicalities," i.e. considerations about human nature and society that help to determine what is necessary to secure the goods mentioned above and to justify to what extent this establishes obligations on others, constitute a second ground for human rights, or rather another component to the foundational story, since I doubt whether it can be seen as an independent second ground.

Without being able to do justice to the rich account of human rights that Griffin develops on that basis, I will briefly discuss the important points of divergence between his view and mine, the essential issue being the difference between a teleological and a deontological notion of "normative agency" as the foundation for a conception of human rights. First, Griffin rightly stresses the importance of a historical perspective, emphasizing that the idea of human or "natural" rights developed within the context of natural law framed by a religious doctrine. Hence in modern times the need for an alternative normative grounding arose – this is still an unfinished business, as Griffin claims (Griffin 2008, 18). I agree with the claim that the "Enlightenment notion" of human rights is in need of an explicit philosophical justification, yet I think that the fact that the idea of natural rights was a polemical one directed against religious-political doctrines of the legitimacy of feudal social structures and absolute monarchy conveys a different and more determinate message than the one Griffin extracts from the historical account. As early as the sixteenth century (in the Dutch Revolution, for example), the discourse of human dignity was linked to the political question of opposing tyranny, i.e. to protests against forms of political domination that did not regard those who are subject to such rule as persons to whom the exercise of political power had to be adequately justified.[14] The *political* question of freedom and justice was essential to the formation of human rights discourse: the *dignity* in question referred to the status of persons who were no longer to be treated as servants, as second-class citizens, as not worthy of being regarded as *normative agents* to whom rulers owed reasons. See, for example, what Pufendorf – whom Griffin cites (Griffin 2008, 10f) – has to say about human dignity and equality:

> Man is an animal which is not only intensely interested in its own preservation but also possesses a native and delicate sense of its own value. To detract from that causes no less alarm than harm to body or goods. In the very name of man a certain dignity is felt to lie, so that the ultimate and most effective rebuttal of insolence and insults from others is 'Look, I am not a dog, but a man as well as yourself.'(Pufendorf 1991, 61)

That is a political notion of dignity as a relational concept, referring to the social and political standing of human beings as agents of justification who are equal to one another. Hence I believe that the history of political struggles teaches us a particular political-moral lesson that Griffin in part mentions when he stresses that human rights were a "popular political force" (Griffin 2008, 13), but which in my view suggests a different normative notion of agency or personhood to lie at the center of the idea of human rights than the one Griffin offers. It is one of an agent as a reason-giving and reason-deserving being – that is, as a being who not only has the ability to offer and receive reasons but has a basic *right* to justification. This is how I propose to substantiate the Enlightenment notion of human rights.

Thus I agree with Griffin's view that a notion of human dignity and normative agency (or "personhood") stands at the center of human rights discourse, but I disagree as to how to reconstruct this notion. Yet the main consideration in that respect – my second point – is not so much a historical but a general and systematic

[14] See my *Toleranz im Konflikt* (2003, chs. 4–6).

one with respect to the normative grammar of these rights. The fundamental issue at stake is where to locate the normative "anchor" of a conception of human rights. A teleological view such as Griffin's identifies basic interests of persons in pursuing the good and transforms them into rights claims in accordance with their weight or value, while other interests (such as being loved, to employ that example again) do not qualify. Hence, certain subjective interests considered to be fundamental are turned into *intersubjectively justifiable claims*. Yet, reflexively speaking, in order to do that, a procedure of intersubjective justification seems to be necessary, as the main generator of normativity, so to speak. For only those interests can be grounds for human rights the denial of which cannot be reciprocally and generally justified among free and equal beings; not just the interests in autonomy and liberty that ground human rights must be *shareable* and turned into reciprocally justifiable claims but also the interpretation of what this means with respect to mutually binding rights "with enough content for them to be an effective, socially manageable claim on others" (Griffin 2008, 38). Whereas Griffin at that point argues to include "practicalities" – considerations of human nature and society determinate enough to generate mutual rights obligations – as a second ground of human rights, I believe it is *mutual justifiability all the way down* (according to the criteria of reciprocity and generality) that confers normative weight to fundamental rights claims, not separate considerations of value or importance or considerations of social specificity. And for mutual justification to count as a morally binding procedure, the rights claim to be a subject of justification needs to be seen as prior and as independently morally valid. Thus, on the view I advocate, there is no "derivation" of particular rights from basic interests in pursuing the good; rather, human rights are seen as the result of an intersubjective, discursive construction of rights claims that cannot be reciprocally and generally denied between persons who respect one another's right to justification. This kind of respect is owed in a deontological sense which I believe is necessary to carry the weight of what we mean by human rights.

An important consideration in that respect is that conceptions of the good – and corresponding interests – are reasonably considered to be contestable, even if they are as formal and general as the ones Griffin refers to. He is careful to attach human rights not to a particular notion of the good or flourishing life but to the general idea of being a "functioning human agent" (Griffin 2008, 35); still, the main function to be realized is the "capacity to choose and to pursue our conception of a worthwhile life" (Griffin 2008, 45). So it is for the pursuit of the good that we value autonomy – in our capacity as "self-deciders" about our good life: Our status as human beings "centres on our being agents – deliberating, assessing, choosing, and acting to make what we see as a good life for ourselves" (Griffin 2008, 32). This depends on the belief that the good life can only be called such when it has been autonomously chosen and pursued, which is a reasonable belief but which might also reasonably be doubted by someone who believes the good to consist in following a higher calling or in one's duties as a member of a particular community in a traditional sense. Especially in an intercultural context, Griffin's seems to be a partial, nonuniversalizable conception of the good and of a basic human interest in pursuing it. Hence, such a conception cannot ground universal human rights.

But even if one believed that autonomy is an essential condition of the pursuit of the good, the moral weight of a general duty to respect others as autonomous agents does not follow without an additional moral consideration: why should one's prudential insight into the value of autonomy for oneself translate into a moral insight that one owes it to every other person to respect their autonomy? Griffin addresses this problem and argues for the independent normative reason-generating force of the value of autonomy: "To try to deny 'autonomy' its status as a reason for action unless it is attached to 'my' would mean giving up our grasp on how 'autonomy' works as a reason for action" (Griffin 2008, 135). But that argument, it seems to me, not only requires a notion of autonomy that is truly universalizable and thus detached from a reasonably contestable conception of the good, it also presupposes a prior insight that in the realm of morality, and especially of human rights, reasons for action must be reciprocally and generally justifiable and shareable. And that again implies, reflexively speaking, the respect for every other person as an equal authority in the space of reasons where reciprocally valid justifications are being sought. Persons with that status of normative agency have a human right to certain forms of respect because one cannot reasonably justify a denial of their basic claims to them. Thus from a first-person perspective, respecting others' human rights cannot depend on my view that doing so contributes to my own good life or that doing so contributes to the good life of the others. For I might reasonably think that pursuing my self-interest in other ways would contribute more to my good, and I might also – from within a religious doctrine, for example – think that respecting another's right to the free exercise of religion leads this person to damnation. Still, I have to respect his or her basic rights – unconditionally. Hence, they have to rest on other grounds not reasonable to reject by anyone who sees himself and others as having the capacity of practical reason and of accepting the duty of justification as implied by the recursive principle of justification which says that every normative claim on others has to be justifiable on the basis of the criteria presupposed by its claim to validity.[15]

In sum, when it comes to grounding fundamental human rights, the starting point is a basic claim to be respected as a "normative agent" who can give and who deserves justifying reasons. This is a notion of respecting an other's autonomy which is neither attached to a reasonably contestable notion of the good nor requires a translation of a prudential ethical value "for me" to a moral reason "for all." The basic claim in that context is one of the active status as a justificatory equal, not of ethical interests and their importance in pursuit of the good. In other words, and this connects my moral argument and my historical one, the notion of normative agency I propose is also different from Griffin's in emphasizing that the moral point of human rights does

[15]In Forst (2007, chs. 1 and 2), I discuss the moral foundations of this view. As opposed to the interpretation of my approach by Menke and Pollmann (2007, 57–68), I see the duty of justification as a duty of both practical reason and morality. The ground of human rights is the moral recognition of the other as having a right to justification, but that kind of recognition is an imperative of moral practical reason.

not just lie in the *protection* of normative agency but also in *expressing* our normative agency and autonomy in a practical sense as "norm-givers."

Third, and connected to that last point, my view contrasts with Griffin's when it comes to the question of whether there is a human right to democratic political participation. Since Griffin's notion of autonomy as "deciding one's own conception of a worthwhile life" is, as he says, at a distance from political self-legislation, there is "no inferential route from human rights to democracy without adding some non-universal empirical premises" which would link democracy and human rights in a primarily instrumental way, given the circumstances of modern societies (Griffin 2008, 247). By contrast, I hold that the normative grammar of human rights, both historically and systematically, calls for a conception of basic rights to democratic participation. Not just from the internal perspective of those who fought or fight for such rights, but also from a principled perspective based on the right to justification, human rights should not be seen as rights to goods necessary for the "good life." Rather, they should be seen as rights that put an end to political oppression and the imposition of a social status which deprives one of one's freedom and of access to the social means necessary to being a person of equal standing. Grounding human rights on the right to justification captures this political and social meaning of human rights as standing in opposition to earlier, as well as modern, forms of social exclusion. What is primarily at stake in inclusion is being regarded as an agent worthy of effective political justification, of giving and receiving reasons in the political realm.

Finally, it is important to Griffin's argument that without taking certain "practicalities" into consideration, no normative conception of personhood intended to substantiate a list of human rights can get off the ground. He emphasizes that we need to avoid arbitrary determinations of the threshold between what one can claim as a basic human right and what would be good to have but which cannot be claimed as such a right. There are states below the threshold of normative agency and states "above" it (Griffin 2008, 45), and the question is which is which. On this point, the alternative between Griffin's teleological view and an intersubjective justificatory theory, such as I propose, is important, for while Griffin substantiates his account of particular rights with a notion of what it means to have the means to pursue a good life, I would hold that only those claims which can pass what I call the test of reciprocity and generality can count as justifiable human rights claims. Since every such rights claim must be generally and reciprocally justifiable in order to be binding, it is precisely these criteria that determine its content. So the main argument for the right to same-sex marriage, to take one of Griffin's examples, would not be that enjoying a particular form of social union and raising children within a marriage is a substantive human aim and generally characteristic of a "worthwhile life" (Griffin 2008, 163), as Griffin argues, but that a society where the institution of marriage is reserved for some couples and denied to others without reciprocally justifiable reasons violates the demand of reciprocity. The test of reciprocity and generality – which requires a proper institutional form in a political context in the first place – would, I believe, show that the reasons given to restrict this right to heterosexual couples only refer to beliefs, either ethical (human nature, the will of God) or empirical (findings about proper conditions for raising children), which cannot stand scrutiny

as the basis for generally binding legal regulations.[16] Hence it is not the ethical judgment about the importance or value of a practice that determines the normative rights claim but, rather, a claim concerning a social and legal standing that cannot reasonably be denied to citizens who are recognized as social equals.[17]

## V

Is the proposed view at odds with current human rights doctrine or practice, as proponents of the political-legal or "functionalist" accounts of human rights mentioned above might object? At this point, I concur with Griffin in his critique of Rawls and Raz.[18] To focus on the role of human rights as that of limiting sovereignty in the international realm misses the *intranational* purpose of human rights.

It is generally misleading to emphasize the political-legal function of such rights within international law (or political practice) of providing reasons for a politics of legitimate intervention, for this is to put the cart before the horse. We first need to construct (or find) a justifiable set of human rights that a legitimate political authority has to respect and guarantee, and *then* we will ask what kinds of legal structures are required at the international level to oversee this and help to ensure that political authority is exercised in that way. Only *after* we have taken that step will it become necessary to think about and set up legitimate institutions of possible intervention (as measures of last resort). The first question of human rights is not how to limit sovereignty from the outside; it is about the essential conditions of the possibility of establishing legitimate political authority. International law and a politics of intervention have to *follow* a particular logic of human rights, not the converse. Such a logic is not a simple one, one must add, for a number of additional factors need to be taken into account when it comes to the issue of legitimate intervention.[19]

Human rights do not serve primarily to limit internal "autonomy" or "sovereignty" (Rawls uses both terms) but to ground internal legitimacy. The claim to external respect depends on internal respect based on justified acceptance; however, that does not mean, to repeat, that one can infer the legitimacy of intervention – or the lack of "external legitimacy"[20] or international "recognitional legitimacy"[21] – directly from a lack of internal acceptance. Violations of human rights place the *internal legitimacy*

[16] I have discussed this more fully in my *Toleranz im Konflikt* (2003, 736–742).

[17] This is not to say that ethical considerations are irrelevant for the justification of rights claims; rather, they are insufficient to establish the normative character of such claims as reciprocally and generally binding.

[18] Griffin (2008, 24); see also his critique of Raz in Griffin (2010).

[19] For a comprehensive treatment of these issues see Buchanan (2004); a more skeptical view is expressed in Jean Cohen (2004, 1–24).

[20] Jean Cohen (2008, 591), following Walzer (1980, 214).

[21] Buchanan (2004, ch. 6).

of a social and political structure in question, but they do not automatically dissolve the independent *standing* of that state in the international arena. To be sure, violations of human rights can provide a strong reason for taking external action, and Beitz is right to point out that this can take several forms,[22] but this does not mean that the point of human rights can be defined as that of generating interference-justifying reasons, as Beitz and Raz argue. Rather, human rights provide reasons for arranging a basic social and political structure in the right way; hence, the primary perspective of human rights is *from the inside*. Otherwise, their moral point of not just protecting but also of expressing the autonomy of free and equal persons is not sufficiently taken into account. The main perspective is not that of the *outsider* who observes a political structure and asks whether there are grounds for intervention. In thinking about human rights and their justification, one must be careful not to assume the role of an international lawyer or judge who presides over certain cases of human rights violations and who at the same time wields global executive power.

In particular, since one important worry that drives "political-legal" views of human rights is to avoid a broad list of human rights which could serve to justify a wide range of interventions, reducing the list of core human rights accordingly is not the right conclusion.[23] Rather, the right conclusion is to devise legitimate international institutions with justifiable procedures for assessing and deciding cases of necessary external action.

## VI

A similar mistake of misplaced perspective is made by "minimalist" normative justifications for human rights. The most obvious one is a "lowest common denominator" approach which would run the risk of being, to use a phrase Rawls coined in a different context, "political in the wrong way" (Rawls 1999b, 491). In looking for a possible universal consensus on human rights, one opts for a minimal justification and, all too often, for a minimalist conception of human rights. And even if Rawls in *The Law of Peoples* was not guilty of locating the justification of human rights in a presumably existing or possible universal consensus, he was willing to restrict the list of human rights so that certain important rights, such as equal liberties for persons of different faiths or a right to equal political participation, were not included (Rawls 1999a, 65 and 71). One reason for this is the assumed connection between human rights and intervention just criticized, and another is the aim to respect nonliberal but "decent" peoples as worthy of being agents of justification when it comes to a common law of peoples (and to avoiding Western ethnocentrism). But the

[22] Beitz (2004, 203). See also Beitz (2009, 33–40).

[23] Even though Beitz criticizes minimalist views of human rights (see Beitz 2009, 106 and 142), his own critique of the human right to democratic institutions (Beitz 2009, 185) attests to the reductivist tendency in "practical" approaches.

question of whether "decent hierarchical peoples" can or should be expected to conform to a "liberal" conception of human rights which is foreign to their cultural self-understanding, if asked from the perspective of the "ideals and principles of the *foreign policy* of a reasonably just *liberal* people" (Rawls 1999a, 10, italics in original), is misguided. For the essential question from a perspective that puts human rights first would be whether such peoples – or their governments – had legitimate reasons to *deny their members* equal liberties or the claim to political participation. This is what it means to say that we need to take "their" point of view properly into account in "our" perspective, assuming that we want to speak in this way.

Rawls presupposes that a "decent" society is characterized by a "common good conception of justice" and by a "decent consultation hierarchy" (Rawls 1999a, 61), and thus we are to believe that there are no further claims to human rights raised since there is a high degree of internal acceptance in that society. However, if disunity and conflict were to appear in such a society and it "cracked," so to speak, and some members raised the claim to more demanding rights as human rights which they could justify reciprocally by attacking certain social and political privileges, would the internal authorities then have good reasons to deny these claims, and would outsiders have good reasons to say that the claims raised are not really human rights claims? I do not think so. Maybe there is not such a "crack" in every culture, but human rights discourse arose in, and has been tailored to, such situations in which societies encounter a crisis and some members are in danger. And then they want some "light" to get in, to cite the words of my epigraph, in the form of measures for an improved, and possibly equal legal, political and social standing, and there is no reason to dim that light when it comes to "nonliberal" societies. One needs to remember that historically this was the context in which human rights were invented in feudal or monarchical societies; therein lies their original and still essential meaning. Furthermore, there is no reason to assume that what those who engage in such struggles want is to transform their society into a "liberal" one as we know it. Human rights do not prescribe a concrete specification of the arrangements of a society. They provide a language that can be spoken in many tongues, but it is the language of emancipation. When we think about human rights, the proper perspective is the one in tune with that of the participants in social struggles.

Seen from this perspective, Joshua Cohen suggests a very appealing notion of human rights. As I mentioned earlier, he views human rights norms as norms that secure individual membership or inclusion in a political society, "and the central feature of the normative notion of membership is that a person's interests are taken into account by the political society's basic institutions: to be treated as a member is to have one's interests given due consideration, both in the process of authoritative decision-making and in the content of those decisions" (Cohen 2004, 197). Cohen argues convincingly that there is a difference between a basic, universalizable account of such membership rights and a full-blown, say, liberal conception of social and political justice (Cohen 2004, 210–213). When it comes to the question of whether there is a human right to democracy, then, Cohen holds that a notion of democracy based on a strict version of political equality is too demanding; rather, a conception of human rights should call for forms of collective self-determination

that need not be democratic in an egalitarian sense of the term (Cohen 2006, 233). From the perspective of "global public reason," he believes, it is reasonable to insist on human rights that ensure membership and inclusion, even if that does not mean full political equality, but it is not reasonable to insist on a liberal idea of free and equal persons (Cohen 2006, 244).

Cohen's argument for the "toleration" of nondemocratic societies in the international sphere as long as they exhibit a certain level of political self-determination, which allows for the assignment of special weight to "some social groups" (Cohen 2006, 233), attempts to do justice to the problem of reasonable pluralism in a global society and to avoid overly strict standards for "external reproach," which may take the form of sanctions and intervention (Cohen 2006, 234). But it shares the problems of Rawls's view. Cohen rightly stresses that the primary reason to argue against a narrow-minded "liberal" way of judging the legitimacy of a society's basic structure and possibly to infer external permission to intervene is the respect for the collective self-determination of such a society. But then to express that respect by narrowing the human right to political self-determination (as expressed, for example, in the Universal Declaration), such that if some of the politically marginalized groups in such a society were to claim a human right to equal representation, "we" – and not just those who are in power there – would say that they have no such right, seems to run the danger of contradiction. It is right to "resist the idea that the political society should be held to a standard of justice that is rejected by its own members" (Cohen 2004, 211), if that rejection is not the result of political pressure and domination, but to infer from this that these members do not have a human *right* to resist unequal and undemocratic forms of organizing political government, is unwarranted. As with every other human being or collective, a political community can decide to settle for different forms of political organization; but the point of human rights is to strengthen those who dissent from certain "decisions" for unequal representation which have not been and cannot be reciprocally justified. One cannot limit the right to democracy by appealing to the principle of collective self-determination, for that is a recursive principle, with a built-in dynamic of justification that favors those who criticize exclusions and asymmetries. The right to democracy, as I conclude, is an undeniable right to full membership in a society, but it need not be claimed in a "liberal" sense if "liberal" means conformity to current social orders in the West.[24] Whether the members of a society interpret and use that right in such a way that it realizes a form of liberal or egalitarian democracy is up to them (as long as these decisions are not made under pressure and indoctrination), but given the nature of human rights as protecting and expressing the right to codetermine one's polity in an autonomous manner, there is no reason to doubt that there is a human right to democracy.

[24] On this point, see also Seyla Benhabib's argument based on the idea of a "right to have rights" (2007) [also in this volume. –Ed.].

## VII

Does the argument for human rights based on the notion of an individual right to justification of free and equal persons violate the claim to justificatory ethical impartiality, given the plurality of cultural understandings of the ethical good? I agree with Cohen that human rights norms should not depend on a "deeper outlook about the proper conduct of a good or righteous life" (Cohen 2006, 237) and that a conception of human rights should be presented "autonomously," i.e. independently of any comprehensive philosophical or religious doctrine (Cohen 2004, 193). But these are considerations that do not place the approach I argue for in question, since it does not rely on any assumption about the good life but only on a conception of what we owe to each other in terms of equal respect. The imperative of equal respect is of a different kind from considerations about what my good life or yours demands, as I argued above. One might hold a deeply religious view that the "tutored life" in accordance with God's will is the correct path in life; yet one would still have the duty to respect others as reason-giving and reason-deserving beings according to the principle of reciprocal and general justification. One must not see the notion of moral autonomy as internally connected to a liberal notion of the good.[25]

Thus, I hold that, in order to avoid being "political in the wrong way," an autonomous argument about the core of human rights has to be a *moral* argument that can justifiably claim general validity independent from particular conceptions of the good. How else should we understand the basic norm – in Cohen's words – that "to be treated as a member is to have one's interests given due consideration", or that no person should be a "no-count"? (Cohen 2004, 197 and 198 And what better ground for such an argument, what better basis for human rights could there be, reflexively speaking, than the claim that any account of the rights or duties of persons as members of a social and political basic structure should be capable of being adequately justified toward them? What "adequate justification" means here cannot, in turn, be determined without the possibility of everyone participating effectively in the practice of justification. There is no valid reason to deny such participation.

Hence, it is right to aim at "justificatory minimalism" as far as the avoidance of ethical doctrines of the good is concerned; yet it is implausible to argue both for an autonomous moral justification and to claim that such justification is "unfoundational" (Cohen 2004, 199) in the sense that it remains agnostic concerning its foundations. For then the moral validity of the core set of human rights is not borne by shareable and generally binding reasons but by a multiplicity of reasons that have to "win support from a range of ethical and religious outlooks."[26] To be sure, Cohen does not see this as an attempt to ascertain a "de facto overlap" but as an "independent" argument for a normative notion of membership; yet this very independence gets lost in the absence of a free-standing moral normativity. There is no way of

[25] See Forst (2005, 226–242).

[26] Cohen (2004, 210). See also my critique of Rawls in Forst (2002, ch. 3.1 and 4.2), as well as Forst (2007, l. 4).

avoiding a substantive claim about the respect owed to persons as agents of justification, as agents to whom one owes certain reasons for claims that are to bind them. And given the dynamic in which human rights claims arise, there is no reason to assume that such claims for justification cannot be raised in many languages from within many traditions in which conflicts of a certain kind have arisen.[27]

Let us suppose that we are confronted with a position – think of the so-called Asian values debate[28] – which holds that such an understanding of justification and autonomy is foreign to a particular social context and cultural tradition. Therefore respect for that particular social order is demanded which is not to be measured according to a yardstick of human rights. On a closer examination, however, what exactly is the basis of this claim for respect?[29] Such a position, as I understand it, claims to defend the integrity of a certain social order as an integrated unity. The whole is supposed to constitute the identity of its members and vice versa; thus violating the integrity of the whole also violates the integrity of the members of that society, and an imperative to respect human rights is seen as such a violation. Yet that seems unfounded, for the claim raised implies that a defense of communal integrity cannot come at the cost of the integrity of its members, be they a majority or a minority. At least that is what the position states, since it is not meant to be a majoritarian one which only addresses the interests of dominant social groups. Thus, there is an internal criterion of legitimacy built into the argument, namely, that of internal and unforced acceptance, for any forced acceptance of social or legal norms would be incompatible with the claim for communal integrity. That claim, then, is suspended when internal dissent arises concerning the acceptability of the dominant social idea of order or its realization. If a society denies criticism of its dominant justifications and of the ways in which justifications can be questioned and formed, its social integrity is placed in question – *from the inside*. In any justifiable social order, internal critique cannot be legitimately answered by force or domination; whatever substantive demands those who protest raise, they demand in the first place that their dissent should be heard, taken seriously, and channeled in such a way that it could lead to a reform of the social structure. Hence, human rights play a double role here: in one sense, they are basic claims for justificatory standing as a full member, and, in another sense, they can also be means to address particular shortcomings of a social structure, such as a lack of religious liberties or of the resources necessary for education or a decent income. Still, such substantive claims must also be fed into the justification procedures of a society, since the common political structure is the first addressee of

[27] I do not deny that a free-standing notion of respect can be incorporated into different "background justifications" of cultural and religious kinds, to use a phrase by Taylor (1999, 124–144). However, these backgrounds must not lead to interpretations of what kind of respect is owed to whom that reproduce the inequalities and asymmetries that human rights are supposed to correct. Given the moral grammar and social function of human rights, they need to have a moral weight of their own that can counterbalance "traditional" hierarchical or patriarchal normative outlooks.

[28] As discussed, for example, in Bauer and Bell (1999) and Bell (2000).

[29] In the remainder of this section, I condense an argument made at greater length in Forst (1999, 35–60).

these claims. Human rights are not immediate claims to certain substantive "goods" but to a certain social and political standing of persons as "norm-givers."

The main insight I want to emphasize in this section is captured by a reflection of Uma Narayan's concerning the difficulties encountered by feminists in non-Western societies in finding a critical language that avoids the pitfall of being seen as an "outsider" who speaks the "alien" language of human rights and betrays local traditions: "We all need to recognize that critical postures do not necessarily render one an 'outsider' to what one criticizes, and that it is often precisely one's status as one 'inside' the culture one criticizes, and deeply affected by it, that gives one's criticisms their motivation and urgency" (Narayan 1997, 412). Social criticism of patriarchal structures and of certain forms of brutality and violence associated with it is always context-related and specific. However, there is no reason to assume that one cannot find certain basic standards of respect and equality which are implied in these many criticisms and which, first and foremost, imply the basic claim not to be subjected to actions, norms or institutions that cannot be adequately defended toward those affected. According to Narayan, to assert that human rights express "Western values" represents a highly problematic form of cultural essentialism and Western ethnocentrism, which denies the place of human rights in other sociocultural contexts and struggles (Narayan 2000, 91). Those who use the language of these rights are not "aliens" in their societies.

## VIII

At this point, I should at least sketch what a comprehensive picture of human rights would look like given their many dimensions as stressed at the outset, namely, moral (rather than ethical), legal, social, and political. The normative basis for a conception of human rights is the right of every moral person to be respected as someone who has a moral right to justification, such that any action or norm that claims to be morally justified, as well as any social order or institution that claims to be legitimate, has to be justifiable in an adequate way. This means that moral actions or norms have to be justifiable with moral reasons in moral discourse (free from coercion or delusion) and that political or social structures or laws have to be based on or (at least) to be compatible with moral norms applicable to them and must be justifiable within appropriate legal and political structures (and practices) of justification. The criteria of justification for moral norms are those of reciprocity and generality in a strict sense, for, recursively speaking, such norms claim to be strictly mutually and universally binding. The criteria for legal norms are those of reciprocity and generality within political structures of justification, thereby presupposing the possibility of free and equal participation and adherence to proper procedures of deliberation and decision making.[30]

[30] On the notion of democracy implied here, see Forst (2001a).

Hence, the notion of "dignity" that lies at the heart of such a conception of human rights is not a metaphysical or ethical one, combined with a doctrine about the good life. Rather, dignity means that a person is to be respected as someone who is worthy of being given adequate reasons for actions or norms that affect him or her in a relevant way. And this kind of respect requires us to regard others as autonomous sources of normative claims within a justificatory practice. Each person is an "authority" in the space of reasons, so to speak.[31] Dignity is thus a relational term; its concrete implications can be ascertained only by way of discursive justification.

With respect to human rights we need to distinguish between what I call "moral constructivism" and "political constructivism" (using Rawls's terminology in a different way).[32] Both are forms of discursive constructivism, in contrast to the idea of "deriving" rights from the basic right to justification. Every content of human rights is to be justified discursively, yet one needs to be aware of the twofold nature of human rights as general *moral* rights and as concrete *legal* rights. At the moral level, the construction leads to a list of those basic rights that persons who respect one another as equals with rights to justification cannot properly deny each other. That kind of list is to some extent general and subject to further elaboration, but it expresses basic standards of respect that must be secured in the form of basic rights, given that this form has proven historically to be the appropriate one for safeguarding individual claims and entitlements. It is important to emphasize that the basic right to justification is not only conducive to rights that secure the political standing of persons as citizens in a narrow sense; it is also the basis of rights to bodily security, personal liberties, and secure equal social status.[33] To put it in negative terms, human rights are those rights which cannot be rejected with reciprocally and generally valid reasons,[34] and that requirement opens up the normative space for claims that secure a person's status as an agent with equal social standing. That implies rights against the violation of physical or psychological integrity as well as rights against social discrimination. The right to justification is not just a right to political justification; rather, it is a right to be respected as an independent social agent who at the same time codetermines the social structure of which he or she is a part.[35]

Using the right to justification as an anchor does not involve any narrowing of focus of human rights, as one may fear,[36] for there are *two ways to substantiate*

[31] This also holds true for persons who cannot use their right to justification in an active sense, such as (to some extent) children or mentally disabled persons; the passive status of having that right does not depend on its active exercise.

[32] I explain the difference to Rawls in Forst (1999, 45ff.).

[33] The latter aspect is stressed by Buchanan (2010).

[34] I modify here the "not reasonable to reject" – formulation of Scanlon's contractualist theory of justification; see Scanlon (1998, esp. ch. 5). I discuss the differences between Scanlon's contractualism and discursive constructivism in Forst (2007, chs. 1 and 2).

[35] This also captures the historical meaning of these rights; in briefly mentioning the social struggles of the Levellers, I pointed out that they were directed against feudalism as a *social* order as well as against absolute monarchy as a *political* order.

[36] That worry has been raised, in different ways, by Allen Buchanan, James Griffin and John Tasioulas, to whom I am particularly grateful.

*human rights* on that basis, first by spelling out the requirements – and powers, so to speak – attached to the status of a socially and politically recognized agent of justification, and, second, via a consideration of the aspects of human life to be protected or enabled by basic rights that no person can morally deny to equal others with good reasons. At this point, claims about the importance of certain goods and about basic social interests reappear, though not as ethical values or interests from which certain rights claims can be derived, but as *discursively justifiable* claims to *reciprocal* respect between persons who recognize one another as autonomous and, at the same time, vulnerable and needy social beings. Human rights materialize and protect that status, and it is by way of procedures of reciprocal and general justification that claims based on human interests can be transformed into rights claims.

Hence, the political point of the right to justification is especially important, for there is a particular institutional implication of this moral argument for human rights. They are moral rights of a specific kind which are directed to a political-legal authority and have to be secured in a *legally* binding form; hence they are an important part of what I call "fundamental justice." A fundamentally just basic political and legal structure is a "basic structure of justification" in which the members have the means to deliberate and decide in common about the social institutions that apply to them, and about the interpretation and concrete realization of their rights. Human rights in that sense have a reflexive nature: they are basic rights to be part of the processes in which the basic rights of citizens are given concrete and legally binding shape. They are rights of a higher order, namely rights not to be subjected to social institutions or legal norms that cannot be properly justified towards those affected, and rights to be equal participants in such procedures of justification. *Political constructivism* thus has moral constructivism as its core, for there can be no legitimate interpretation and institutionalization of basic human rights that violates their moral core as explained above, but it is also an autonomous discursive *practice* of citizens who are engaged in establishing a legitimate social and political order. There are certain core rights presupposed by that political construction, hence the idea of *fundamental justice* in a "basic structure of justification," but an essential point of the construction is to establish a contextualized structure of rights and institutions worthy of acceptance by a political community. The ultimate aim, ideally speaking, is *maximal justice*, i.e. a "fully justified basic structure."

It must be added that human rights are more wedded to fundamental than to maximal justice; the task of establishing a justified – and just – basic structure is more comprehensive and complex than that of establishing an acceptable and legitimate structure of basic human rights. Human rights are an essential part of the full picture of social and political justice, but they are only a part. As the realm of moral rights is larger than that of moral human rights, so is the realm of political and social justice larger than that of legally established human rights.[37] It is important to stress in this connection that political constructivism is not simply a "realization" of fixed moral human rights; rather, it is a discursive exercise within proper procedures of justification.

[37] I agree with Griffin (2008, 41), on that point.

Human rights, to sum up, are those basic rights without which the status of a being with a right to justification is not socially secured. They entail the essential personal, political, and social rights necessary to establish what I call a social structure of justification, and second, they entail those substantive rights which no one within such a structure of justification can reasonably deny to others without violating the demands of reciprocity and generality. Recursively speaking, and that is my central idea, the point of human rights is that persons have the basic right to live in a society where they themselves are the social and political agents who determine which rights they can claim and have to recognize. This is the autonomous agency highlighted by human rights, today as well as in earlier times.[38] To put the double, reflexive character of human rights in a nutshell: they are rights that protect against an array of social harms the infliction of which no one can justify to others who are moral and social equals, thus presupposing the basic right to justification – but above that, they protect against the harm of not being part of the political determination of what counts as such harms.

## IX

I have argued that human rights are an important component of an account of political and social justice. But other authors argue that they are "basic requirements of global justice,"[39] and so the question arises as to whether my account falls into a "statist" or a "cosmopolitan" category. Yet I would suggest avoiding these categories. Undoubtedly, the basic right to justification is a universalist starting point, and so is the result of the list of human rights by way of moral constructivism. Still, the account of political constructivism sketched above does not predetermine whether the political community that interprets and institutionalizes these rights is a particular or a global one. Thus, the questions at issue between globalists and statists have to be decided elsewhere, namely with reference to a conception of transnational justice which aims at establishing a transnational order of justification based on considerations of the relevant contexts of justice.[40] In a sense, then, human rights are part of an account of transnational justice, but just a part of it, and they are agnostic with respect to the question of the proper political context for their realization.

[38] In an important sense, I share Habermas's idea of the "equiprimordiality" of personal and political autonomy as well as of human rights and popular sovereignty, as explained in Habermas (1996, esp. ch. 3). In another sense, however, I diverge from it, for my notion of equiprimordiality sees the right to justification as *one* source for both, while Habermas sees different sources at work. In addition, none of these has the moral status of the right to justification for which I argue. For a discussion of this see my "The Justification of Justice: Rawls's Political Liberalism and Habermas's Discourse Theory in Dialogue," (2007, ch. 4).

[39] Beitz (2003, 44). In his *The Idea of Human Rights* (2009, 142f.), Beitz distances himself from this view, however. For another example of that position, see Pogge (2002, ch. 1).

[40] See Forst (2001b, 169–187).

A full-blown conception of transnational justice is more comprehensive than a conception of human rights can be, and it entails numerous aspects of political and economic, as well as historical, justice. And even though the conception of human rights implies rights to the necessary means for an adequate standard of living which cannot be denied to any person to whom reasons are owed for the social structures to which they belong, this in no way satisfies the demands of justice, either nationally or transnationally, given the world as we know it.

What is important, however, is that the primary addressee of human rights claims is a political and legal basic structure with the form of a state. In that respect, a conception of human rights needs to combine moral-universalist and institutional aspects, even though I disagree with an institutional view which not merely argues that the state is the central institution for securing human rights but also contends that it is only violations perpetrated by official actors that count as human rights violations.[41] That is too narrow a connection. It is the task of a state to secure human rights and to protect citizens from human rights violations by private actors such as large companies, for example. Failure to do so, either because the state decides not to act even though it could or because it is too weak,[42] constitutes insufficient protection of human rights, though their violation is not the work of the state but of other agents. So the state is the main addressee of claims to protect rights, even though it is not the only agent who can violate them.

However, human rights do, of course, have a transnational moral as well as a legal meaning. Their moral meaning is that a violation of human rights is a breach of standards which the human community in general believes should be respected; thus, in case states prove to be either the perpetrators of such crimes or unable to stop them, the "world community" is called upon to react not just morally but also politically. That, however, calls for a "mediation" of such duties to avoid or put a stop to violations of human rights in the form of proper institutions, not just because it needs to be determined who has what kind of duty to assist those in need but also because a structure of justification needs to be established to avoid arbitrary judgments concerning cases of aid or of intervention.[43] Hence, the moral meaning again has to be transformed on a legal and political level in order to establish credible international institutions to prevent, judge, stop, or sanction human rights violations. There is another form of political constructivism called for here whose task is to codify transnationally and internationally binding human rights in political and legal terms.[44]

There are further aspects of the legal existence of human rights in international declarations and covenants that I cannot go into here. There are duties to establish institutions for those who had to flee their states because of human rights violations,

[41] See Pogge's argument (2002, 58).

[42] Pogge discusses the case in which the state is not willing to act and categorizes it as a kind of "official disrespect" (2002, 61).

[43] For the notion of "mediation" here see Shue (1988).

[44] This point is stressed by Habermas in (2001), 113–130, and (2006), 113–193.

or for other reasons such as economic deprivation. The "right to have rights"[45] and to belong to a political community where one is protected from rightlessness is an important issue in a world of forced migration; so, too, is the duty to avoid the creation of zones of lawlessness, such as extraterritorial detention camps, in international conflicts.

## X

Human rights are essential and fundamental standards of the legitimacy of a social and political order; even though such an order is their primary context and addressee, there are a number of reasons for an international order that aims to secure these rights. But their main point remains that, insofar as these rights are to establish the core of a justified social order, their normative ground is the basic claim to be respected as an agent who has a right to justification. The logic of justification combines reflexive, procedural as well as substantive, arguments for human rights, and every such right is to be seen as a claim that cannot be reciprocally rejected between persons who recognize that they owe one another a legal and political protection of their right to be a socially and politically autonomous agent of justification. Rights have to be understood horizontally, so to speak, as reciprocally justified and binding claims to a certain moral, as well as a legal, a political, and a social, status. They express forms of mutual recognition, and in their concrete form they are results of procedures of discursive construction. Rights are not goods received from some higher authority; rather, they are expressions of reciprocal respect between persons who accept that, whatever form these rights take, everyone to whom they apply has a basic right to be an agent of justification, such that no set of rights can be determined without adequate justification.

The view I have explained is at odds with two rival ones. The first is a teleological view which grounds human rights in basic interests in well-being and derives basic rights to certain protections and realizations of these interests from them. The second regards human rights as having primarily a legal international existence, leaving their moral justification open. It seems to me these two views downplay the social and political point of human rights. They are not simply means to achieve or enjoy certain goods, and they are not primarily means to evaluate social structures from the outside in the international arena; rather, they are autonomous achievements of those who regard themselves and others as agents who resist being "mere" subjects of norms or institutions that are not responsive towards them. Their basic claim is one of status, but of a dynamic kind, namely no longer to be treated as a justificatory nullity, and thus the claim to "count" socially and politically. Rights confer upon agents social and political power, in the sense of "normative power": the power to codetermine the conditions of one's social and political life. Human beings have a claim to such power, and human rights are a way to express that.

[45] See Arendt (1979, ch. 9); for an interpretation and application of this thought, see Benhabib (2004, ch. 2).

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# Chapter 6
# Social Harm, Political Judgment, and the Pragmatics of Justification

**Albena Azmanova**

*The executioner always wears a mask: the mask of justice.*

Stanisław Jerzy Lec

Political judgment and human rights draw their force from apparently opposite sources: human rights – from the appeal to universal justice; political judgment – from the urgency with which immediate and local experiences of injustice trigger demands for adjudication and political action. The tension between context-specific considerations and demands for normative rigor is intrinsic to political judgment – the judgment over the fair terms of social cooperation, over the right normative order of society.

In what follows, I will advance a solution to this tension in the form of a discourse-theoretic concept of political judgment, or what I call a 'critical deliberative judgment.' This model develops not by spelling out procedural and substantive principles of justice, but by exploring the pragmatics of justification, and highlighting the interplay between interest-related and morality-related considerations lying therein. My point of departure is the tension that emerges, in cases of conflicts among rights, between societal conceptions of justice and conceptions of fairness: a tension that calls for the exercise of political judgment. The parameters of the model of political judgment I advance first evolve from a particular reconstruction of the normative concerns of Critical Theory (as a tradition of social philosophy) that enables focusing attention on the emancipatory, rather than on the conciliatory (consensus-building) dimension of rights. I further develop this model by conceptualizing the way specific experiences of injustice affect a public's identification of what counts as relevant issues in debates over conflicting rights – thus shaping societal notions of

A. Azmanova (✉)
Brussels School of International Studies, University of Kent, Brussels, Belgium
e-mail: Azmanova@kent.ac.uk

C. Corradetti (ed.), *Philosophical Dimensions of Human Rights: Some Contemporary Views*, DOI 10.1007/978-94-007-2376-4_6,

fairness. Finally, I will address the critical and emancipatory work that democratic practices of open dialogue are able to perform, ultimately relating local sensitivities to universal demands of justice by disclosing the structural (rather than agent-specific or culture-specific) sources of injustice.

## 6.1 Justice Versus Fairness

Whenever power feels compelled to speak the language of rights, it is most often to endow a course of policy action with the secure foundation that only universal validity can grant. Thus, when in September 2010 the United Nation's Human Rights Council established the legal responsibility of governments to provide water and sanitation to their citizens, it vested this responsibility as a new 'human right to clean water and sanitation' – a right deemed integral to the right to life and human dignity.[1] Earlier that year the Finish government bound itself to ensure internet access to all its citizens, codified as a legal right, itself justified in terms of a 'fundamental right to communicate.'[2] Finally, at the start of the same year, the United States Supreme Court increased corporations' political influence by lifting the ban on corporate funding of political broadcasts, on the grounds of corporations' right to free speech.[3]

That political causes, even when openly interest-driven, are fought on the territory of rights is unsurprising, and even uncontroversial. It is in the essence of right that it overrides considerations of pros and cons: there can be no discussion of the benefits of the exercise of a 'right to life,' or the costs of its provision. That is why rights, as Ronald Dworkin has famously observed, have the capacity to trump interests: that which is general overpowers what is partial and parochial. This power of rights derives from the range of their scope of validity: the wider the scope, the higher the claim to validity, the stronger the appeal to political responsibility and the more irresistible the call for political action. Basic rights issue a universal claim to validity, and therefore have the strongest political pull. Unsurprisingly, governments in liberal democracies, as much as in autocracies, have in recent years violated the basic rights to freedom of speech and privacy in the name of security and safety (for instance, by increasing wholesale surveillance measures), by invoking that most general of rights – the right to life and the state's corresponding obligation to safeguard it. It is in this sense that politics' taste for rights is uncontroversial, and not necessarily

[1] UN Resolution "Human rights and access to safe drinking water and sanitation" A/HRC/15/L.14; 30 Sept. 2010.

[2] According to a poll conducted by GlobeScan for the BBC World Service, almost four out of five people around the world believe that access to the Internet is a fundamental right, an integral part of free speech (Globe Scan Report 2010).

[3] *Citizens United v Federal Election Commission* (2010).

confined to western liberal democracies. But the power of rights over interests is also unsurprising: philosophical argument has been corroborated by socio-psychological research revealing that even quite young children are able to distinguish between an outcome that is favorable to them and one that is fair.[4] By force of being an element of the human condition, the sense of justice is also a parameter in the mundane operation of power.

Dealing with rights becomes controversial not when rights come into conflict with *interests*, but when the enforcement of rights that are otherwise recognized as valid and are codified as legally binding, clashes with society's notion of *fairness* – most often in instances of conflict among rights. Thus, it is society's common sense notion of fairness that Justice Stevens invoked in his dissenting opinion in the Supreme Court's judgment of corporate electoral funding:

> In a democratic society, the longstanding consensus on the need to limit corporate campaign spending should outweigh the wooden application of judge-made rules… At bottom, the Court's opinion is thus a rejection of the common sense of the American people, who have recognized a need to prevent corporations from undermining self-government since the founding, and who have fought against the distinctive corrupting potential of corporate electioneering since the days of Theodore Roosevelt. It is a strange time to repudiate that common sense. While American democracy is imperfect, few outside the majority of this Court would have thought its flaws included a dearth of corporate money in politics.[5]

In the case at hand, the sense of unfairness which Judge Stevens' opinion evokes is triggered by a clash among basic rights constitutive of American society's overarching conception of justice: a clash between the right to free speech, and the right to self-government. The conflict among rights within a general conception of justice is a phenomenon often articulated in the categories of unfairness – a phenomenon born out in the tension between 'having the right to' and 'being right about,' between 'having rights' and 'being right.' This tension has become tangible in the public debate on the building of an Islamic community center and mosque near Ground Zero in New York (dubbed 'Park51'). While the project's supporters defend it on the grounds of religious freedom, which is guaranteed as a basic right in the U.S. Constitution, not only its opponents but also many of its supporters deem that the project is "inappropriate," "insensitive," or "not right."[6] Thus, the controversy around Park 51 is not generated by the public's being divided along the fault lines of support and rejection of religious freedom; it is generated by the tension between

[4] Lerner (1974).

[5] *Citizens United v Federal Election Commission*; Opinion of J. Stevens (2010, 90).

[6] According to an opinion poll conducted among New Yorkers and published in the New York Time on September 11th (2010), the majority of those surveyed believe that, based on freedom of religion, the developers have the right to build Park 51. However, some 50% of respondents oppose the project on grounds that it is inappropriate in view of prevailing sensitivities after the Sept. 11 terrorist attacks when two aircraft hijacked by Muslim extremists on September 11, 2001, crashed into the World Trade Center's twin towers, causing them to collapse (http://www.nytimes.com/2010/09/03/nyregion/03poll.html).

the rights we embrace as binding and the notion of fairness that guides our judgment in the application of these rights.

A similar contrast between a conception of fairness and a rights-based conception of justice has recently emerged at the trans-national level via the debate over corporate remuneration and taxation. Global corporations that are finding legal routes to reducing their tax payments (ultimately grounded on the basic right to property) have been accused of incurring losses of human lives. Thus, the international development charity Christian Aid has blamed the deaths of 1,000 children a day in developing countries on "transnational corporations' wielding their enormous power to avoid the attention of the taxman."[7] This tension between the right to life, on the one hand and, on the other, the right to private property and the rule of law, which together constitute the grounds on which corporation's tax avoidance is justified, actuates an emerging global sense of fairness surpassing codified norms of justice.

While society's shared conception of justice is composed by the unity of basic values (including those codified as rights) which it holds to be valid in themselves, the conflict among rights that often emerges in the course of rights' application brings about a tension between society's conception of justice and its conception of fairness.[8] Thus, it was the tension between the right to life and the right to privacy (and free moral choice within the zone of privacy) that unsettled American society's conception of fairness in the abortion debate of the 1970s; it was the tension between the abstract principle of equality, as codified in the 'separate-but-equal' doctrine, and that of individual dignity that, by mobilizing society's conception of fairness, gave valiance to the Supreme Court's move to outlaw segregation in 1954. By unsettling society's conception of fairness, the tension among codified rights puts into question society's normative order. This in turn issues a call for political action for resolving the conflict of rights and for stabilizing society's normative order. The process of judgment necessary for resolving the conflict of rights in line with society's conception of fairness is properly political judgment.[9] How should political judgment be guided in reconciling context-dependent notions of fairness with the rules of universal justice, spelled out in codified norms of basic rights?

[7] Reported in *The Financial Times* 9 Nov. 2010, 12.

[8] In line with Rawls, I consider here justice only as a virtue of social institutions, not of persons or actions; I also endorse his argument about the need to distinguish between the concept of justice and that of fairness. However, unlike Rawls, who develops his own concept of justice around the notion of fairness in his theory 'justice as fairness' in which justice becomes synonymous with a fair system of cooperation (thus collapsing the initial distinction between justice and fairness), I believe that it is analytically important to maintain the difference between the two concepts. For the earliest formulation see Rawls (1957). Throughout later reformulations of his position, Rawls does not revise the relationship he articulates here between the notion of justice and that of fairness.

[9] To anticipate my argument, I do not perceive the societal notion of fairness in the terms of community's ethical life (*Sittlichkeit*). More on this in Sect. 6.4 below.

## 6.2 Justice, Judgment, Justification

A strict and stringent enforcement of codified norms of human rights would not go far neither in arbitrating among conflicting rights, nor in securing compliance, even though it might nominally create a legal obligation. What a narrowly legalistic and highly formal notion of human rights excludes is the congruence between law and underlying social practice that underpins legitimacy and ensures the practical enforceability of law. By failing to take into consideration the situatedness of rights – the way rights are invoked in dealing with particular grievances related to specific social practices, or the way participating in law's construction and interpretation within inherited traditions contributes to legitimacy and obligation, such an approach aggravates the problem, instead of providing a solution. Yet, embracing the view of soft and customary law as basis for solving conflicts among codified rights is hardly a viable alternative. Proponents of this perspective have argued that it is customary law, rather than human rights as a codified peremptory norm (*jus cogens*) that has allowed for the operation of human rights law internationally, despite the lack of a mechanism of compulsory jurisdiction (Finnemore and Toope 2001). Indeed, the International Court of Justice has followed this approach to promoting greater bindingness by offering less precision. Admittedly, the power of imprecise legal norms might go a long way in enabling context-pertinent interpretation of rigid norms. However, this comes at the price of a dangerously broad margin of political discretion when deciding on the correct interpretation of rights in light of customary law.[10] The difficulty in finding an alternative comes from the diametrically opposed natures of human rights and politics: the a-political nature of human rights (whose source is human nature, rather than political authority) and the deeply political nature of the situations in which rights are invoked as guidelines for decision and action. This results in the tension between the necessarily abstract moral universalism of human rights and the urgency of immediate and local grievances that trigger demands for political judgment.

The tension between a universal appeal to justice and contextual notions of fairness has been recently resolved via a shift of attention from ideal models of justice to the process of justification itself, or what Alessandro Ferrara has described as an emergent 'judgment paradigm' in contemporary political philosophy. This consists in the waning of the early modern model of generalizing universalism based on the power of principles, laws, norms and rules to transcend the particularity of contexts, and its replacement by a vision of normative validity based on 'reflective judgment' (Ferrara 1999, x. and 2008, 16–41). Pioneered by John Rawls, Jürgen Habermas, Bruce Ackerman, Frank Michelman, Seyla Benhabib and Ronald Dworkin, this

[10] Take, for instance, Islamic codifications of human rights, such as the *Universal Islamic Declaration of Human Rights* of 1981, or the *Cairo Declaration on Human Rights in Islam* of 1990. While effectively adapting the notion of human rights to local context, these documents establish the political authority of Islam, curtail religious freedom, and assert the superiority of men over women.

shift of inquiry from principles of justice to modes of judgment and justification has most recently been adopted by Amartya Sen,[11] and has culminated in the formulation of what Rainer Forst has defended as the 'right to justification' (also in this collection) – a right that underpins and enables the search for justice. As developed within the communicative turn in Critical Theory initiated by Habermas, the judgment paradigm takes the shape of a process of mutual reason-giving among participants which proceeds as the 'unforced force of the better argument.' The shift of focus from pre-established normative guidelines to the very process of democratic opinion and will formation via collective reasoning is particularly distinct in Sheyla Benhabib's conceptualization of democratic iterations – everyday 'conversations of justification' through which citizens become gradually convinced of the validity of universal moral norms.[12]

While entrusting democratic deliberations with the authority and capacity to generate rules of social cooperation, models of democratic deliberations advanced within the communicative turn in Critical Theory also minimize the danger of political arbitrariness by advancing compelling standards of normative validity. Within the model advanced by Habermas the validity of claims is tested in a counterfactual way: we judge whether actual outcomes fit the hypothetical outcomes of argumentation under conditions described as 'an ideal speech situation' – a situation in which reason-giving among participants is free of the power asymmetries that permeate actual social interactions.[13] Alternatively, Alessandro Ferrara has proposed to test the validity of normative claims by means of a reflective judgment about the self-congruity or authenticity of an individual or collective identity (also in this collection).[14] However, to the extent that model of justification relies on idealizing presuppositions (e.g., the ideal speech situation; authenticity of identity), it imposes its own limitations: they do not tell us how the actual process of reason-giving operates. We are still to provide an account of the mechanism through which deliberative political judgment serves the goals of universal justice in actual processes of argumentation and justification. To that end, I advance a process-centered account of political judgment, to complement the models of discursive validity already advanced within Critical Theory.

I therefore turn next to the pragmatics of justification (the actual process of meaning-formation in the course of reason-giving), which I prefer to approach

[11] In *The Idea of Justice* (2009), Amartya Sen defends the priority of public argument and debate over set principles of justice.

[12] See Benhabib (2008, 44–80). See also her contribution in this collection.

[13] In the ideal speech situation, participants in the deliberative exchange of arguments are constrained by the principles of communicative reciprocity expressed in speech: "[C]ommunicatively acting individuals must commit themselves to pragmatic presuppositions of a counterfactual sort. That is, they must undertake certain idealizations – for example, ascribe identical meanings to expressions, connect utterances with context-transcending validity claims, and assume that addressees are accountable, that is, autonomous and sincere with both themselves and others" (Habermas 1996, 4).

[14] Ferrara names this new universalism 'exemplary' universalism based on 'oriented' reflective judgment about the self-congruity or authenticity of an identity.

within the analytical perspective of a political sociology of justification, rather than rely on a moral anthropology that stipulates an innate moral capacity of individuals. My turning away from idealizing presuppositions about what Philippa Foot has described as "the natural goodness of human will,"[15] or what Habermas has defended as the citizens' capacity jointly to adopt a moral point of view independent of, and prior to, the various perspectives they individually adopt[16] is not due to my own skepticism about the natural goodness of the human will or the capacity of publics to access the moral point of view. My misgivings concern the reliability of such optimistic assumptions when it comes to analyzing contestations of society's normative order and the justice of political rules. Instead of a moral anthropology that derives the moral point of view from intrinsically cooperative attitudes, it is safer to ground analysis on more realistic assumptions about human motivation in social interactions. To the extent that all public debates on justice imply a contestation of existing rules of social cooperation, all justificatory discourses are deeply political and thus 'tainted' by instrumental considerations pertaining to partial individual or collective perspectives. The real challenge of critical social theory is to account for the possibility of emancipation and justice not despite, but through, power-imbued processes of contestation.

Therefore, my first methodological move will be to shed idealizing assumptions of two orders: those related to an instrumental, interest-driven and conflict-ridden nature of the political, and those related to communicative action free of strategic interests and oriented towards understanding (positions that serve as each other's alibis). In their place, I would adopt a pragmatist orientation to social science in the spirit of what Pierre Bourdieu has described as one in which a focus on the 'economy of practices' supersedes the two equally partial views of economism and semiologism, i.e. of reducing social exchanges to rational and strategically oriented action, on the one hand, and to phenomena of communication, on the other (Bourdieu 1986, 241–258). From such a position, the contestation of the normative order of society is to be seen as simultaneously enabled and constrained by existing relations of power. On this view, social interactions are processes of cooperation-within-conflict, processes whose *lex insita*, the principle underlying the immanent regularities of the social world, is that of the struggle over the norms regulating the distribution of life chances in any society – a struggle as much to perpetuate the normative framework of interactions as to change it. Any practice contains as much the reified rules that constitute it as a recognizable social practice and, to the extent that coordinated social life depends on continuous interactions for its reproduction, the possibility of challenging the rules and altering them in the very process of rule-application. If the

[15] Philippa Foot has argued compellingly that human beings are "creatures with the power to recognize reasons for action and to act on them," this power itself residing in the natural goodness of the human will (Foot 2001).

[16] Habermas (1998, 77). Citizens are assumed capable of mutual attribution of a capacity for moral judgment, itself drawn from a conviction that social integration of everyday life depends largely on communicative practices oriented toward mutual understanding (ibid., 79–80).

dynamics of social interactions are simultaneously dynamics of cooperation and of conflict, of perpetuation and change, social relations are best described neither as intrinsically cooperative nor as intrinsically conflictual in nature, but as cooperation-within-conflict; conflictual cooperation that is the source of both the preservation of the social order and of its transformation.

Viewed from this perspective, the engagement in mutual argumentation does not need to hinge on an intersubjectively shared moral point of view. What Rainer Forst has conceptualized as the 'right to justification' could also be derived within the perspective of a social, rather than moral, anthropology of modern societies: here the reflex of justification is intrinsic to social interactions conceived as a process of conflict-within-cooperation. As social interactions are constitutive of actors' social identities, actors have a simultaneous interest in maintaining, as well as questioning and altering these relations. Thus, whether an actor wants to preserve a certain modus of social relations or alter it, she, being a side to a relation that constitutes her as a social actor, can neither alter, nor preserve it, without justification to all those who are her counterparts within the given social relation. In the political realm this takes the form of the necessity of modern power to justify itself in order to perpetuate itself. If, as Hannah Arendt has contended, power corresponds not just to the human ability to act, but to act in concert, and the legitimacy of power (in democratic as well as autocratic regimes), is always ultimately anchored in "the opinion upon which many are publicly in agreement" (Arendt 1965, 71), that is, in commonly held convictions – then the justification of political action is a socio-political impulse, endogenous to the very structure of power relations as relations enabling acting in concert (i.e., governance). That is why symbolic practices of justification (not only communicative ones), are used even by autocratic political regimes, especially in modern societies that cannot rely on social integration via a settled traditional ethos.

This understanding of justification as a socio-political impulse typical of modern societies has implications about the status of normative conflicts. Disputes about the justice of the normative order of society originate from clashes of views on the fair distribution of life chances within a given normative order, thus triggering political dynamics of conflict. These clashes, however, are unthinkable where social practices do not create a shared world of social cooperation: as John Dewey often asserted, the question of justice only arises in normative conflicts within shared practices.[17] Appeals to justice always take place as others-oriented grievances about the unfairness of the particular societal pattern in the distribution of life-chances. In such a process, instrumental (interest-based) and ideational (moral) dimensions of judgment are not only inextricably linked, but also equally relevant. It is the very imbrication, rather than separation between, on the one hand, interests endogenous to actors' identities and, on the other, identity-transcending moral considerations, that activates the dynamics of justification.

This synergy between identity-constituting interests and context-transcending moral orientations in the symbolic practices of justification is notable in the

[17] See for example, Dewey (1969).

history of rights. I will next undertake a conceptual archeology into the historical emergence of the 'due process' norm, in order to present it as a prototype of the right to justification. This will supply an additional argument in support of the right to justification: an argument emerging not within moral philosophy, but instead within the perspective of what I described above as the socio-political impulse to justification underlying the operation of modern social practices and modern power dynamics.

The prototype of modern rights as we know them are those codified in the English *Magna Carta* of 1215. The familiar 'moralist' rendition of the story tells us that a combination of higher taxes, unsuccessful wars and conflict with the Pope had made King John unpopular with his barons, who raised grievances against the central power and demanded limitations to that power in the form of codified freedoms (Crouch 1996, 114). A 'realist' reading of the document tells the story of a struggle for privilege – what the barons really sought was to overthrow the King, the demand for a charter being a "mere subterfuge" (Poole 1963, 479). Both readings give a story of contestation of the existing normative order in which parochial interests were mixed with cogent, for the given context, perceptions of the social circumstances for the safeguard of dignity – the increase of taxes (an attack on wellbeing), combined with central power's failing to safeguard sovereignty, triggered perceptions of unfairness and subsequent demands for altering the organization of power. The notions of unfairness in the case at hand are neither solely constituted by the encroachment on the material interests of the nobility, nor by the king's failure to perform the key legitimacy-conferring functions of central power–the protection of its subjects' wellbeing. It is the combination between interest-based motive, linked to the social position of the rebelling barons as members of the nobility, and interest-transcending notions related to the key legitimate and legitimacy-conferring functions of central power (to use Claus Offe's terms)[18] that prompted the contestation of the existing normative order in thirteenth century England.

The most significant outcome of this contestation was that, in contrast to previous cases when the rebellious nobility had rallied around an alternative monarch, it is the first time that it sought protection of their liberties in the law, namely in the principle of 'due process.' Although in current-day usage 'due process' refers to the notion that laws and legal proceedings must be fair, or the principle that the government must respect all of the legal rights that are owed to a person according to the law,[19] tracing back the line of formulations of 'due process' would lead us to the right to justification. Let us note that the term 'due process of law' was only formulated in the revision of *Magna Carta* in 1369. Significantly, this formulation, which puts the stress on rights codified in law, has replaced the earlier formulation of "lawful judgment of his peers":

[18] These functions concern "the state capacity to manage and distribute societal resources in ways that contribute to the achievement of prevailing notions of justice" (Offe 1985, 5).

[19] The U.S. Constitution guarantees that the government cannot take away a person's basic rights to "life, liberty or property, without due process of law" (14th Amendment, §1).

> No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will be proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land. (Magna Carta: §29)

This original focus on judgment and shared norms of fairness, which has subsequently been lost, is significant. The contestation of the authoritative normative order that led to the earliest codified protection against arbitrary power invoked, before all else, a notion of justification: that whenever the central authority acted to harm a person, this had to be done upon examination of the valid grounds for such an action. The later, more legalistic formulation of due process that places the stress on codified legal rules, has obliterated the original notion of justification as articulation, in the course of judgment, of the valid grounds on which central authority can act against the individual. This notion of justification, formulated in 1215, is the starting point from which an on-going process of generalization began in which freedoms gained as privilege transformed into universal rights. The engine of this generalization was the right to justification formulated in clause 29 of the 1215 statute. It is due to the notion of justification, as it invites questioning of the normative grounds of political action and its scope that, within a century, the privileges granted initially to any 'free man' in the sense of non-serf, were extended to all: the 1354 statute replaced the formulation 'no free man' with 'no man, of whatever estate or condition he may be.'[20]

## 6.3 The Problem of Validity

If we conceive of the right to justification as being grounded in the very socio-political dynamics of the operation of modern power, this alleviates the reliance on unsafe (as compelling as they might otherwise be) idealizing presuppositions about the moral attributes of individuals or about the quality of communication. However, this relative gain in conceptualizing the right to justification comes at the expense of clarity about criteria of validity: when should a judgment about the justice of social norms and political rules be considered valid? Normative political philosophy has advanced criteria of validity in the form of constraining assumptions either about the settings of judgment – as in the "ideal speech situation" of Habermas, or in Rawls's "veil of ignorance," or alternatively by introducing more substantive tests, as that of the self-congruity of an identity (Ferrara). As Habermas notes, "[t]here seems to be no way around the explanation of the moral point of view in terms of a procedure that claims to be context-independent" (Habermas 1998, 99). Yet, it seems to me that such an alternative, that is, the possibility of deriving the moral point of view from context-dependent claims, is effectively available within the very philosophical tradition within which Habermas writes – Critical Theory of Frankfurt School descent.

[20] Statute "Liberty of Subject," 1354: §3 (1354 c. 3/ 28_Edw_3).

Within the perspective of analysis articulated by the founders of Critical Theory, normative standards informing critique are to be derived not from posited ideals of justice, but from an analysis of the socio-structural dynamics of social injustice operating in a given context. Three related elements are constitutive of this particular notion of critique, which I espouse in advancing my own theory of critical political judgment.[21] First, this is critique from an 'internal point of view,' or what Theodor Adorno has described as immanent, as opposed to transcendental critique (Adorno 1973). Second, at its center is a stratum of empirical experiences of suffering. In this sense, to borrow Michael Walzer's apt phrase, social criticism is "the educated cousin of common complaint" (Walzer 1987, 65). From this perspective the question "What is Justice?" cedes priority to that of "Who suffers?." Here Critical Theory comes close to the position held by philosophical pragmatism, formulated with regard to rights by Richard Rorty in the following way:

> The difference between an appeal to end suffering and an appeal to rights is the difference between an appeal to fraternity, to fellow-feeling, to sympathetic concern, and an appeal to something that exists quite independently from anybody's feeling about anything – something that issues unconditional commands. (Rorty 1996, 15)

The third feature of critique concerns the type of experiences of suffering that qualify as object of social criticism. These are experiences of *social* injustice – i.e., experiences originating in the socio-structural dynamics of the distribution of life-chances in society. As Nancy Fraser has noted, the empirical reference point of critical theory is to be grasped not so much in terms of individual and pre-political (psychological) experiences of suffering, but ones related to social subordination.[22] This re-directs attention to the political economy of capitalism, an interest the Frankfurt School writers inherited from Marx. Without upholding the importance of political economy in the production of social patterns of injustice, Critical Theory would lose its critical edge.

Combined, the three elements of critique designate the larger conceptual territory of Critical Theory. While the *purpose of critique* is to bring to light the socio-structural origin of experiences of injustice, normative *criterion of validity* (of claims, policy actions, and political rules) is the alleviation of such suffering; in turn, the *goal of political action* is changing the pattern of social relations within which structurally generated suffering takes place (in this sense neither distribution nor recognition would suffice). The normative goal of critique, therefore, is not the articulation or production of a societal consensus over principles of justice codified as rights, but the unveiling and elimination of socio-historical patterns of injustice. The proper purpose of critique, and of political action guided by it, is emancipation, not justice.

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[21] This position is articulated in more detail in Azmanova (2012).

[22] Fraser (2003, 205). Here Fraser rejects Axel Honneth's diagnosis that social and political conflicts have their source in the "moral" injuries that arise from assaults on the basic human need for recognition in unequal societies. She prefers to see misrecognition not as a psychological injury but as "status subordination" generated via institutionalized patterns of discrimination and value inequality.

## 6.4 On the Pragmatics of Justification

How does the operation of judgment within the process of justification of normative claims attain emancipation in the particular sense described above? Let us examine the practical process of judgment and justification, putting aside the constraints of idealizing assumptions – both those regarding the process of reason-giving, as well as those regarding the moral and cognitive capacities of individuals. As I already noted, claims to justice most often originate as specific grievances of suffering, and proceed as a contestation of the normative order of society (provided that the sources of suffering are social in nature). According to the form of critique adumbrated above, however, there is no position of normative validity that is untainted by the dynamics of power and free of the normative vocabularies of these dynamics. This means that the structural features of the sources of social injustice are encoded in the very operation of judgment – they are endemic to the pragmatics of justification. How can then political judgment nevertheless play an emancipatory role?

I have outlined elsewhere the parameters of such a model of judgment, which I have described as a "critical deliberative judgment" (Azmanova 2012, ch. 6–9). This is a process of reason-giving that proceeds not so much along the logic of the force of the better argument (testing of arguments against the counterfactual situation of power-free conditions of justification), but instead as a process in which participants, by giving account of the reasons for the positions they advance, achieve an understanding of their mutual entanglement in the socio-structural production of injustice. The only procedural condition for the functioning of public deliberations in this way is the condition of socio-cultural diversity of participants (i.e., the condition of epistemic pluralism). Let me adumbrate briefly this point.

Viewed as social practice (rather than as ideal conditions for testing the legitimacy of claims in a counter-factual manner), unconstrained public discussions in which participants advance claims about the just arrangements of their collective life are deeply imbued by the features of participants' social identities and status,[23] as well as by features of the social practices through which participants' socialization has taken place within specific contexts. It is exactly because deliberations are invariably marked by participants' social identities that the mutual reason-giving takes place as intersubjective (rather than interpersonal) dynamics of communication. To the extent that public deliberations involve the full range of socio-cultural diversity in society (ergo, the requirement of epistemic pluralism) they can be regarded as a condensed expression, in a dialogical form, of the larger dynamics of social interactions taking place in societies.

How does this dialogical expression of larger social interactions take place? Deliberations, especially if they involve a diverse public, do not immediately mobilize a 'common' sense – sense shared by all. Instead, they proceed as "making sense

[23] In line with Bourdieu, I understand this to be determined by the amount of economic, social and cultural capital an individual possesses (Bourdieu 1986).

in common," starting from the questioning of a social practice which, whether tacitly or explicitly, is the object of debates on justice. This happens through what I conceptualize as a process in which some aspects of common social practices become visible (to participants) as issues first of all relevant for normative disagreement and therefore – for public debate. What deliberations in the first place do is that, as they are triggered by lived experiences of social injustice, they proceed as articulation of a number of reference points participants deem to be relevant to their relations to others in respect to the issue of injustice under discussion. For instance, the debates on wearing the Islamic headscarf in universities in France and Turkey, although having a common point of normative contestation (allowing or not the display of religion identity in a secular society), have brought forward different reference points as being normatively relevant. In the French case, the grievance against the headscarf ban concerns the tacit subordination of Islamic group identity to a hegemonic secular identity. In the Turkish case, the grievance against the headscarf ban concerns the deprivation of women from more traditional rural background from access to university education. In the first case, the field of relevant reference points is constructed along the distinctions between a dominant secular French culture versus socially subordinated religious culture; in the second case the key distinction structuring the field of reference points is that between an identity related to a hegemonic urban modern culture versus an identity related to a subordinate traditional rural culture. The differences between the sets of reference points activated in the two debates are due to the differences in the experiences of injustice that have initiated these debates.

In other words, the formulation of conflicting positions (e.g., "the ban of the headscarf is beneficial/detrimental to diversity") is both constrained and enabled by a basic overlapping agreement on what issues count as politically significant ones – salient issues of governance around which a debate about the just rules of social coordination can take place. These first articulations of visibility and relevance are not a matter of purely factual knowledge (e.g., "most women in liberal democracies do not display signs of their religious beliefs"), and neither do they have an evaluative function (e.g., it is better not to display religious symbols in public), they simply orient judgment by way of drawing distinctions, by way of a discrimination among reference points, a discernment of what stands out to attention.

In the course of mutual argumentation, the diversity of reference points that individual participants introduce start to form a structured field of references, thereby articulating the contours of a shared notion of fairness. Shared perceptions are thus formed concerning what issues are salient ones in the formation of a collective notion of fairness: for instance, that corporate right to free speech is related to the right of self-governance, or that corporate taxation has something to do with the preservation of lives – to return to the examples used at the begging of this analysis. It is this field of mutually connected reference points that serves as a framework for collective meaning-formation around a shared notion of fairness. This process of drawing distinctions and establishing linkages among reference points eventually brings about a conception of fairness to emerge that is shared by participants irrespectively of any moral disagreement they might have (for instance, regarding the

prioritization among rights); it even enables the communicative expression of that disagreement. Thus conceptualized, the societal notion of fairness does not express a pre-existing, fixed cultural identity of a community in the sense of a shared ethical life (*Sittlichkeit*); it expresses the relational nature of the social practices within which actors maintain and alter the normative order of society.

## 6.5 Emancipation Through Deliberation?

The emergence, in the process of deliberative justification, of what I described above as a shared conception of fairness is the first step in the adjustment among conflicting rights within the general conception of justice. As it spells out the issues (reference points) in relation to which normative claims acquire particular signification (both meaning and significance), the conception of fairness serves as a structured space of validity within which political judgment operates. In this sense the function of public deliberations is different from what is commonly prescribed by models of deliberative democracy. The functions of democratic discussions, in my account, is neither to spell out the just rules of social cooperation and political order, nor to bring about a consensus on a course of political action, but (1) to articulate the *valid grounds* of political decision-making and policy action; (2) to allow a *disclosure of the social origin* of lived experiences of suffering. Let me clarify this double function of critical deliberative judgment.

To the extent that public deliberations are triggered by specific grievances concerning the authoritative normative order of society, they inevitably, though initially only implicitly, address the legitimacy relationship between public authority and citizens. This legitimacy relationship is constituted by what Claus Offe has described as "the key legitimate and legitimacy-conferring state functions" (Offe 1985, 5). These are functions (i.e., from defense of territorial integrity to redistributing wealth, or protection of collective identities) that citizens expect from public authority, conditioning their obedience on the effective delivery of these functions. Before this relationship takes the explicit form of discrete functions of public authority, it is perceived by citizens in terms of reference points of practices, consequences of these practices, and rules codifying these practices that are seen to be politically relevant. Thus, suffering in individual instances of harm (say, a life lost in a hurricane) would not be considered as politically relevant (and thus would not enter society's notion of fairness) to the extent that the sources of such suffering are seen to be personal, rather than social. Such instances of suffering do not give grounds for political action, as they are not perceived as relevant to the societal notions of fairness and therefore remain outside the legitimacy relationship between public authority and citizens. However, when suffering is seen to be caused by the authoritative rules of social cooperation (and thus by the politically sanctioned social order), then forms of suffering start to matter politically – i.e., they become reference points in societal notions of fairness. Thus, if hurricanes systematically destroy the residences of the poor, this indicates that the sources of harm are social, rather

than natural and personal. Then the loss of residence caused by a natural disaster becomes a relevant reference point in societal conceptions of fairness, redefining the grounds on which political decision and action can be undertaken. In this sense public deliberations have the important function of enunciating the valid grounds of political action in the form of internally structured (via mutually related reference points) notion of fairness.

Additionally, especially when conducted in conditions of epistemic pluralism (representation of the full range of socio-economic and socio-cultural identities) public deliberations have the capacity to alter the legitimacy relationship by way of giving political relevance to previously unquestioned social practices. For instance, to return to the examples already used, deliberations might establish a link between corporate taxation and famine, between corporate right to free speech and the right to self-government, between access to sanitation and the right to life, access to internet and the freedom of expression – links that had previously not been drawn, but which, when articulated, begin giving particular signification to the debated issues of justice. Thus, once access to clean water starts to be problematized in relation to the right to life within society's conception of fairness, the provision of clean water enters the legitimacy relationship between public authority and citizens and calls for policy action.

Judgment in this formula of unconstrained (non-ideal) public deliberations allows for universal validity without presupposing universal justice. Let us recall that in the process of justification of normative claims, judgment proceeds from the particular experiences of structurally generated social harm, and its purpose is not so much the formulation of binding norms and rules, but the discernment of the social sources of injustice. Within this process, universality emerges not in a "subsumptive," but in an "interactive," way, to use Seyla Benhabib's terms. This is universality enabled not by compliance with abstract moral commands, but by the all-human experience of suffering. Moreover, the power of such judgment to compel political action is all the more stronger when public deliberations reveal the socio-structural origins of suffering: as inaction cannot be justified in the face of socially generated, and therefore avoidable, suffering. It is in this sense that unconstrained public discussions can be a venue of critical judgment with emancipatory outcomes. To enable public deliberations to play such an emancipatory role, we do not need substantive or procedural tools giving access to the moral point of view. Instead, the single condition is full representation of the socio-economic and socio-cultural dimensions relevant to those grievances that are object of debates on justice. Such representation would enable the disclosure of the social origin of lived experiences of suffering. It would do so by allowing participants to come to an understanding of the relational nature of specific grievances, as well as of their own complicity in the social production of harm by way of their participation in the mundane social practices underlying this production.[24]

[24] I provide an empirical account of this process in Azmanova (2012, Ch 9).

## 6.6 Conclusion

With typical wit, Stanisław Lec – the Polish-Jewish aristocrat, socialist and incurable maverick, remarked that executioners always wear a mask – that of justice. Rather than relying on the appeal to universal justice that human rights so strongly emanate, I have advanced here a model of critical political judgment that checks the validity of claims to justice and related to them political action against an alternative measure: that of emancipation from structurally generated suffering. I argued that the best setting for such judgment is unconstrained (non-ideal) public deliberations in which all relevant socio-economic and socio-cultural positions are represented. Such diversity prompts debates to focus not so much on the best course of political action, but to articulate, within an emerging framework-conception of fairness, the valid grounds of political judgment and policy action. Moreover, this formula of justification enables the disclosure of the structural, rather than agent-specific or community-specific sources of harm, thus pressing a more urgent call for political action. This strategy allows for universal validity without presupposing universal justice: when debates of justice are triggered by specific grievances, and the claims for redress are directed to others involved in the social practices within which suffering originates, the process of justification follows the logic of transcending individual circumstances and particular cultural contexts and reaching the socially relevant, rather than the universal, scope of validity. This scope of validity needs not be larger than the social practices within which the grievances of injustice originate; yet there is in principle no limit to the dynamics of generalization. It is the question "Who suffers?", rather than "What is justice?" that will tell judgment how far to go.

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# Chapter 7
# "It All Depends": The Universal and the Contingent in Human Rights

**Wojciech Sadurski**

As Klaus Günther notes: "the idea of universal human rights is in itself a particular European idea…." (Günther 1999, 117). This simple phrase nicely illustrates what may seem to be a paradox: a conception aimed at universalism – aspiring to universal application – cannot claim universality itself. But, of course, the paradox is only illusory: there is no contradiction between a theory's aspiration to universal implementation and its being local in its pedigree and even reach. Indeed, if a test for the coherence of a theory's universalism were to be whether it is universally espoused then no substantive conception of political morality, or of any concept, would pass such a test.

For some, this in itself may be a decisive argument against any pursuit of "universality" by any substantive conception of political morality, including that of human rights. But it need not be so: it is a non-sequitur to say that a conception of the good is discredited if not all those to whom it is meant to apply share it. Whether such a conception is rendered in these circumstances "intolerant" (because we propose to displace the values of the people with whom we disagree), or "paternalistic" (because we attempt to impart it upon those who visibly do not espouse it, and we claim that we do it for their own good), and further, whether such "intolerance" or "paternalism" is a bad thing, is a matter of substantive moral argument and cannot be pre-empted by a claim of incoherence.

I will attempt to outline such an argument in the first part of this working paper. But even if we dispel (as I will try to) the charges of an objectionable form of intolerance or paternalism levelled at a universalist project of human rights, we do not thereby satisfy ourselves about the *feasibility* of such a project – that is discussed in the second part of this paper. I will claim, unoriginally, that there are clear limits to the feasibility of the universalist project, and that the structure of human-rights

W. Sadurski (✉)
Faculty of Law, The University of Sydney, Sydney, Australia
e-mail: wojciech.sadurski@sydney.edu.au

C. Corradetti (ed.), *Philosophical Dimensions of Human Rights: Some Contemporary Views*, DOI 10.1007/978-94-007-2376-4_7,

discourse is such that certain factual factors which are built into this discourse are crucially context-dependent. I will try to identify the main categories of such factors, and provide illustrations for these categories by different case studies culled from our conventional human rights discourse.

As is clear from the description of the tasks of this paper, there in one glaring gap in the field covered. I am going to show (in the first part) that universalism is not vulnerable to certain charges usually levelled against it, and (in the second part), that it is only partly workable. But to defend a certain position against the habitual charges is not the same as to make a positive case for it, and if no positive case is made for it, the argument about incomplete workability may seem redundant: unless we can make a positive moral case for it, we do not need to enter into the argument about workability (so may be said). No such direct, positive case for universalism's moral attractiveness will be attempted here. *In lieu* of making such a positive case (which could be a theme for another paper), I will simply begin by making two assertions which will set the scene for the remainder of my argument. However, they will be precisely that; assertions rather than arguments. First, I assume that human-rights liberalism – a theory that the ultimate measure of a good society is how it contributes to the well-being of its members, and that among the criteria of this well-being, individual liberties have special prominence – has a universalist dynamic built into it. All the great, historical and contemporary human-rights declarations, from the French Declaration of the Rights of Man and the Citizen, up to the UN *Universal* Declaration of Human Rights, have been formulated in a universalistic language, and in predominantly liberal terms. The natural, inherent tendency of liberalism is to support the extension of its benefits (as perceived by liberals) to all individuals (or, in a weaker version, to all individuals who want it – a point to be discussed in more detail below). This sounds more convincing when formulated from a negative perspective; liberal defenders of human rights being committed to the protection of all persons, regardless of their particular location in a specific culture, country or milieu, against harms to their life, physical integrity, dignity and sense of self-respect. Human-right liberals (an arguably pleonastic term!) are therefore prima facie hostile to contextualization, particularism, and any linkages of the conferral of human rights to the group-based identities of individuals. As a measure of this hostility, consider the characterization – by an adherent of a cosmopolitan theory of democracy – of the very notion of citizenship as "the last pre-modern relic of personal inequalities" (Ferrajoli 1994, 288).

There is a presumption, built into human-rights liberalism, in favor of universalism – a presumption which can be overcome only by very weighty arguments. Diversity, as an allegedly inherent value of a good society, does not in itself figure among such arguments. Unless, that is, it can be further reduced to the good of the individual subjects for whom departures from the universal liberal freedoms are proposed. "True" liberalism is therefore reluctant to easily accept the arguments for cultural exceptionalism, group rights, membership-based particularities, and for community- and citizenship-conscious claims, as it suspects that all such arguments, exceptions and claims have a potential for exclusion, discrimination and

inter-group oppression.[1] As noted by the author who has made an eloquent and passionate defence of such liberal universalism:

> [I]t seems overwhelmingly plausible that some groups will operate in ways that are severely inimical to the interests of at any rate some of their members. To the extent that they do, cultural diversity cannot be an unqualified good. In fact, once we follow the path opened up by that thought, we shall soon arrive at the conclusion that diversity is desirable to the degree, and only to the degree, that each of the diverse groups functions in a way that is well adapted to advance the welfare and secure the rights of its members. (Barry 2001, 134)

A little later, he declares: "The liberal position is clear. Nobody, anywhere in the world, should be denied liberal protections against injustice and oppression" (Barry 2001, 138). One does not have to endorse all the polemical excesses contained in Brian Barry's book, to agree that there is something deeply troubling to a person committed to the value of liberty, in the project of "political liberalism" which is tolerant of moral and cultural diversity, the price of which is paid by the most vulnerable and powerless members of illiberal groups and states. Such a project, associated with the writings of "late Rawls" (meaning, basically, the post-"Theory of Justice" Rawls), Michael Walzer or Chandran Kukathas, faces the problem of overcoming particularly high argumentative hurdles, stemming from the intrinsic universalist dynamic of human-rights liberalism. Tolerance for illiberal cultures, groups and societies, which deprive their members (usually, the weakest ones, but often all) of those very human interests in liberty and dignity which activated the liberal project in the first place, is hard to square with commitment to fundamental liberal values. A conception of cultural particularism, when applied to human rights, is on very shaky ground when the "This is the way we (they) do things here (there)" argument is extrapolated from the sphere of, say, table manners or norms of decorum in dressing, to the norms exemplified by the cases of, say, killing an author of a book not sufficiently respectful of religion, or execution by stoning of a woman accused of adultery. There are, of course, many intermediate points, but the closer we get from the former to the latter ends of the continuum, the more nervous human-rights partisans are, and rightly so. Or so I would claim, at any rate.

My second assertion is of a more epistemological nature. A human-rights liberal committed to the universalistic message, need not be required to provide an argument based on first philosophical principles, say about the alleged inherent nature of human beings. In other words, a universalist need not be foundationalist. One can (indeed, if one believes in human rights, one *should*) endorse the substantial part of the "Enlightenment project," without necessarily claiming that all those human rights which follow from it can be deduced from the objectively demonstrable precepts of Reason. For my part, I would declare myself to be a non-foundationalist, Rawlsian constructivist. I seek a reflective equilibrium in which the intuitions – the fixed points of our argument – do not reflect any alleged essence of humanity which must be necessarily shared by all human beings. In the search for universally applicable

[1] See Gardbaum (1996).

human rights, I suggest that we may repeat after Rawls (whose words apply to justice, not to human rights, in the quotation which follows) that "we are not trying to find a conception . . . suitable for all societies regardless of their particular social or historical circumstances" but rather "[w]e want to settle a fundamental disagreement over the just form of basic institutions within a democratic society under modern conditions" (Rawls 1980, 518). One can be universalist (in aspiration) and non-foundationalist at the same time if only one believes that, in the process of seeking reflective equilibrium, one can convince others to one's own ideals by bringing their own convictions to bear upon the question of human rights. Whether those *others* are within or outside one's own polity which is largely bounded by national borders is a secondary and morally irrelevant issue; hence the scope of reflective equilibrium (its constituency, so to speak) may be planetary, and our theory – universalistic. As Rawls himself explains, his idea of a social contract extended upon the Society of Peoples – the "Law of Peoples" – is "universal in its reach" in that it "include[s] reasonable political principles for all politically relevant subjects: for free and equal citizens and their governments, and for free and equal peoples" (Rawls 1999, 86).

The theory assumed here is therefore universal by virtue of an actual, perceived convergence of those considered convictions which feature in the cosmopolitan reflective equilibrium rather than by virtue of a deeper moral truth about human nature or the universally valid first principles; it is universal – to continue in the Rawlsian mode – because we can hope to actually identify a worldwide "overlapping consensus" about what rights we should have (regardless of why we think we should have them), and so the nature of the justification is (to borrow from Rawls one more time) thoroughly "political, not metaphysical."

## 7.1 Intolerance, Paternalism, and Human-Rights Universalism

Our frequent reticence in making universalistic human rights claims – that apply to a society, different from ours, which seemingly does not value the same rights as we do (for the sake of simplicity, I will refer to such a society as a "distant people" but of course it may well be the people just across the border, or even within our own multicultural polity) – is usually grounded in an attempt to avoid hubris, a moral or intellectual arrogance. Indeed, we do not want to be seen as "imposing" our values on those who do not seem to espouse them. Hence, the celebrated Rawls's plea for the law of peoples – the plea which can be read as a warning against the (alleged) intolerance inherent in the missionary zeal of liberals: "If all societies were required to be liberal, then the idea of political liberalism would fail to express due toleration for other acceptable ways (if such there are, as I assume) of ordering society".[2]

[2]Rawls (1999, 59, see also 84). It should be remembered that respect for human rights is one of the requirements with which non-liberal but "decent" societies (which, in Rawls's view, are "members in good standing" of an international Society of Peoples) must comply with.

It is clear that he frames the duty to accept societies structured differently than the liberal ones in terms of toleration:

> Liberal societies may differ widely in many ways: for example, some are far more egalitarian than others. Yet these differences are tolerated in the society of liberal peoples. Might not the institutions of some kinds of hierarchical societies also be similarly tolerable? I believe this to be so. (Rawls 1999, 84)

But the conflict between universalism and tolerance is illusory just as there is no connection between "localism" and tolerance. To consider why, let us translate the notion of "localism" into that of "relativism." Is such a "translation" legitimate? After all, "localism" as used in the sense of an opposition to universalism may mean many other things, and need not be based on a meta-ethical position of relativism. However, for the strictly limited purpose of examining a connection to tolerance, the reduction of "localism" into a form of moral relativism seems to be justified. It is because the version of moral relativism declaring that the moral worth of any norm, principle or judgment is relative to the society, group or individual to which it is meant to apply, so that one and the same norm, principle or judgment may have different moral worth in different societies, a conventionalist brand of relativism, as we might call it, seems fundamentally anti-universalistic and therefore lends itself well to a defence of localism. Now there is no intellectually respectable connection between the attitude of "moral relativism" and the attitude of tolerance (understood in the simplest way as the requirement of non-imposition of our norms upon those who do not share them). As Bernard Williams famously explained, the relativism-tolerance connection claim is incoherent because the normative demand of tolerance (saying that it is wrong for people in one society to condemn or interfere with the values of another society) is itself non-relative and so escapes (and undermines) the teaching of relativism (which in its vulgar form basically says that the proposition about something being right always means "right for a given society"). Such a combination results in a "logically unhappy attachment of a non-relative morality of toleration or non-interference to a view of morality as relative."[3] When extrapolated upon the discourse of human rights, this conclusion reads as saying that there is no connection between "localism" of human rights and the value of tolerance: tolerance by definition cannot be "local" because it is about the relationship (of non-interference) *between* different systems and not *within* any of them.

Suppose I am right about the resemblance of localism to relativism for the purposes of its relevance to tolerance, and consequently that there is no strict connection between localism and tolerance. Still, it does not show that there is a positive connection between universalism and tolerance, and that universalism precludes intolerance. Universalism (the argument may go) may reveal intolerance towards the people upon whom we would like to "extend" our conceptions of human rights (when they seemingly do not share them) even if there is no necessary connection between localism and tolerance (hence, there may be some forms of intolerant localism).

[3] Williams (1982, 172); see also Williams (1985, 159).

I admit that a universalism-intolerance connection is conceptually not inconsistent; however, it is *unlikely* as a practical matter that an intolerant attitude might move someone to postulate universalist conceptions of human rights. Rather, if there is a prima facie objectionable attitude which is likely to trigger a universalist conception of human rights, it is paternalism and not intolerance. This point needs to be explored in more detail.

### *7.1.1 Forms of Human-Rights Expansionism*

Before I explain the role of the intolerance/paternalism distinction in the present context, first a digression about the forms in which any objectionable attitude, such as paternalism or intolerance, can be said to be revealed in the "imposition" of human rights. Human rights expansionism (as we may call it generically) may have different forms, and we are using different words to describe what we are actually *doing* with human rights when we are being universal: we talk about "imposing," "transplanting," "advocating," "requiring," "inculcating" or – most vaguely, "spreading" them upon different cultures. Now it does make a difference, when considering the charge of "intolerance" (and other related objectionable attitudes), at which point at the spectrum between pure advocacy and a forcible imposition our action is located. The self-righteous rhetoric, readily used by all authoritarian governments, denouncing an "interference in the internal affairs" whenever anyone from the outside criticizes their regime, should make us hostile to any identification of "advocacy" with "interference." It is one thing to argue that it would be good for X (where X may be freedom of religion, freedom of speech, or any other right) to be enjoyed by a different people; it is another to advocate the imposition of X, and it is yet another to actually try to impose X. To protest, on behalf of the value of tolerance, against the advocacy runs into the problem of self-contradiction: for if it is the tolerance which is our goal, then not only the tolerance for the non-adherents to X, but also the tolerance for the advocates of X, should be taken into account and placed on the balance.

The distinction between advocacy and interference (with various points in-between these poles) is *not*, however, a serious problem from the point of view of tolerance. For, *if we know* that the distant people do not value X highly (and this is presently accepted for the sake of argument), then the difference between the advocacy of X and the imposition of X is one of degree only. This degree naturally matters for the strength of our (putative) condemnation of human-rights expansionism but it may be bracketed for the purpose of a general discussion of principle. It would be eccentric to say that intolerance can be revealed only through a forcible imposition but never through an advocacy of a forcible imposition of our values upon those who do not share them. After all, many of us (probably, most of us) are *not in a position* to impose any human right on anyone in a distant society: all we *can* do is to advocate its imposition (as citizens, voters, writers of opinion pieces in newspapers or of letters to editors, etc.) but that does not deprive us of an opportunity

to be intolerant, so to speak. If "ought implies can," then we *ought* to be tolerant only if we *can* be so, and we can be so only if it is available to us to be *in*tolerant: it would make no sense to talk about our tolerance if there is nothing that we can do to the other people, even if we wanted.[4] So there is no obstacle towards attributing intolerance to "mere" advocacy. While the principle of freedom of speech which naturally protects "advocacy" of anything, at least *prima facie*, may trump the moral wrong of advocating intolerance, it does not make it any less wrong: it just says that the balance of moral argument is for toleration of the advocacy of (putative) intolerance. Of course, the volume of moral harm is higher in the *imposition* of X than in merely *advocating* such an imposition but the moral wrong of the former radiates upon the latter. Likewise *vice versa*, if we come to the conclusion that the advocacy of an extension of human rights to a different society is justified, then it is also prima facie justified to try to bring it about that those rights are actually extended to that other society. This is only "prima facie" justification, as all the countervailing values and side-effects have to be taken into account before the final calculus is ascertained. Even if we believe women in Saudi Arabia should have full political rights, we probably would not support sending the US (or EU) military forces there to enforce free and democratic election rights for all adult Saudis, regardless of gender.[5] This is, however, for contingent reasons resulting in a particular cost-benefit calculus; in cases when the calculus is likely to fall on the opposite side (when the violation of rights is more drastic, and the costs of intervention are relatively lower), the very idea of forcible intervention from the outside is not anathema today. The growing recognition of the correctness, in some circumstances, of the international community to intervene militarily to prevent further human-rights abuses in a particular oppressive state, confirms that this intuition is now widely accepted.[6] The upshot is that, when talking about "intolerance" and the related attitudes which may be perhaps raised by universalism of human rights, we may disregard any distinction between the advocacy and the actual imposition.

The truly important distinction is not between the advocacy of the imposition of X and the imposition of X but between these two forms of giving effect to universalism of human rights on the one hand and a statement that it would be good for a distant people to enjoy X. Consider, for analogy, Gilbert Harman's distinction between two forms of judgments: "inner judgments," which have the form of a proposition that someone ought to do something or that it is right for her to do something, and on the other hand, evaluative ought-judgments, of the sort that it ought to be the case that someone acted in a certain way, or that it would be a good thing if she acted in a certain way. Inner judgments, Harman claims, make sense only if we believe that the agent to whom they apply "is capable of being motivated by the

[4] See Sadurski (1996, 378).

[5] See, similarly, Barry (2001, 138).

[6] See, e.g., Cassese (1999).

relevant moral considerations."[7] Ought-to-do statements presuppose a commonality of reasons for action between the evaluator and an agent. It would therefore make no sense (and this is a matter of a "soberly logical thesis about logical form", as Harman assures us) (Harman and Thomson (1996) to say, for instance, that slave-owners should have not acted the way they did, or that it was wrong for Hitler to exterminate Jews. All we can say is, in a more anodyne fashion, that it would be good thing if slavery or Hitler had not existed.

I do not want to go into the merits of Harman's thesis which becomes truly fascinating (and highly controversial)[8] when he combines it with an agreement-based theory of morality which claims that all valid moral judgments presuppose prior tacit agreement or convention. I want merely to exploit Harman's distinction here in order to suggest an analogous distinction between a normative version of human-rights universalism (a distant people "ought" to enjoy the right X) and a merely evaluative statement of the form that it would be a good thing if a distant people enjoyed the right X. I wish to claim a symmetry between Harman's distinction between judgments about ought and evaluative statements on the one hand, and conferral of rights and evaluative statements on the other. Just as, in Harman, "inner judgments" are contingent upon an agent being capable of being motivated by our own moral considerations, so in the case of normative human-rights judgments we must believe that the people to whom they apply stand to benefit from the enjoyment of X. X defines an aspect of their good when we make a normative ought-judgment about extending a right upon a distant people but not necessarily so when we make a merely evaluative statement about it being "a good thing" if they enjoyed it. The latter statement may be valid exclusively by reference to our own preference (just as we say that it would be a good thing if there was a larger rather than a smaller number of biological species in the world, and we say so because it would make *our* life more interesting or colourful). Consider a distinction between: (1) "A distant people should not practice cruel penalties" and (2) "It would be good if it was the case that a distant people did not practice cruel penalties." This is the equivalent distinction to that between inner judgments and evaluative statements in Harman, extrapolated upon the language of human rights.

Note that the proposition (2) may come in two versions: (2a) "It would be good if it was the case that a distant people did not approve of cruel punishments, and consequently did not practice them," and (2b) "It would be good if a distant people did not practice cruel punishments, regardless of what they think about it." But from the point of view of the value of tolerance, both versions are equally unobjectionable although, *all things considered*, version (2b) seems more objectionable (but not for tolerance-related reasons) because it violates the principle of democracy. In the version (2a) we just make an evaluative judgment about the preferences of the people concerned: the outcome (non-practising of cruel penalties) is seen as tracking

[7] Harman (1996, 190); see also, similarly, in Harman and Thomson (1996, 59–61).

[8] For a critique, see Sadurski (1990, 70–86).

those preferences. In the second version, we make the same judgment about an outcome but we sever the link between the outcome and preferences of the people concerned. However, it is hard to attribute the wrong of intolerance to either version of such a proposition. For intolerance is implicated by the interference, advocated or actual, and no mode of interference is postulated by the proposition that the world would be better if there was no cruel punishment practised and condoned. In fact, such a proposition does not belong to the discourse of human rights *sensu stricto*. For when we engage in the discourse of human rights we are in the realm of performative statements: to make an ought statement about a human right is to postulate this right. A statement of the type that it would be good if the distant people enjoyed a particular right, when disconnected from advocacy altogether, does not lend itself to be part of the human-rights discourse, and so is outside our interest here, just as non-inner judgments are not really of interest for Harman.

### *7.1.2 The Problem of Defective Representation*

The political context in which the universalistic claims of human rights are most often made (and refuted) in the modern world, must be briefly mentioned at the outset, just to make sure that we do not conduct our analysis in a fantasy-land. The political context suggests that, more often than not, the universalistic claims are neither paternalistic nor intolerant but aim at displacing the claims of non-democratic governments to represent the true values and preferences of their people – the claims which are rarely credible. This is, politically speaking, the most usual situation in which the universalistic human-rights claims meet the resistance of "other" societies which seemingly do not share those values. In reality, the "resistance" comes from a despotic elite of this other society, and has nothing to do with the actual preferences and desires of the members of the societies which often would be delighted by an "interference." Anti-universalistic objections are then usually merely a rhetoric used by a non-democratic power elite who wants to keep its grip on the society – *vide* the ideology of "Asian values" which should be properly seen as part of the authoritarian regimes' legitimation strategy.[9] As an ex-Deputy Prime Minster of Malaysia said: "[I]t is altogether shameful, if ingenious, to cite Asian values as an excuse for autocratic practices and denial of basic rights and liberties."[10] To "respect local values" is then based on a mistake about who is the genuine spokesperson for the society in question. Our universalistic claims are then of course based on *anything but* paternalism (much less, intolerance).

The ambiguity about how to ascertain the actual preferences of a distant people and, in particular, how representative of those preferences the governments are, may

[9] See Thompson (2001, 154–65). See also, similarly, Dworkin (2002).

[10] Dr Anwar Ibrahim, quoted in, *The Economist* (1998, 25).

be seen as underlying some of the critiques of Rawls's *The Law of Peoples*.[11] The book caused a degree of dismay among those who had long postulated an extension of Rawls's conception of justice as fairness into international scale, and who thought that Rawls has now turned out to be inexplicably solicitous of various non-liberal regimes in his *Law of Peoples*. Putting the questions of economic justice to one side, we may say that the extension of the first principle of justice (as announced in *A Theory of Justice*) would result in a global human-rights principle (going much beyond the human rights minimum established by Rawls as a yardstick for "decent" but hierarchical societies). This solicitousness is based, I believe, on a question-begging connection between moral judgments and practical "feasibility" in Rawls. Responding to those who would like to ground the global principles of justice on a sort of "global original position," Rawls observes that "peoples as corporate bodies organized by their governments now exist in some form all over the world" (Rawls 1993, 50). From this statement of fact (which, in itself, need not carry any moral significance) Rawls immediately proceeds to conclude that: "Historically speaking, all principles and standards proposed for the law of peoples must, *to be feasible*, prove acceptable to the considered and reflective public opinion of peoples *and their governments*."[12]

The status of this "feasibility" proviso is unclear. Why must the principles be acceptable to the governments in addition to their acceptability to the peoples in order to pass the constructivist test of justification? After all, the law of peoples is determined in the same constructivist way as principles of justice in the conception of justice-as-fairness; hence, only the "appropriate reasons" guiding the specification of the Law of Peoples under "fair conditions" count (Rawls 1993, 32). True, the principles *un*acceptable to the governments (while acceptable to their peoples) have little chance of being universally followed but then we face the issue of non-compliance, and hence of non-ideal theory, while the principles for the law of peoples belong to the ideal theory, which aims to describe the world "in which all peoples *accept and follow* the (ideal of the) Law of Peoples" (Rawls 1993, 89, emphasis added). Rawls explicitly announces that the extension of the law of peoples from liberal upon hierarchical societies belongs to the ideal theory (Rawls 1993, 5); it is therefore not a step triggered by non-compliance, unfavourable conditions, etc., and as such, is subject to the same justification procedure as within the liberal societies. The feasibility test demanding an additional acceptance of principles by government, over and above that of their people, presupposes that they are not the accurate

[11] Dr Anwar Ibrahim, *The Economist* (1998, 25).

[12] Rawls (1993, 50, emphases added). Note that this quotation comes from an earlier article by Rawls upon which his book was to be subsequently based. I have not located an equivalent statement in the book but neither have I found any clear, or even implicit, repudiation of the view expressed in the statement. In fact, there are several implicit reiterations of this point; for instance, in the context of his rejection of an idea of "global original positions" in which all persons (as opposed to peoples or their governments) participated, Rawls adds: "The Law of Peoples proceeds from the international political world *as we see it*…." (Rawls 1993, 83, emphasis added).

spokespersons for their peoples' preferences – that they are not democratic, in other words – but this seems to put them beyond the range of the societies which are "well-ordered and just." They are therefore worse than being merely non-liberal, in the sense that they are "hierarchical," not perfectly democratic and do not respect the separation of church and state – these are Rawlsian *indicia* of decent non-liberal societies. Those societies where the governments, routinely, fail to track the preferences of its peoples must surely fall below the level of "well-ordered and just." Rawls explains that, while there is no fully-fledged democratic system required of those societies, there nevertheless must be "a decent consultation hierarchy" and public officials must be guided by a common-good conception of justice (Rawls 1993, 71–2). Since he explicitly contrasts a "consultation hierarchy" and a "paternalistic regime" (Rawls 1993, 72), (with the implication that the latter would not pass a test of a well-ordered society) it follows that such regime must track the avowed preferences of its people (otherwise a common-good conception would be purely paternalistic: the only factor that stands between the common good test and paternalism is the tracking of the avowed preferences). Either way, there seems to be no reason for those governments to be included in the reflective equilibrium on the law of peoples: either they are so non-democratic as to place themselves beyond the pale of well-ordered societies,[13] or they do track the preferences of their people in which case they need not be included because they are treated, in the theory of justification, merely as a mouthpiece for their people. The "global original position" does not need, therefore, to invite the governments into its constituency.

### *7.1.3 Intolerance and Paternalism*

But now let us put the case of defective representation of preferences to one side. Let us consider a situation in which our universalistic claims indeed meet a genuine resistance of the community upon which we would like to extend our conception of rights, and the ruling elite is at one with the large majority of the community. Under such circumstances, is it really *intolerance* that is implicated by universalist discourse of human rights? A distinction between intolerance and paternalism may be obscure in real life but is quite sharp and clear when stated in abstract terms. I will define here intolerance as an interference with other people's behaviour based on our moral disagreement with their values. (Note that it is a maximally neutral, and perhaps somewhat artificial, concept of intolerance: under this definition, intolerance has no necessarily negative connotation because if you agree with me that the values with which I interfere are morally repugnant, then you are likely to approve of my intolerance, as in intolerance for thieves or plagiarists.) Paternalism is defined

[13] Rawls admits that societies which "honor human rights" but whose members "are denied a meaningful role in making political decisions" are not well-ordered (Rawls 1993, 4).

as an interference with other people's behaviour on the basis that their values, when pursued, are (in the opinion of an interferer) harmful to them, and that the overall consequences of interference will make them better-off.[14] So the criterion which distinguishes intolerance from paternalism is whether it is relevant for an interference that, in the eyes of an interferer, the interference is to the benefit of those upon whom we impose "our" values. Such a judgment of benefit is irrelevant for intolerance but crucial to (indeed, defining of) paternalism.

This is a standard distinction, and if we are careful to respect it, it becomes clear, I believe, that paternalism is a much more likely candidate to be an objectionable basis of universalism of human rights (if there is to be one) than intolerance. Human rights identify the standards which, in the eyes of those who propound them, confer benefits upon the right-holders. They are not independent of the good of the right-holders; rather, their justification holds insofar as we believe that they are good for those upon whom we would like to extend them. It simply make no moral sense to say: "Everyone ought to have a human right X, whether it benefits them or not". Rather, one may say: "Everyone ought to have a human right X because it benefits everyone, whether they actually realize it or not." And *this* is paternalism (subject to the provisos below). It may still be an objectionable attitude but it is *differently* (and, arguably, *less*) objectionable than the attitude of intolerance. What is the significance of this distinction?

I certainly do not want to make a general claim that intolerance, *in abstracto*, is more objectionable than paternalism.[15] I am not sure how one would go about supporting such a bizarre claim, and I suspect that it is meaningless. But I believe that in the present context, that is, in the context of the discussion of universalism/localism of human rights discourse, paternalism is an attitude which has some redeeming virtues. In such context, our "paternalism" is most likely to be of a moderate version only, that is, to be based on a plausible conviction that the resistance by the members of the distant societies to the rights which we would like to extend upon them results from ignorance and oppression,[16] and that this ignorance and oppression is often deliberately supported by the power elite – so, in the end, the situation is not totally unlike the one that we have discussed in Part 1.2, namely, that "local values" merely serve as an excuse for the ruling elite's oppressive policies.

Consider the issue of gender equality and a resistance of some Muslim societies to our insistence that women should be offered equal legal status and equal professional and educational opportunities as men. The resistance of *women* themselves to such an extension of human rights upon them raises the issue of paternalism. The most plausible explanation of their resistance, if genuine, is that they are not given the necessary information and the necessary political freedom to form a considered

[14] See, e.g., Sartorius (1983, ix); Feinberg (1986, 3–8).

[15] More on this distinction, in the context of freedom of speech, see Sadurski (1999, 173–78).

[16] For discussions of such a "mild," ignorance-removing paternalism, see, inter alia, Feinberg (1986, 269–315); Dworkin (1983, 28–33).

judgment on the issue. It is not the case that we (*qua* universalistic human rights proponents) will keep insisting upon their rights to equality despite their resistance but rather that we insist that they should have an opportunity to know the full range of options, to understand the issues at stake, and to decide freely on the matter. But, of course, once we have reached that point, we have extended at least some of the "universalistic" rights upon them in the process. Another, very likely explanation for the endorsement of such practices by women is that it is a case of non-autonomous preferences described by Jon Elster as a "sour grapes" syndrome, consisting of our adaptation of preferences to what is seen as possible to achieve under existing constraints.[17] The phenomenon of the victims of discrimination or oppression accepting their fate and convincing themselves that they are actually well-off is psychologically understandable (reduction of "cognitive dissonance") and reasonably well explored, and surely it is a instance of a pathology of preference-formation. These "adaptive preferences" do not fit the scheme of respect-deserving p as figuring in traditional liberal critiques of paternalism.

Paternalism conceived as a response to defects in knowledge and in preference-formation is not a particularly objectionable one as long as it is proportionate as a remedy to these defects;[18] indeed, it may be *more* objectionable to take at face value the expressed preferences without looking into the preference formation process. If we do the latter, we are likely to cheat ourselves, and end up producing comforting rationalizations for doing nothing about the oppression elsewhere: we hypocritically satisfy ourselves, for example, that those Muslim women do not want equality of access to education or employment, or that Asian peasants really do not want freedom of the press, etc. Perhaps they indeed do not want such rights at present, and if that is the case, our relentless insistence upon these rights for them is paternalistic; but if their not wanting it is a result of the state of ignorance in which they have been kept so that they never had an opportunity to consider that there may be a different way of living one's life, then our paternalism is actually less objectionable than our avoidance of interference.

But there is yet another, even less objectionable, version of paternalism which is likely to accompany many universalistic conceptions of human rights. Consider again the case of "our" (that is, enlightened liberals in the developed democracies) attitude to the subordination of women in some Muslim countries. The ignorance-removing paternalism may be a likely motive for proselytizing about gender equality towards the *women* who seem to be content with their condition in these countries. But what about the subordinating *men*? One answer is that the voice of the oppressors should not count in moral argument, but this is to proceed too quickly. For their persistence in maintaining the patterns of women's rights violation may result from

[17]Elster (1983, esp. Chap. III). See also Sunstein (1986, 1146–50).

[18]The proportionality proviso is important because we may imagine an objectionable paternalism which is applied to people whose preferences have been defectively formed but where paternalism does not track those specific defects but rather follows from a general attitude of disregard for avowed preferences of people.

a sort of collective-action dilemma: no-one is prepared to interrupt unilaterally the state of affairs which benefits everyone so long as everyone else practices the norms included in this pattern, but everyone (or, let us say modestly, a majority) would prefer a system of gender equality, under the condition that others play by the rules of this new system (This is of course a sheer and perhaps fantastic speculation but it is provided here only *arguendo*). They might have this preference for all sorts of reasons: because they do not want to look like barbarians to their Western counterparts (for example, business partners) in a globalized world; because they do not want to feel a sense of guilt toward the women they encounter; because they want to provide their wives and daughters with fair life opportunities; because they may realize that their religion, properly articulated, does not mandate a system of oppression of women, etc. In this case, the "imposition" of the system of gender equality by human-rights universalists is a rational solution to a Prisoner's Dilemma: it identifies an optimal solution (optimal in the eyes of those to whom it applies, not just by *our* standards), and it selects the most effective means to achieve this preferred solution.

In one, simplistic, way, it still *is* paternalistic: it is an imposition of a system of rules on the basis of the best interests of those upon whom it is being imposed. However, it is a shallow notion of paternalism because it is not based on an identification of a central moral wrong of paternalism, which is the "I know better what is really good for you" attitude: such an attitude may or may not be present in an imposition of coercive rules upon some people based on their best interests. One recalls Isaiah Berlin's emphatic attack on paternalism:

> Paternalism is despotic, not because it is more oppressive than naked, brutal, unenlightened tyranny . . . but because it is an insult to my conception of myself as a human being, determined to make my own life in accordance with my own (not necessarily rational or benevolent) purposes, and, above all, entitled to be recognized as such by others. (Berlin 1969, 157)

No such insult is recognizable in the "paternalistic" solution to Prisoner's Dilemma. So in this *deeper se*nse, the practice just described is *not* paternalistic because it is not the case of displacing the actual preferences of the agents upon whom the system of rules is being imposed: rather, their motivations (as in any Prisoner's Dilemma situation) do not match their avowed preferences, and the distance between the motivations and preferences needs to be bridged by an imposition of a rule with which everyone has to conform (and, crucially, a rule about which everyone *knows* that all others have to conform with, too). Now if this form of paternalism may be plausibly attributed to some universalistic human-rights pursuit in the modern world then this is even less objectionable than the paternalism based on ignorance and other defects in preference formation because the most objectionable ingredient of paternalism, which renders it such an unwholesome attitude, is missing here: namely the breach of the actual preferences of agents on the basis of an allegedly better insight of the imposer into their true interests. To use Berlin words, there is no "insult to [one's] conception of [oneself] as a human being" implicated by such paternalism.

## 7.2 Universalism Mediated by Contingency

Nothing said so far addresses the issue of how *feasible* the universalistic project of human rights is. The contention which I would like to put forward, and defend in the remainder of this paper, is that in the very structure of human rights there are some clear limits to the feasibility of universalism: not because of any "external" reasons, such as our possible concern about tolerance and avoidance of arrogance but rather for "internal" reasons – because, *at a certain point*, universalism ceases to make good moral sense. "At a certain point" is a crucial proviso, and I will attempt below to identify some of these "points." To put it in a simplistic and only preliminary way, the normative weight of universal human rights depends crucially, for its justification, upon certain factual factors which obtain differently in different circumstances.

Roughly speaking, I identify three main versions of such mediation: empirical, justificatory and institutional. I will provide a case study to illustrate each of these three types of mediation. The first case study will be of the right to equal treatment; the second, the right to freedom of political speech, and one particular, very specific but controversial issue, namely, to what extent people should have a right to freely express such repugnant propositions as those denying the fact of the Holocaust. The third case study belongs to a different category. Rather than addressing a major substantive human right (to equality or to free political speech, as two first case studies, respectively), it will consider the question of an institutional articulation of human rights: to what extent do *constitutional* human rights require, for their effectiveness, robust articulation by non-majoritarian, non-elective and non-representative, judicial or quasi-judicial bodies?

I am not trying to say that we *should* not be universalistic in our human-rights aspirations; rather, I suggest that, to a certain degree, we *cannot* be so. There is a point at which we need to blend, so to speak, some local justificatory, empirical or institutional factors with our universal human rights, and the results will be different in different societies. One and the same right will look differently in different societies, or its concrete articulation will or will not be justified in different societies, or its institutional articulation will have to take different forms. This is, perhaps, banal. Perhaps we all know this. If this is the case, the only excuse for offering these remarks is that we sometimes tend to forget about it, so providing illustrations for these obvious truths may be a healthy antidote to what is a *real* universalistic hubris.

### *7.2.1 The Right Not to Be Discriminated Against*

Perhaps the most important "universal" human right is the right not to be discriminated against: a right to equality. It is tempting to say that the criteria of "discrimination" differ from culture to culture but this would be glib – to say that there is a right

not to be discriminated against but the criteria of discrimination are supplied by local cultures would render the whole principle of non-discrimination meaningless. For these are precisely those local cultures which often inflict discriminatory burdens upon its minorities and dissidents, and if the right to equal protection is to have an effective edge, it must provide those minorities with a protection against the discrimination perpetrated, or only even approved, by the majorities. So the point at which the *universal* right of equality blends with the *contingent* facts must be located at a somewhat deeper level of theory of equality.

The most difficult task of an equal-protection theory is to establish the workable and morally plausible criteria of non-discriminatory classifications: the criteria of what renders a classification permissible, and what taints it as violating legal equality. The most popular approach to identifying such criteria (if the popularity is to be judged by the influence on judicial case law and on constitutional drafting) is by identifying certain types of classificatory properties as discriminatory *per se*, and thus either absolutely impermissible, or at least triggering a much stricter than usual standard of scrutiny of classification. The idea is that certain traits of individuals can never serve as grounds of legal classifications in impositions of legal burdens or in conferral of legal benefits (or, in a weaker version, that when they do serve as such grounds, they call for a much stronger defense than other types of classification).

This theory – which, for brevity, may be called a "*per se* theory of discrimination" – is as legally influential as it is philosophically implausible. Indeed, if one tries to give the best possible justification to this theory, its implausibility becomes apparent. The most likely candidates for "impermissible" traits are those which are immutable, such as race (hence, the postulate of "color-blindness")[19] or gender. But if one tries to provide a coherent justification for what is wrong *per se* in drawing legal classifications on the grounds which are immutable, then the theory breaks down. The most obvious reason which springs to one's mind is connected to an intuitive feeling that there is something particularly wrong in classifying people who are selected on the basis of characteristics which are beyond their control. There may be two ways of making this general intuition more specific. One such reason would be to say that immutable characteristics are, by their very nature, much more tightly linked to the *identity* of an individual than are the alterable characteristics which are more defining of a person's changeable *roles* in society. Under this argument, "immutability" is just a proxy for identity-defining characteristics. But, unless this equivalence is a matter of definition, so that anything that is immutable is *defined* as identity-constituting (in which case the argument is circular), immutability is a very imperfect proxy for identity. There are some characteristics which are immutable but which do not define anything particularly significant about an individual's identity (for example, freckles on one's back), and there are also

[19]For some typical expression of "color blindness" in the United States jurisprudence, see DeFunis v. Odegaard, 416 U.S. 312, 331–4 (1974) (Douglas, J., dissenting); Fullilove v. Klutznick, 448 U.S. 448, 523 (1980) (Stewart, J., dissenting); in the US legal scholarship: Bickel (1975, 132–3); Posner (1974).

characteristics which *may* define an individual to a great degree but which are alterable (for example, membership of a political party). But even if it were true that immutability properly captures identity-constituting characteristics, it would still be question-begging to say that legal classifications based on identity-defining characteristics are necessarily more suspicious than classifications based on more contingent properties.

A second (and probably better) reason why one might consider "immutability" as an impermissible criterion of legal classification is on the basis of the argument that imposing legal burdens upon individuals defined by criteria which do not leave the bearers of those burdens any opportunity to escape a burdened group is unfair. The key feature which would disqualify immutable characteristics from serving as a basis for legal classifications is, therefore, that individuals so classified cannot, through acts of their own volition, escape burdensome classifications. But again, the very articulation of this reason is sufficient to discredit it. It is analogous to an argument that hate speech addressed against a racial minority would be considered less harmful if members of that minority could easily change their skin colour. Or to saying that persecution of members of a particular religion is not wrong as long as the adherents to this religion can convert to another faith. The problem with this approach to immutability is that it amounts to saying that it is less bad to attach legal consequences to those characteristics which the individual can alter in order to escape certain legal liabilities through her own voluntary action. But would it render religious discrimination less invidious if we thought that people freely choose their religion as opposed to being born into it, or acceding to it by a form of illumination from which any element of human choice is absent? Would it render classification against gay men and lesbians any more palatable if we thought that sexual orientation is a matter of individual choice as opposed to genetically determined predisposition? Would these sort of considerations be relevant to our judgment about the existence, and the gravity, of discrimination in the first place?

A "*per se*" approach to discrimination is, therefore, philosophically implausible. Neither is it warranted by our intuitive distinction between permissible and impermissible classifications. For if immutability (as the most frequent candidate for a characteristic which is allegedly impermissible *per se*) is taken to be proxy for a characteristic which an individual can alter through her own effort, then we encounter as many cases of intuitively justified classifications based on the characteristic which it is not easy (often, impossible) for an individual to alter through her own effort as, on the other hand, the illegitimate classifications based on perfectly alterable characteristics. Immutability is therefore a very defective identifier of the characteristics which would, when used as a basis for legal classifications, taint the classification as discriminatory.

So the theory of legal equality must work a little harder if it wants to identify the criteria for non-discriminatory classification – the criteria which would be both philosophically respectable (that is, would engage an explanation about the link between such criteria and that which confers moral odium upon discrimination), and also which would match our intuitive line drawn between discriminatory and non-discriminatory classifications. Such a theory most likely will refer to

some legislative motives for classification as impermissible, and as tainting the classification with discriminatory character. It will say, for example, that it is not the very fact of drawing legal classifications along certain lines which renders a classification discriminatory, and not even the fact that it produces some winners and some losers (every classification does) but rather, it is the fact that such a classification gives effect to the legislators' contempt, hostility or prejudice towards the victims of classifications – those who lose more than they gain as a result of the classification – which renders the classification discriminatory, in a truly morally reprehensible sense.

The distinction drawn above between a "*per se* theory" (which is both theoretically shallow because it does not reach the moral link with moral odiousness, and intuitively without vindication) and a motive-based theory appealing to the expressions of contempt, hostility and/or prejudice, corresponds to what Ronald Dworkin usefully characterized as "banned categories" and "banned sources" (Dworkin 1986, 383–87, 394–97). An idea that certain "categories" drawn by a legislator are symptoms of discrimination is incapable of explaining an odious moral character of discrimination, in contrast to the theory which condemns certain "sources" of classification as discriminatory. But of course, to end the matter there would render the theory of discrimination largely unworkable because we need some more precise signposts for identifying the contempt (or hostility, or prejudice, etc.) behind a given classification. In order to make a theory workable, we need some *indicia* of classification which would work as reliable indicators of contempt as a likely source of a given classification. As often is the case, we need to infer about the legislator's motive from the outcome – this is not something peculiar to a conception of legal *equality*. But we certainly cannot content ourselves with saying: people have a universal right not to be subject to classifications triggered by legislators' contempt, hostility, or prejudice. Because the disagreement about whether a given classification actually does express contempt etc. largely replicates a more fundamental disagreement about whether such a classification is unjust, and the right against unjust classifications, without more, is meaningless as a universal standard – a standard of human rights which we would like to recommend to societies other than ours. We need some more workable *indicia* than some a vague standard.

What such *indicia* may be? A prior question to be answered should be, "how do we go about searching for such *indicia*?" The answer I provide appeals to a familiar method of trying to match the general principles with our intuitive convictions that some actual patterns are unqualifiedly immoral – a method of reflective equilibrium. Here, we need to match our intuitive responses to what is wrong about some undoubtedly odious discriminations with our general theory that discrimination is a legislative expression of contempt. "Reflective equilibrium" in Rawls's explanation consists of achieving a rough coherence between our "considered convictions of justice" (understood as specific and intuitive moral responses to situations lending themselves to evaluations in terms of justice) and our "principles of justice" (understood as general and abstract moral maxims), (Rawls 1972, 19–20). This methodology seems to be particularly well-suited to our purposes here. In the area of anti-discrimination law, many of us are relatively uncertain about whether remedial

racial preferences or protective bans upon the employment of women in some positions or the exclusion of women from combat duty are discriminatory or not. Furthermore, even if some of us have strong views about these matters, we face a disagreement among rational people arguing in good faith about acceptability of those regulations. But we do not have similar doubts, and we do not face a similar disagreement in our societies, about whether racial segregation in public transport is wrong, whether refusal of voting rights to women is wrong, or whether religious tests for public office are wrong. The point is to elaborate the test of prejudice, hostility and other wrongful motives, using the latter (unquestionable) cases of discrimination as a starting point, and then be able to apply them to those actual moral disagreements and dilemmas which we actually face in our societies.

I have three such candidates for *indicia* of contempt which may emerge from such a process of reflective equilibrium: three *indicia* which are present in indubitable discriminations, and which connect with contempt, and yet give more traction than contempt itself. The first *indicium* found in all indubitably objectionable discriminations is that they imposed legal burdens upon those who had been (before the law under scrutiny) already in a legally and socially disadvantageous situation – the law in question did not reverse, but added to, the pre-existing (that is, present before the law under consideration) pattern of disadvantage. It has the effect of perpetrating, strengthening or freezing of the existing pattern of disadvantage. The second *indicium* is that truly objectionable discriminations can be characterized as the imposition of burdens by those who enjoyed better access to law-making (either through numerical strength or for other reasons) upon those who lost out in this classification. It can be therefore characterized as exploitation of access to law-making power in order to improve one's own position. Third, all truly odious discriminations have had a stigmatizing function. Apart from all other burdens, they also placed on its victims the stamp of inferiority, whether moral, intellectual, or both. The burden placed by a classification upon the losers carries also the symbolic message that a particular group is unworthy or incapable of performing certain social tasks, or enjoying certain social benefits, to an equal degree as other groups.

Now it would take a long argument to defend the use of these three *indicia* (a task I have attempted elsewhere), (Sadurski 1998, 93–102), and all that I can do here is assert that they fare quite well in a reflective equilibrium test. If one thinks of some paradigmatically invidious discriminations, such as the exclusion of women from education or work, or denial of voting rights to members of racial minorities, one finds all these three features prominently present in these classifications. And not just present but also functionally related to the contempt, prejudice or hostility underlying the lawmaker's attitude towards the victims of classification. To confirm this insight, consider why the "reverse discrimination" – affirmative action based often on those same criteria of classification as those which had featured in more paradigmatic discrimination – is so much less obvious a candidate for objectionable discrimination. It is because it usually lacks some of the three (often, all three) *indicia* proposed above. It is not an classification which adds to the already existing pattern of disadvantage. It is not an act of imposing burdens upon others by those who have privileged access to law-making. And nor does it carry (at least, it is not

supposed to carry) a message of inferiority of those disadvantaged by the classification (here, the non-beneficiaries of affirmative action schemes). To the degree to which any of these *indicia* are present in a purported affirmative action, its benign (and morally unproblematic) character is correspondingly reduced.

It is now time to connect this argument with the "universalism of human rights" discourse. Suppose one claims that all should benefit from a legally recognized protection against discrimination, and that the state should not discriminate (or condone discrimination) against any groups and individuals. If my argument about a plausible conception of non-discrimination is correct, then this claim translates into the claim that those legal classifications which carry the three *indicia* just described should be struck down, or (in a weaker version) should be treated with the utmost suspicion, and be allowed to stand only if absolutely necessary to achieve particularly pressing goals. But of course each of the three *indicia* listed above is, in an important sense, "local," and it responds to patterns and factors which are context-dependent rather than universal. The first *indicium* relies upon a baseline of a pre-existing pattern of disadvantage in a given society; a pattern which may or may not be replicated in a different society. The second *indicium* makes a reference to an actual distribution of opportunities to access and influence the law-making process; it identifies the groups which are closer to the process and those which can be seen as "permanent minorities" (perhaps "discrete and insular minorities") whose voice on legislative proposals is rarely heard and rarely taken into account. The third *indicium* appeals to a cultural symbolic meaning conveyed by a classification: does the message imply, in the minds of those who receive it, that those burdened by the classification are somehow inferior, less worthy, undeserving of different treatment? Is the stigma attached – in a given society, at a given time – to the particular burden?

None of these *indicia* lend itself to a universalist articulation. Put together, they create a template which can be applied only if we infuse them with the factual circumstances of a given society, of its own patterns of disadvantage, the structure of its ruling elites and its prevailing symbolic meanings of stigma. The *limits* of universalistic claims of a right to equal protection are reached when we try to articulate the morally plausible standards of non-discriminatory classification for a specific society.

We would not have that problem if the "*per se* theory" (or, to use Dworkin's language, a "banned sources" theory) was plausible. We would then be able to say, in a universalistic vein, that whenever and wherever legal classifications draw the legally significant distinctions between citizens along the lines of their race, or sex, or religion, or whatever other individual property – they violate a universal principle of non-discrimination. But such a "*per se* theory" is profoundly implausible, for reasons indicated before, and so we are left with a theory which can claim strong moral plausibility, but which in the balance deprives us of the luxury of universalistic articulation. When asked, "is a particular racial classification in a particular country consistent with the rule of non-discrimination?", we must answer "It depends." Fortunately, if we accept the theory outlined about, we know what it depends *on*. But to give a considered answer to the question we need to look at the local circumstances through the lens of our three proposed *indicia*, and the answer will differ from place to place, from country to country, and from epoch to epoch.

### 7.2.2 *A Right to Outrageous Speech*

My second case study is about the universal human right to free speech, more specifically, about free political and academic speech, and even more particularly, free speech the contents of which are likely to hurt deeply – and for understandable reasons[20] – many people who will be likely to consider it as a deliberate and grave insult at their national, ethnic or religious group. To focus the examination even more narrowly, I will consider just one example of such speech, namely the case of Holocaust denial.[21]

My choice of the case study is dictated by several factors. First, it is a real and lively issue in a number of contemporary democracies (the so-called historic "revisionists" made themselves known and heard in countries as diverse as Poland, France, Germany, the United States, the UK, Canada and Australia). Second, it is the issue which elicited diverse responses in those countries – with some (France, Germany, Austria) introducing formal legal sanctions for expressions of such views, and other (notably the US) considering these expressions as belonging to the sphere of constitutionally protected speech. Hence, from the point of view of the question of universality of rights, the case provides an interesting litmus test for universality: if the right in question is universal, and if it extends to this particular form of speech, then we have good reasons for remonstrating with those countries (such as France or Germany) which prohibit these expressions, and urge them to comply with the universal human right. Of course, it is important to remember that the Holocaust denial law is used here merely as an instantiation of a broader right, that is the right to unpopular or hurtful speech on public matters. To postulate a universal human right to deny the fact of Holocaust sounds bizarre but to postulate a right to political speech which may hurt many of the listeners is not.[22]

This particular case study is significant because it encapsulates at least two, independently significant, themes in traditional thinking about what makes free speech valuable even if it is deeply offensive and hurtful to some. First, that speech which aims at making an academic or scholarly finding (however misguided) should never

[20] As opposed to the speech which hurts people because of their unusual, eccentric sensitivities.

[21] For two good discussions of different legal approaches to Holocaust denial, see Schmidt and Vojtovic (2000, 133–58); Cooper and Williams (1999, 593–613).

[22] Universality, just as "fundamentality," of any given right can be easily ridiculed by formulating a right at a very concrete level but the rhetorical force of such a ridicule disappears when we remember that these concrete formulations are instantiations of a more abstract right, as the dissenting judges in *Bowers v. Hardwick* announced in the opening passage of their dissent: this case is no more about "a fundamental right to engage in homosexual sodomy," as the Court purports to declare, than *Stanley* v. *Georgia* was about a fundamental right to watch obscene movies, or *Katz v. United States* was about a fundamental right to place interstate bets from a telephone booth. Rather, this case is about "the most comprehensive of rights and the right most valued by civilized men," namely, 'the right to be let alone,' *Bowers v. Hardwick* 478 U.S. 186, 199 (1986) (Blackmun, J. dissenting) (citations omitted).

be censored or penalized because the best way to pursue the truth is by letting all the hypotheses and theories compete freely in the marketplace-like environment – a variation on Millian anti-censorship theme.[23] Second, that speech which is about matters of public (and more specifically, political) interest deserves particularly stringent protection regardless of its contents and regardless of the hostility it may provoke because any attempt to censor some speakers in that domain reduces the sovereign position of the people exercised through democratic self-government. This may be referred to as the Meiklejohnian theme.[24] The case study selected here seems to implicate both the Millian and Meiklejohnian themes because it is both about an alleged statement of a historical truth and an intended political position about the alleged exploitation by Jews today of the Holocaust. The fact that, to most of us, the denial of the Holocaust is an absolute historical nonsense does not make it any less worthy of protection under the Millian theory, and the fact that it is morally and politically abhorrent does not diminish its claim for protection under the Meiklejohnian thesis.

Suppose you believe (as I do) in the two themes of the free speech argument – the Millian and the Meiklejohnian themes – as providing good reasons for a robust protection of speech even if it is offensive, harmful and patently untrue. Suppose you believe that it is a universal human right that, as a general proposition, all societies should tolerate speech on public and academic issues even if many people are upset by it, and even if most of us think the speech false. Or, to put it more moderately, and from a negative side, you believe that it should be at least a universally recognized part of the right to free speech that the very fact of its patent falsity and its strong offensiveness are *not* sufficiently good reasons for its suppression. No genuine right to freedom of speech (you believe) can survive the proviso that an act of speech, to enjoy protection, must be true and must be inoffensive. And since you believe, let us assume it for the sake of argument, that the right to free speech, at least as far as speech on public and academic matters, should be universally recognized, this proviso forms a part of your understanding of universal human rights.

But it does not settle conclusively the question as to which legal regime of Holocaust denial conforms with the universal principle of freedom of speech. The proviso that offensiveness and falsity are not sufficient reasons for speech suppression does not imply that *any* offensive and/or false speech must be, in virtue of its offensiveness and/or falsity, legally protected. For the offensiveness may be of such magnitude that the presumption in favour of speech protection regardless of its marginal offensiveness will be rebutted here. And the harm incident to its falsity may be

[23] Its *locus classicus* is of course the second chapter of John Stuart Mill's "On Liberty." Perhaps the best-known modern judicial statement of this idea is the United States Supreme Court's assertion that "[e]ven a false statement may be deemed to make a valuable contribution to public debate," New York Times v. Sullivan, 376 U.S. 255, 279 n. 19 (1964). A modified recent restatement of the theory may be found in Sunstein (1993).

[24] See Meiklejohn (1948); see also Meiklejohn (1961).

of such gravity that it will defeat all usual arguments for protection of harmful speech.[25] This is the proviso which Dworkin had expressly attached to his initial "rights as trumps" articulation: to say that rights trump utility considerations means only that a simple net disutility of a right-exercise is not a sufficient ground for preventing this exercise, but at a higher level of the scale of disutility, we may be authorized (indeed, obliged) to stop the exercise of a right without at the same time denying the trumping characteristic of this right.[26]

So where does it place us with respect to Holocaust-denial laws? "It all depends," again, although this time, it depends on the factors that are somewhat different than those depicted in the case study of discrimination. Let me suggest an intuition with which to work through. Those who do not share the intuition, will admittedly have no reason to follow me in the attempt to unpack it and provide rationalization for it – this will not be *their* reflective equilibrium.[27] But when I think about Holocaust denial (and even more generally, anti-Semitic and other hate speech) I have this intuition – I do not object to this type of speech being legal in the United States (where it is legal) or in Canada (where it is illegal), but I do object to such speech being protected in Germany (where it has been declared illegal) and perhaps in Austria (where it is also illegal).

Those who do not find this intuition outlandish might ask themselves a question about what accounts for the difference between the United States and Germany in this respect. One obvious reason is a matter of sensibility: one may be committed to a robust principle of free speech, and normally be prepared to tolerate even extremely unpalatable consequences, but one feels just *sickened* by the fact that the country which perpetrated the Holocaust on Jews in Europe only 60 years ago could now legally protect its own citizens who wish to deny that it actually happened. Such a feeling of nausea does not necessarily connect with the idea that the offence to the memory of the victims of Holocaust, and to the sensitivities of their survivors, is higher when the lie is uttered in Berlin than in Boston – though this may be the case. It is just a much higher violation of sensibility norms.

If that is all there is to the distinction between (say) the US and Germany then it arguably gives us no mileage in providing a plausible rationalization to our initial intuition. But there may be more. There are different types of social harms which may result from speech, and some are disallowed from figuring as justifications for restrictions on speech (for example, "harm" consisting of lowering the reputation of politicians as a result of political satire) while others – not (for example, harms consisting of weakening of national security resulting from willful publication of military secrets). There are many harms which lie in-between such obvious cases: they are not absolutely disallowed from figuring in justifications for speech suppression but the threshold is placed relatively high for showing that harm was

[25] See Schauer (1982, 7–10).

[26] Dworkin (1978, 92).

[27] As is clearly the case of Cooper and Williams (1999).

sufficiently severe and/or sufficiently likely. Something like a doctrine of "a clear or present danger" (or its equivalents) acts as threshold-lifting devices, and such doctrines place a high presumption (with varying degrees of ease of rebuttability in various types of cases) in favour of legal protection for speech.

A danger to the democratic system and to peaceful stability of society resulting from the growth of extreme political movements is one type of evil which may result from certain types of speech, and is a sort of harm that lies between the two extremes just noted. It *may* figure among the justifications for speech-suppression but the threshold for showing the reality of threat must be relatively high. This proposition is, obviously, a mere assertion which would call for a further argument, but for the present purposes I will take this assertion to be plausible. And this may provide us with an explanation of our initial intuition about Holocaust-denial laws. Holocaust denial is (as I would suggest without risking sounding eccentric) an expression of anti-Semitism masquerading as a historical theory. It is a part of a larger package of an ideology which maintains that Jews cannot be trusted on anything, even on their own past. As such, it is not merely a veiled incitement to societal distrust toward an ethnic group.[28] It is also a useful symbolic rallying theme for extreme anti-Semitic movements. But the danger that such a speech is likely to provoke is different in different countries. In Germany, with racist and other extreme-right movements reaching a high point of political mobilization, the threat is real that an unrestricted circulation of openly racist propaganda may bring the democratic stability to a point of crisis. In the United States, the groups which feed on the literature such as "historical revisionism" are part of the political folklore, just as are flat-Earthers and Montana separatists: probably irritating and deeply offensive to many, but very unlikely to reach a capacity to challenge the democratic system to its core.

The question about applicability of this particular "universal human right" – the right to express publicly one's political opinions and one's scholarly findings – depends therefore upon some contingent local circumstances, in this case, how is the exercise of this right likely to undermine social stability of a democratic system? This boils down to a debate about "intolerant democracies." Some democracies have urgent reasons to be intolerant toward undemocratic movements if the integrity of their democratic institutions is at stake, while others can afford to be tolerant towards extreme, anti-democratic movements.[29] This is not a matter of an intellectual choice of one theoretical conception of democracy as opposed to another but rather a matter of political urgency which is of contingent and local character. And so is the case with human rights in general, and this particular human right in particular.

[28] As Professor Troper concludes, with respect to the French *loi Gayssot*: "En punissant la négation du génocide des mêmes peines que l'incitation à la haine raciale, [le Parlement] présume qu'elle est une acte équivalent parce qu'il est de même nature et qu'il porte comme lui atteinte à des intérets qui doivent être protégés" (Troper 1999, 1252).

[29] See Fox and Nolte (1995).

To the question whether one should have a right to speak one's mind freely even if it may be seen as offensive or false, the answer is again, "It depends," and again, we have a rough idea of what it depends *on*. The factors which are decisive in this case have a form of empirical evidence about what is the level of mobilization and organisational capabilities of the extremist movements which use this form of speech as their tool, what is the societal support for these organizations and the level of social frustration which feeds the social demand for these movements, how likely they are to perpetrate acts of violence and ignite social instability, etc.

Of course, to an orthodox civil libertarian such criteria are anathema. The right to free speech, we will be told, cannot be guaranteed under the condition that this speech will be ineffective. But "effectiveness" of speech in terms of leading to social disturbances is an argument which fits the proportionality or necessity analysis in the European tradition (whether a restriction is necessary in a democratic society to avert certain, clearly specified, social evils) or "strict scrutiny" of restrictions of constitutional rights in the US constitutional parlance. The contingent factors related to the facts which affect the likelihood of the dangers which a restriction of a right permissibly averts, enter the analysis of how a universal right blends with a local situation.

### *7.2.3 Extra-Political Articulation of Rights*

My third case is not about a universal human right but about an allegedly universal institutional device to give effect to *constitutional* rights. This may be therefore seen to be outside this topic. After all, not all constitutional rights are human rights, and further, the substance of constitutional rights is a separate issue from that of their articulation and protection. But these things cannot be so neatly separated from each other. The universal move of constitutionalization in the contemporary world has led to the situation of a virtual inclusion of human rights into the ambit of constitutional rights. It is hard to think of rights which have been postulated as human and which have not been (at least in some places) constitutionalized. Consider Rawls's catalogue of human rights which, as he says, express a minimum standard for all decent societies: the right to life and security, to liberty, and to formal equality as expressed by the rules of natural justice (Rawls 1999, 65). All these rights form a canon included in modern explicit or implicit constitutional charters of rights. And when constitutionalization have been seen as a paramount form of a recognition of a human right, it has been often thought that constitutionalization of rights is meaningful only when accompanied by certain forms of protection of those rights, not only against oppressive practices of law enforcement and private power, but also against the vicissitudes of political process. It has been therefore posited as a universal requirement of constitutional rights that the power of articulating them should be vested in some or other extra-political institutions, typically of judicial or quasi-judicial character.

But how "universally" valid is this demand? To see it, one must explore the reasons that the advocates of extra-political articulation of rights (for example, through a system of judicial review) provide. I hope that I am fair to these theories and that I am not constructing a man of straw when I claim that all the main arguments in favour of extra-political articulation of constitutional rights boil down to two types of arguments stemming from distrust and from deliberativeness. The first argument is straightforward. It claims that we cannot expect our democratically accountable representatives (and those directly dependent on them) to produce a fair articulation of constitutional rights because it was distrust of them that activated constitutionalizing rights (and thus, put them outside the day-to-day political agenda) in the first place. The actual reasons for this distrust may have to do with our awareness of various incentives which act upon the democratically accountable politicians, and those incentives are not conducive to the fairest articulation of vague constitutional rights. In particular, those incentives support the oppression of minority by majority because there are not enough votes in supporting minority causes, and it is precisely the protection of minority against majoritarian oppression which is one of the main rationales for constitutionalizing human rights.[30] (Note that, contrary to some simplistic interpretation, the argument from distrust is not a version of the "*nemo iudex in res sua*" precept which is sometimes presented in the form that those who made the law should not sit in judgment on constitutionality of this law. The invocation of this principle in the context of scrutinizing the laws *in abstracto* under criteria of constitutional rights is an obvious mistake, for reasons so convincingly spelled out by Jeremy Waldron).[31]

The second fundamental argument in favour of an extra-political articulation of constitutional rights connects rights-reasoning with the concept of deliberation. It claims that the reflection which optimally leads to the fairest possible articulation of rights is deliberative (or discursive, in the meaning of the word given to it by Philip Pettit), (Pettit 2001, 90–93), rather than representative in nature. In other words, that it consists of dispassionate consideration of all possible arguments which can be mustered in connection with the given issue, in circumstances in which all the parties to disagreement may in the conditions of equal freedom present the best possible case for their argument, and the outcome is dictated by an honest choice of the option for which the best reasons can be produced. In contrast, the representative type of reasoning consists in a mere articulation of different preferences (or desires) avowed by those who are represented, and the choice is dictated by a procedure which envisages a content-insensitive manner of aggregating, and eventually selecting, the strongest and the most widespread preferences (such as, majority rule). As the argument goes, a political system (typically relying upon the representative institutions and the executives accountable to them) has a representative nature while extra-political institutions, such as judicial or quasi-judicial ones, are

[30] See e.g. Hart Ely (1980, 135–79).

[31] See Waldron (1998, 280–81).

deliberative in that they are guided by the strength of the reasons (as opposed to the strength of preferences) which can be adduced to alternative options.

This may appear to be a drastic reduction of the wealth of arguments about how best to articulate rights in an extra-political way – after all, the arguments about the rationales for judicial review are probably the most fertile ground for constitutional theory, certainly in the United States – but it seems to me that most of the important argument boil down to one of the two just mentioned. In turn, these two arguments are independent from each other: the argument from trust does not hinge upon the deliberative nature of an institution (we can distrust an institution for reasons other that it is non-deliberative), and, on the other hand, the expectation of deliberativeness is not necessarily based on the trust that perverse incentives will not affect a given institution.

How "universal" are these two types of arguments? Hardly at all. Consider first the issue of trust. The argument for extra-political articulation of rights proceeds usually along the negative path: that the political procedures and institutions cannot be trusted to avoid irrelevant (especially, selfish) concerns in forming authoritative articulations of rights. First of all it needs to be noted that what matters is how trustworthy is one institution (or one set of institutions) compared to another institution (or another set of institutions) in its actual functioning.[32] It is no good to compare a real, unwholesome description of a political institution with an idealized model of an extra-political one. Whether we can trust a particular institution more than the other one that it will strive to articulate human rights in the fairest possible way rather than pursue the self-interest of its members depends on a great variety of factors. Most of them (though not all)[33] are of institutional character, that is, they are related to the formalized patterns of screening, selection, accountability, length of term, revocation etc. of those who people those institutions. For example: limited term with no possibility for reappointment may promote self-serving behaviour consisting of adjusting one's action to post-term career; limited term, with the possibility of re-appointment, may promote self-serving behaviour of trying to ingratiate oneself with those political agents (or citizens) who have the greatest influence on re-nomination and re-appointment; life tenure may promote a disregard for changing social values and perceptions regarding the articulation of a particular right; specific professional or competence-related conditions for appointment may promote various types of *déformation professionnelle*; transparency of official proceedings leading to an authoritative articulations of rights may increase the importance of good reputation (avoidance of public shame) as a motive for behaviour and thus an impediment

[32]For an impressive statement and elaboration of the "comparative institutional" thesis, see in particular Komesar (1994).

[33]There are also significant cultural factors. What is the dominant social expectation about certain types of people who are encouraged to stand for election, or to apply for nominations to certain bodies. These cultural expectations are of course, themselves, *partly* determined by institutional factors (what are the procedures and formal criteria for election or nomination).

for self-serving conduct (but may also, under less favourable circumstances, engender demagogy and populism), etc. There is a long list of institutional variables which produce different types of incentives, each of which may affect dishonesty, self-serving conduct, myopia or sheer stupidity. Different constellations of these institutional variables – different institutional designs – and their corresponding incentives may affect differently our judgment about comparative "trustworthiness" of one institution vis-à-vis another, and there is no universal reason to believe that political (representative) institutions are affected by perverse incentives-creating factors necessarily to a higher extent than *any* extra-political institutions.

In this context it is perhaps useful to recall Pettit's distinction between two different strategies in institutional design: the deviant-centred strategy and the complier-centred strategy. The former presupposes that people are likely to cheat whenever they can do so with impunity, and so the institutional design is focused on the elimination of pathologies, but in the process, it fails to provide optimal incentives for the non-knaves (Pettit 1997, 215–30). The complier-oriented design presupposes a more optimistic view of human nature, namely that most people are not knaves and so it tries to maximize the opportunity for valuable action though it also provides some sanctions of knaves (without, however, focusing all its attentions on the prevention and punishment of knavish action). These two strategies correspond to two very different sets of specific "screens" and "sanctions" (to use another useful distinction by Pettit), and of course both have their advantages and benefits. It may be the case that within one and the same system, the relative proportion of deviant- v. complier-centred strategies varies from one institution to another but these proportions will also vary from country to country. For example, election laws in different countries may reflect different approaches towards deviant- v. complier-centred strategy. As a result, in some countries we will have stronger reasons to suspect members of political institutions of behaving in a self-serving way, and in other – weaker reasons for harbouring such suspicions.

Now consider the argument from deliberation. Political, representative institutions are considered to be inherently less deliberative than the extra-political ones because, what ultimately matters in the former is a representation of the preferences rather than contemplating the good reasons which can be provided for opposed arguments. Of course, in order to make a link between extra-political institutions and the best articulation of rights via the medium of deliberation one must presuppose that human rights are indeed better articulated, compared to other political standards, through deliberation than through representation. After all, we do not use the deliberation-based antipathy to parliaments as a basis to deny them the powers to enact laws in general (even though these laws might be thought to be superior if resulting from deliberation rather than mere representation of preferences) or control policies of government. Suppose, for the sake of argument, that a link between rights and deliberation (as the superior method of the best articulation of rights) can be established. There is, however, no reason to accept in abstract terms a proposition that representative institutions are *eo ipso* less deliberative than the non-political ones. After all, the aggregation of preferences which is one of the functions of

parliaments, may (though does not have to) be mediated by the deliberation about the relative reasons which can be supplied for various conflicting preferences in question. And the virtue of representative institutions, which compares them favourably to direct democracy, is precisely that they allow for a deliberation and consideration of conflicting arguments. On the other hand, just as representative institutions make room for deliberation, so there may be a strong streak of "representation" in extra-political institutions, such as courts. If one considers the literature on the Supreme Court of the United States, for example, one finds as a very strong theme the idea that the Justices behave as if they were representatives of certain dominant political forces which are responsible for their selection – the theory which most recently has been labelled as that of partisan entrenchment (Balkin and Levinson 2001, 1066–83). In this perspective, the position of Supreme Court justices is not unlike that of Senators except that the former have longer tenure.

The allegedly neat distinction between political and extra-political institutions along the lines of representation and deliberation is therefore bound to collapse: both types of institutions display varying degrees of both types of decision-making processes, and which prevails is a matter of institutional design which varies from place to place. There are a number of variables which may promote the incentive and the opportunity for deliberation. One is the obligation to present publicly the reasons for decisions. If an institution is expected to elaborate on the reasons it had for a particular decision, then the risk that the decisions will be taken for wrong reasons, or for no reason at all, is somewhat minimized. Another is the obligation to defend its decisions after they have been taken, whether there are any *fora* in which members of the institution can be questioned, criticized and challenged with respect to decisions already taken. Anticipation of such possibility will of course be a counter-incentive against insufficiently justified decisions. The established conventions for argument and grounds of decisions are another variable. Members of a particular institution may be too restricted, through the established conventions about what counts as a good ground for decision, to reason in terms conducive for articulation of rights. For example, a highly adversarial model of judicial argument may become a straitjacket which will screen out a number of rights-relevant reasons from figuring in the reasoning. The sources of allowable information, the competencies of the members of an institution, the power of self-initiation of the process for rights articulation, etc. – all these variables will affect how a particular institution, whether political or extra-political, will engage in a deliberation as opposed to merely asserting the preferences for this or that decision.

And so, with respect to the question of whether extra-political institutional forms for articulation of human rights are to be preferred to political, democratically accountable institutions, the answer must be again, "It depends." This time, it depends mainly on institutional variables. The forms of institutional design which create different incentives and opportunities to avoid self-serving behaviour and to engage into deliberation about reasons for a decision about how best to articulate the constitutionally recognized human rights.

## 7.3 Conclusions

We have now considered three different cases of how a universal human right blends with local conditions to result in different outcomes, as a function of these different local variables. These three types of local variables belong to different categories. In the first case (the principle of anti-discrimination) an answer to the question about whether people have a right to be protected against certain types of official classifications depended upon certain facts which figured in the very justification of that right. They figured in the right only indirectly and negatively (the three factors which, as I suggested, were the plausible *indicia* of contempt in classification, provided us with good reasons for hostility towards certain classifications, and so grounded an individual's human right to be protected against them), but figured there nevertheless. They identified to us – as *indicia*, or as plausible symptoms, if you like – the presence of factors which justify our hostility towards certain classifications, and therefore which justify our extension of a protection of individuals against these classifications. As this protection against contempt-based classifications is universally justified, we consider it a universal human right; but as the facts which suggest the presence of such factors differ from place to place, the blending of a universal right with the local conditions will produce different local contours of that right.

The second type of variable is of a somewhat different character. The variables on which the existence of a certain human right depended were of empirical character, just as in our first category, but they were not related to the justification of a right but rather to the outer boundaries of the right. They had to do with the important goods which collide with a given right, and which therefore argue for a more or less restrictive approach to the scope of a given right. They are not "justificatory" in the sense that these facts do not appertain to the reasons we have for protecting such a right in the first place but rather they indicate the point of the conflict between the right and other social goods which may enter into collision with the goods protected by that right.

The third variable is of an institutional character. It refers to some specific characteristics of institutional design which, of course, vary from country to country and which affect the way the incentives and opportunities for rights articulation influence those charged with such articulation. Without looking at the specific institutional design, we are unable to say what general type of arrangements for rights protection (parliamentary supremacy? robust judicial review? quasi-judicial bodies charged with reviewing laws under constitutional rights?) is superior to others.

One should not exaggerate the differences between these types of variables. "Justificatory" variables are of empirical character, "empirical" variables may figure in the justification for the definition of a scope of a right, "institutional" variables are affected, for their function, by such empirical phenomena as the patterns of political culture, etc. And they are not meant to be an exhaustive list. Put together, they provide an illustration for a proposition made at the outset: there is nothing intolerant (perhaps only paternalistic, but in an unobjectionable way) in formulating

human rights with a universalistic aspiration – meant to apply to different societies from our own – but for their articulation, they will blend with local, contingent circumstances in different ways, resulting in different local shapes of universal rights.

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# Chapter 8
# Tiny Sparks of Contingency. On the Aesthetics of Human Rights

**Giovanna Borradori**

> The more people know about one another,
> The less they want to recognize other peoples as their equals,
> The more they recoil from the ideal of humanity (Arendt 1952, 235).

The concept of human rights acquires a full political and juridical formulation in the two master-documents of the Enlightenment: the American revolutionists' Declaration of the "inalienable" right to life, liberty and the pursuit of happiness, and the French Proclamation of the "natural" rights of man and the citizen, including liberty, property, security, and resistance to oppression. But the history of human rights, especially from the perspective of the movements that rose to defend them, was profoundly marked by something that neither of these two documents could have foreseen: the invention of the photographic image known as the heliograph, in 1816, later perfected to be commercialized as daguerreotype, in 1836.

The question of how to represent human rights *vis a vis* both the truth of their essence and the formation of a humanitarian consciousness ready to stand by their implementation has intersected the history of photography from very early on. For example, circulating "atrocity photographs"[1] has been a key strategy of one of the earliest humanitarian campaigns launched at the end of the nineteenth century to stop King Leopold of Belgium from continuing to perpetrate crimes in his personal colony, the Congo. Visual documentation of Leopold's massive acts of cruelty was disseminated in the public sphere through photographs published on newspapers and slides projected in magic-lantern shows at lectures and protest meetings in the United States and throughout Europe. What was perhaps the first emergence of a global humanitarian consciousness is thus largely due to the circulation of such atrocity photographs, which exposed how, between 1880 and 1920, an estimated ten

[1] See, Adam Hochschild (1999), and Sharon Sliwinski (2006).

G. Borradori (✉)
Department of Philosophy, Vassar College, Poughkeepsie, NY, USA
e-mail: giborradori@vassar.edu

C. Corradetti (ed.), *Philosophical Dimensions of Human Rights: Some Contemporary Views*, DOI 10.1007/978-94-007-2376-4_8,

million Congolese died of starvation, disease, and various forms of torture, including rape, amputation, and whipping.

As the twentieth century forced the world to reckon with the unfathomable violence of the Holocaust and the Stalinist gulags, and subsequently with other genocidal pursuits such as the Pol Pot's regime in Cambodia, the Hutu's extermination of the Tutsi in Rwanda, and the ethnic cleansing of the Bosnian Muslim population at the hands of Serb militia in Bosnia, a robust discussion ensued surrounding the ethical import of photographs and other visual documentation of such atrocities. In rarefied academic circles the position that photography is structurally unable to either tell the truth about what it represents or provide enough context to spur the viewer's critical engagement with its subject matter has run side by side with debates in photojournalism about how photographers ought to capture suffering, or whether they should capture it at all. Since photographs are ineluctably constructed, if only by the sensibility of who takes them, the ethical quandary in both the academic and photojournalistic fields has centered on whether it is possible to expose the pain of others without feeding on the public's thirst for sensationalist consumption. Or even more darkly, whether it is possible not to aestheticize unimaginable pain, thus translating the private torment of a helpless victim of abuse into a photographer's act of self-expression.

In this paper, my take is that atrocity photographs and other images of suffering, whether still or moving, projected on TV or disseminated in the blogosphere, provide us with a powerful lens to read the formation and development of humanitarian consciousness. More specifically, I wish to claim that exposure to visual documentation of extreme suffering and abuse has forged, and is still forging, our moral sensibility concerning human rights by way of a negative dialectics. As critic Susie Linfield claims, reversing Walter Benjamin's dictum that "there is no document of civilization which is not at the same time a document of barbarism": "Every image of barbarism – of immiseration, humiliation, terror, extermination – embraces its opposite, though sometimes unknowingly. Every image of suffering says not only, 'This is so,' but also, by implication, 'This must not be'; not only, 'This goes on,' but also, by implication: 'This must stop.' Documents of suffering are documents of protest: they show us what happens when we unmake the world" (Linfield 2010, 33).

I wish to elaborate on the negative dialectic I see governing the images of suffering that, in my reading, have performatively constituted the modern humanitarian consciousness with its corresponding sense of universal responsibility toward human rights. Along broadly Adornian lines, I will argue that these images of suffering are by definition the expression of a devastatingly oppressive social reality. Since for dialectics the only adequate representation of a social antagonism is a contradiction, I will read these pictures are as contradictions that, by negation, reveal the system of domination and dehumanization in which they exist. In the aftermath of WWII, Hannah Arendt's called for a guarantee of human rights and found it in a principle of humanity minimally understood as the event of natality. In bringing home the irrefutability of bodily harm in the context of public discourse, these images work dialectically at undoing the dominant paradigm of dehumanization and performatively at the formation of a humanitarian consciousness in Arendt's sense. Politically,

however, it is by visual iterative acts that global civil society emerges as the subject and the author of the norm of humanity. In this perspective, I will show the link between my analysis and Seyla Benhabib's theory of democratic iterations.

Images of suffering, I will further explain, tap into our deepest level of moral motivations by revealing the human body as "the original site of reality"[2] and presenting us to ourselves as vulnerable bodily subjects. On the basis of a distinction between the "ethics of showing" and the "ethics of seeing," I will suggest that the problem with images of suffering is not so much that they are irreducibly constructed, or that they run the risk of aestheticizing pain rather than critically engage the viewer; the problem with images of suffering is that they may be engineered to induce a numbing of affect that allows viewing the other as not fully real, or human, because it is either demonized or victimized to the extreme. Following Judith Butler's idea that others appear to us as truly living only if their lives are framed as vulnerable, or at the risk of being lost and thus grieved, I will explore the possibility of a "thin" normative standpoint regulating the ethics of showing as well as the ethics of seeing images of suffering. Within the legitimate boundaries of showing and seeing cruelty the other will thus emerge not only as an autonomous and self-sovereign individual, but also as a deeply contingent subject, who precisely in her vulnerability to suffering, exposure to the ravages of time, and the always impending possibility of loss, finds her uniqueness, and thus lays her claim to the future. In this respect, I agree with Benjamin who, in spite of his own preoccupation that the visual deluge would be the mark of an aestheticized and fundamentally passive society, held that photographs hold a magical power: for "the beholder feels an irresistible urge to search such a picture for the tiny spark of contingency, of the here and now, with which reality has (so to speak) seared the subject, to find the inconspicuous spot where in the immediacy of that long forgotten moment the future nests so eloquently that we, looking back, may rediscover it."

## 8.1 The Unloading Ramp at Auschwitz

While both the American Declaration of the "inalienable" rights and the French Proclamation of the "natural" rights were drafted on the basis of a theoretical project, the 1948 Universal Declaration of Human Rights was approved by the United Nations in the aftermath of the greatest devastation the world had ever witnessed. The Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the United Nations in 1948, zeroed in on the specific crime of genocide against the European Jews, which concluded a long debate that intersected the discussion of crimes against humanity, which had began circulating at the close of World War I with reference to the massacre of the Armenian population at the hands of the Ottomans. As international jurists, diplomats, and representatives of the newly

[2] Scurry (1988).

founded institutions struggled to formalize political institutions able to prevent, or at least prosecute, perpetration of such crimes, civil society's humanitarian consciousness went through what is perhaps its most defining moment as images of horror and suffering in the concentration camps began to steadily flood the Western media.

In commenting on the issue of collective guilt and responsibility in the context of the so called "Historians Debate", centering around the attempt to provide revisionary accounts of the Holocaust, Jürgen Habermas remarked that, no matter how subjective one's perspective or how distant personal memory of the facts may be, the moral point of departure is still the same: "the images of the unloading ramp at Auschwitz" (Habermas 1989, 229). In perhaps the most iconic photograph of the unloading ramp, Birkenau's (Auschwitz II) so-called "gate of death" looms in the background, a Christian cross stands tall on its pediment, its arched entrance stares at the viewer as an empty mouth into which converge three intersecting railroads. The sky is white and so is the ground covered with snow. No prisoners or trains can be seen, but the ominous emptiness of the desolate landscape speaks loudly of one the key moments of the Holocaust, which repeated itself over and over again for many murderous years: the selection of the prisoners on the three railroad unloading ramps. It was on these very ramps that SS doctors determined who was qualified for labor and who had to be killed immediately, which amounted to an average 75% of the prisoners.

Habermas refers to the image of the unloading ramp at Auschwitz to ground his notion of responsibility for the memory of that horror, a memory that transcends the boundaries of the self-sovereign subject and even the facts of her actual experience. Habermas's choice of an image based on photographs and other visual documentation to substantiate his claim about collective and historical responsibility, or even universal responsibility, is from my perspective not a coincidence. Atrocity photographs and images of suffering function in defiance of the standard mode of understanding that Theodor W. Adorno called "identity thinking" and described as subsuming of a particular object under a universal concept. Identity thinking, for him, objectifies propositional content because it uses predication as the master key for identification. In other words, it pretends to unlock the particularity of an entity by the enumeration of its predicates. If we look at the statement, "the loading ramp at Auschwitz is the three intersecting railroads converging into the gate of death," the apparently analytical statement would count as an example of identity thinking because it objectifies the meaning of the loading ramp at Auschwitz by reducing it to the three intersecting railroads. By contrast, the deserted image of the three intersecting railroads converging into the gate of death, which Habermas recalls referring to photographs of the unloading ramp at Auschwitz, exceeds identity thinking by both succeeding and failing in the representation of its content.

In spite of his robust attempts to distance himself from Adorno, Habermas's reference to the unloading ramp at Auschwitz seems to cause him to slip back into his mentor's footsteps. When he wrote that the moral point of departure is the loading ramp at Auschwitz, Habermas did not certainly mean to translate that image into an identity statement about the three railroad tracks. I suggest that the peculiarity of images of suffering, such as the one Habermas invokes, is precisely to resist identity

thinking. Instead of letting their meaning be subsumed under a conceptual heading, images of suffering dialectically engage the irreducibly contingent and the uniquely singular in ways that are ontologically and politically significant. The contingent and the singular is what Adorno called the "non-identical – the ineffable, non conceptual particular" (Adorno 1973, 5ff., 11ff., 148ff).

Following Adorno's lead, I wish to claim that, similarly to representational works of art, images of suffering problematize their own propositional statements. This is so because images of suffering are by definition expressions of a devastatingly oppressive social reality – one that we can imagine as the radicalization of an "antagonistic totality" (Adorno 1973, 10). The more antagonistic the totality, the higher the ideological charge of its language, the greater the need for dialectics, assumed as the thesis that objects are never exhausted by any concepts applied to them, since we can understand them only by examining them in relation with the whole of society (Adorno 1973, 5, 152). This conception of dialectics stems from the premise that the only adequate representation of a social antagonism is a contradiction. As dialectics is a kind of critical thinking that derives truth from insisting on the contradictions of a given social context, by focusing on the presentation of the object in all its irreducible uniqueness, negative dialectics reveals the total system that maintains itself invisible in order to keep social antagonism itself invisible. In the case of images of suffering, I suggest that the total system revealed by negative dialectics is a system of dehumanization that becomes visible only starting from the irreducibly contingent expressed by the images of suffering.

## 8.2 Neda and the New Law on Earth

In *The Origins of Totalitarianism,* which appeared a few months after Convention on the Prevention and Punishment of the Crime of Genocide became operational in 1951, Hannah Arendt wrote that "Anti-Semitism (and not merely the hatred of Jews), imperialism (not merely conquest), totalitarianism (not merely dictatorship) – one after the other, one more brutally than the other, have demonstrated that human dignity needs a new guarantee, which can be found only in a new political principle, in a "new law on earth" (Arendt 1952, IX): this is a cosmopolitan principle of humanity, able to anchor and defend human dignity. While for preceding generations humanity was a concept and/or an ideal, after the Holocaust humanity "has become an urgent reality" (Arendt 1968, 82). Arendt's key point here is two-pronged: on the one hand, morally, only a principle of humanity can act as the normative source for an imperative of common responsibility; on the other hand, politically, "the right to have rights, the right of every individual to belong to humanity, should be guaranteed by humanity itself" (Arendt 1952, 298).

The challenge of finding what Arendt called "a new law on earth" consists in the fact that such a law cannot be founded on an abstract rational parameter, and thus in the recognition of the same in the other, which, according to Arendt, represents the philosophically invalid and politically disabling presupposition of the Enlightenment

conception of human rights, endorsed by both the American Declaration and the French Proclamation. Arendt retrieves the new law, or new principle of humanity, in the emotionally charged "elemental shame" that she associates with the sheer fact of being human. Four decades earlier than Habermas's reference to the unloading ramp at Auschwitz, Arendt grounded responsibility in the ongoing human capacity for unspeakably shameful acts of cruelty. "For many years, I have met Germans who declare that they are ashamed to be German. I am often tempted to answer that I am ashamed to be a human being. This elemental shame, which many people of the most various nationalities share with one another today, is what finally is left of our sense of international solidarity" (Arendt 1994, 131).

Arendt's post-Holocaust sensibility provides us with a powerful lens to read the historical reality of a humanitarian consciousness that has developed, and is still developing, through exposure to visual documentation of extreme suffering and abuse. In particular, Arendt's conceptual framework helps us understand the workings of the latest wave of images of suffering, which are not produced by professional photojournalist and war correspondent, or by photographers working for human rights organizations, but rather by the cell phones of victims of acts of violence. Their role emerged during the upheaval following the presidential elections in Iran, in June 2009, when the face of Neda Agha Soltan, a young woman killed by the police, became the symbol of the repression. The image of her agony on the pavement of a street in Teheran seems to me to tap exactly into Arendt's new law on earth, by bringing home both the shame at the senseless loss of human life and the irrefutability of bodily harm and suffering. Soltan body in pain represents what Adorno called the non-identical, the ineffable, the inexpressible in the sense of the aspect of what cannot be subsumed or reduced to a concept or a category.

For Arendt, since international solidarity springs from the shame at what humans are able to do to each other, it is of paramount importance that evil not be attributed to any specific group, such as the Germans under the Nazi regime or the Serbians during the Bosnian War. To allow any given group to assume the "monopoly of guilt" (Arendt 1994, 131) means not only to disempower global civil society from taking responsibility and face the human capacity for unspeakable crimes, but also, in doing so, open the possibility that one group elect itself as superior to others and claim the right to exclude others by dehumanizing them. In the last section of this paper I will show how this mechanism was at work in the War on Terror launched by George W. Bush's Administration in the aftermath of the attacks of September 11, 2001. The two images of suffering from the prison of Abu Ghraib that I will examine in that section testify to it.

Fending off the possibility that a monopoly of guilt is attributed to any one group is for Arendt the guarantee that a thick understanding of humanity provides to modern political thinking, which cannot but start from the universal acceptance of what people are capable of. This is indeed not an easy task, it has to be said, because it asks philosophy to come out of the comfort and safety of the academic space and engage the world. This is the task that made Adorno feel like the man he became in his dreams, namely, "the emanation of the insane wish of a man killed twenty years earlier" (Adorno 1973, 363).

Perhaps similarly to the late Kant of the Third Critique, Arendt sees humanity's guarantee suspended between two opposite affects: she writes, "the speechless horror at what man may do and what the world may become is in many ways related to the speechless wonder of gratitude from which the question of philosophy springs" (Arendt 1994, 445), Arendt believes that speechless horror rather than a sensibility for beauty is what stimulates human wonder,[3] that deep and ineradicable wonder, ripe with metaphysical, ethic, and aesthetic connotations, that the ancient Greeks recognized as the matrix of philosophical thinking. As Peg Birmigham has brilliantly argued, however, we should not mistake Arendt's appreciation of wonder for any form of enchantment with humanity. Yet, for all her pessimism, she refuses to abandon the idea altogether, because "only a principle of humanity is able to provide the source for an imperative of common responsibility. For all the horror at the heart of human relations, and despite her rejection of a metaphysical notion of human nature, Arendt remains a humanist" (Birmingham 2006, 8). The principle of humanity, which is the normative core of the new law on earth, is for Arendt the anarchic and always already embodied event of natality.

As Birminham suggests, Arendt does not understand the human metaphysically, as an essence, but rather phenomenologically, as a "condition" of experience whose two emotional registers are "the speechless horror at what man may do and what the world may become," and the ability to feel gratitude. The ability to feel gratitude is inherent in the event of natality, which builds on the significance of biological birth to express a notion of the human as a radically new beginning. This kind of beginning "is not the same as the beginning of the world," Arendt writes in *The Human Condition*, which would carry theological and teleological implications. "It is not the beginning of something, but of somebody, who is a beginner himself" (Arendt 1998, 177). This is the event of freedom assumed as always already embodied and in action, indeed, as the very "faculty of action" (Arendt1998, 146). The "who" that we build through action does not, for Arendt, possess any fixed traits because of its intrinsic contingency and unpredictability. I want to claim that Soltan's photograph, agonizing on the pavement of a street in Teheran, in the drama and uniqueness of its absolute contingency resists assimilation to the dehumanizing ideology of the antagonistic totality from which it emerges. In so doing, it dialectically points to the emotional charges of the human condition: the speechless horror at what man can do and the "who" that we build through action.

[3] If Arendt stopped at locating what is distinctly human within the boundaries of cruelty she would be in the company of a large group of philosophers and intellectuals, which include among many others her mentor, Martin Heidegger. As Derrida demonstrated, in spite of his anti-humanism Heidegger has a positive conception of the human, based on the human's irretrievable distance from the animal. As the animal is poor of world, poor of history, and essentially unable to own up to its own death, the human appears in possession of the symbolic keys to the making and the unmaking of her surroundings as well as of those with whom she shares them. While the animal is stranger to good and evil, the human holds the reigns of cruelty, of that inexpressible limit of bestiality that beasts themselves are protected from. In this sense, we can say that we live in an "age of cruelty," in an age of the self-understanding of the human as the distinctive agent of acts of cruelty.

"Hunger looks like the man that hunger is killing,"(Galeano 1997, 278) Uruguayan essayist Eduardo Galeano wrote of one of the early photographs by Sebastião Salgado, the eminent Brazilian photographer, portraying a victim of famine in the Sahel. The new principle of humanity looks like the woman humanity is killing. The last moments of Soltan's life were caught by the camera of a cell phone belonging to a political activist or to a passer-bye, we don't know, certainly a witness who felt it important to immortalize an extreme act of political violence against an innocent victim. This is not a work of art like Salgado's, with a detectable formal intentionality. It is, to use Benjamin's language, a tiny but extremely powerful spark of contingency, which present us to ourselves both as the vulnerable bodily subjects that we are and as the resilient and active agents of our destiny, irremediably exposed to the whims of fate, as Arendt's notion of natality suggests.

In one of the pictures with the greatest political impact for the protests against the presidential elections, Soltan is lying on the street her arms folded up as if she was giving herself in to the hopeless help of two men, whose faces lie outside the picture's frame. While the arms of one man in a white short sleeves shirt are obviously engaged in cardio-pulmonary resuscitation, the second man's arms, recognizable by a blue striped shirt are puzzlingly placed: his right hand, all stained with blood and made heavy by a watch, rests on top of the other man's hands, busy with the resuscitation. We cannot tell whether this second man is exercising any pressure, and thus helping the other with the cardiac massage, or whether he is silently telling him to stop by gently holding his hands down. His left hand is also enigmatically placed, as it quietly rests on Soltan's own right arm whose fair complexion stunningly contrasts the gray of the pavement. Yet, for all the ambiguity surrounding the cardio-pulmonary resuscitation, what is really stunning is Soltan's piercing gaze that stares directly at the viewer: her eyes wide open, as in terrified disbelief, she seems to be asking why. The physical pain is almost superseded by a search for orientation and reference. Solten appeal is admittedly vague but not incomprehensible: perhaps it is an appeal to life, perhaps it is an appeal to some fundamental right of walking down a street of her city and be safe, whether she is taking a stroll or voicing her political dissent in the company of others. The inexpressibility of Soltan's appeal is voiced by the unintentional formal features of the image but is also contained in its ontological makeup, its existential truth, so to speak, which stems from its irreducible contingency, the embodiment that is essential to the event of natality. Invoking again Benjamin's language, the image of Soltan's agony has the magical power of a "here and now" with which reality has "seared" her subjectivity, a here and now in the sense of a fragment of humanity that resists, and thus reveals, the dominant pattern of dehumanization.

## 8.3 Visual Iterations

For Arendt, more fundamental than the rights of freedom and justice are the rights of action and opinion, as well as the right to belong to a political community in which one's speech and actions are communicatively pertinent. Arendt's formulation

of the "right to have rights" emerges from her reflection on the event of *initium*, or natality, which arises from the two overlapping dimensions of givenness, meaning embodiment and contingency, and publicness, namely, of acting in ways that are meaningfully recognized by others. In this sense, to be human is defined for Arendt not so much by having the right of agency and freedom but the more fundamental right of action and speech, which cause individual and collective sovereignty to be replaced by the right to belong to an organized political space, inhabited by a plurality of actors.

In this perspective, Arendt swerves considerably from the liberal tradition's paramount concern for freedom and justice, which in her mind does not capture the fact that in politics there is a more fundamental dimension at stake: belonging to a political community. While freedom and justice are the right of the citizen, whenever the space of dissent, and with it membership, is annihilated an individual's "treatment by others does not depend on what he does or does not do. This extremity and nothing else is the situation of people deprived of human rights" Arendt (1952, 296).

The historical reality of the post-Holocaust years in which Arendt was writing made her associate the situation of people deprived of human rights with the masses of denationalized minorities, refugees, stateless people for whom "the very phrase 'human rights' became for all concerned – victims prosecutors, and onlookers alike – the evidence of hopeless idealism or fumbling feeble-minded hypocrisy" (Arendt 1952, 269). A fact that, as Linfield acutely put it, "revealed the ugly secret at the heart of the human-rights doctrines: the only person who makes an appeal – who must make an appeal – to something as vague and weak as human rights is the person who has been stripped of everything and is, therefore, no longer recognizably human" (Linfield 2010, 37).

The 60 years that separate us from the publication of *The Origin of Totalitarianism* and the Convention on the Prevention and Punishment of the Crime of Genocide have not fundamentally altered the situation. Masses of people lack political membership: some live under brutally repressive regimes, some are refugees from war-zones and guerilla-infested areas, some are simply stateless, and some other belong to the tidal waves of migrants scouring the richer nations of the planet in search of the sheer means of physical survival. Defenseless against the violence of organized crime, as Arendt had already seen this segment of the human population's only hope for re-entry in to the juridically and politically organized human community is to break the law.

Yet, even in this depressingly dark scenario an image of suffering, holding all the tragic magic of Arendtian *initium,* acted as the spark that unleashed the unraveling of one of the most stunning movements of political protest in recent history: the so called "Arab spring," which was literally set on fire by the images of the self-immolation of 26 years old Mohamed Bouazizi, a Tunisian street vendor. The protest engulfed Tunisia and quickly spread to Egypt, causing the transition from authoritarian regimes to democratic rule in both countries. I want to read this image of self-immolation as a spark of resistance to the pervasive pattern of dehumanization. The visual iterations of a man on fire, by circulation on the Internet and branding in public demonstrations, have performatively worked out the appeal made by the Arab street to its own leaders. The image of Bouazizi's self-immolation has thus

played a constitutive role in the formation of a new humanitarian consciousness both in the Arab countries involved in the upheaval and in the global civil society that has responded to their plight. From this perspective, such consciousness is both the subject and the author of what Arendt called the new law on earth: the cosmopolitan principle of humanity.

The images of Bouazizi's self-immolation are from December 17, 2010, when he set himself on fire in protest against the confiscation of his wares and the harassment and humiliation by a municipal official. As is the case with the image of Soltan's agony, a cell phone of a stunned passer-by shot the specific picture of Bouazizi's body on fire that I am taking into consideration here. In it, we see the young man already collapsed on his knees but still holding himself up on his arms and hands. The flames cascade down from his neck as a long scarf is flowing lightly between his arms. More flames rise from the around between his arms and legs, probably from the pool of gasoline dripped on the pavement as he was drenching himself in it.

This arresting image says nothing of what happened after Bouazizi's body caught fire. According to Bouazizi's sister, people panicked and someone threw water on the flames apparently worsening his condition. Also, the image does not say that Bouazizi survived for 18 days in a coma, and that the now deposed Tunisian despot, Zine el Abidin Ben Ali, promised to have him transferred to a French facility specializing in severe burns, but ultimately did not. From my perspective, the most relevant fact about the image of this young man's self-immolation is that, in becoming the symbolic anchor of the protests that ultimately brought down Tunisia's autocratic regime, it has also become the site of a democratic process.

My analysis echoes Seyla Benhabib's notion of democratic iterations, assumed as those "complex processes of public argument, deliberation, and exchange through which universalist rights claims and principles are contested and contextualized, invoked and revoked, posited and positioned, throughout legal and political institutions, as well as in associations and civil society" (Benhabib's 2004, 179). Far from running the risk of aestheticizing and thus depoliticizing injustice, images of suffering are, in my reading, political practices, and thus are part of the "complex processes of public argument, deliberation, and exchange" that constitute democratic iteration according to Benhabib's definition. Images of suffering, which I see regulated by negative dialectics in the way that I showed earlier, negotiate the tension between the abstract and the concrete, the universal and the particular dimensions of the right claim that Arendt posits as the justification of all right claims, and thus as their normative condition: the principle of humanity. In order to specify the way in which the image of Bouazizi's self-immolation worked as a visual iteration of a democratic process it is useful to briefly examine Benhabib's own theory of the performative in politics, which starts from her appropriation of Derrida's assimilation of iteration to iterability.

For Derrida, "iterability is at once the condition and the limit of mastery [of our mastery of language]: it broaches and breaches it" (Arendt 1988,107, 61, 100). According to Derrida, the iterability of a sign is, on the one hand, what makes speech acts possible, a fact that broaches mastery, but on the other hand, iterability

is what makes every speech act imperfect, incomplete, unsuccessful. In that sense, iterability breaches linguistic mastery.[4] Benhabib takes from Derrida the idea that "in the process of repeating a term or a concept, we never simply produce a replica of the first intended usage or its original meaning: rather, every repetition is a form of variation. Every iteration transforms meaning, adds to it, enriches it in ever so subtle ways" (Benhabib 2007, 21). In this sense, the application of norms cannot be understood as a simple translation from theory to practice, because iteration is never repetition, but entails transformation and interpretation. "Every act of iteration involves making sense of an authoritative original in a new and different context. The antecedent is thereby reposited and resignified via subsequent usages and references. Meaning is enhanced and transformed; conversely, when the creative appropriation of that authoritative original ceases or stops making sense, then the original loses its authority upon us as well" (Benhabib 2007, 21). In the context of images of suffering such as that of Bouazizi's self-immolation the authoritative original is the irreducible nugget that resists being explained once and for all, or, to say it in Adorno's vocabulary, resists being objectified and reduced to the terms of identity thinking. This is a nugget of contingency and irrevocability that, precisely because it cannot be repeated, does not let the viewer just watch the image but engages her in thinking of herself as a vulnerable bodily subject.

According to Benhabib, "there is a fundamental relationship between complex cultural dialogues among peoples in a global civil society and processes of democratic iteration. Only when members of a society can engage in free and unrestrained dialogue about their collective identity in free public spheres can they develop narratives of self-identification that unfold into fluid and creative re-appropriations of their own traditions" (Benhabib 2007, 23). If the image of Bouzizi's self-immolation has acted as a fuse for the chain-explosion of protests known as the Arab spring, it is in my reading because it has engendered a process of visual iterations. The consciousness that is behind the new cross national Arab humanitarian polity, demanding the implementation of true deliberative democratic rule and the respect of human

[4] Derrida holds that what makes something a sign is its conformity to a certain code or structure, and its place in that code or structure. While many tend to think of these structures or codes as universals, rules or conventions, Derrida's position is that, wherever there is a formal order, there must be the possibility of different realizations of that order. Thus, the sign must be iterable. Yet, the order that is supposed to give the sign its identity is in a sense itself a sign, in the sense that it too signifies. How, then, can we fix the identity of the order? For, if we don't, we have to believe, as Derrida does, that the identity of the order is constituted by all its possible realizations. And if his is the case, the identity of the sign supposed to be constituted by that code is constituted by all the possible repetitions of that sign. In this sense, the structure of iterability that makes a sign possible constitutes the identity of a sign. Since that identity is constituted by all the possible repetitions or uses of the sign, such identity can never be consummated or fully exhausted. This is why it is always deferred, which means that the sign as a type is never fully there. The structure of iterability cannot thus be understood in terms of the type/token distinction. Furthermore, since all possible uses of a sign are involved in constituting the identity of a sign, assumed as a unity of signifier and signified, or meaning, it follows that all possible uses of the sign are involved in fixing its meaning. Finally, if this is all true, it follows that the very possibility of the so-called deviant, abnormal, parasitical uses affects how we are to understand any use.

rights, has engaged with the image of Bouazizi's charcoaled body some form of "unrestrained dialogue" about its identity. It is in dialogue with images of suffering as this one that the Arendtian appeal to the principle of humanity is worked out. If I am right, then unlike Benhabib's democratic iterations that she seems to see occurring in contexts in which right claims are politically implemented, visual iterations may sustain the challenge of a context in which right claims are not politically implemented. In fact, by being visually iterated, images of suffering performatively constitute the space in which right claims emerge as "an urgent reality."

## 8.4 Injurable Lives

By presenting the human body as the fundamental locus of reality in all its fragility, an image of suffering such as Bouazizi's self-immolation resists, and in doing so reveals, an important component of the dominant discourse of dehumanization and violence: radical self-sufficiency, which is the foundation of social disconnection and atomization.

For Butler, singularity and mutual dependence go hand in hand, and stem from the recognition of what she calls "precariousness," understood as shared exposure to vulnerability and loss. We recognize each other to be unique and interdependent only if we are able to recognize under what conditions the life of the other, like mine, can be sustained. This recognition is predicated on the awareness that existing is to face vulnerability and the risk of loss, and thus, that to recognize the other as both unique and interdependent is to affirm our common exposure to the possibility of grief. Grievability, therefore, is a necessary condition for the recognition of the other. Pictures of suffering reinstate precariousness on deontological grounds and because of its present uneven distribution.

The notion of precariousness, in Butler's theory, stems from her assumption that to be a body, human or otherwise, is to be exposed to "social crafting." In her *Frames of War*, Butler writes, "the body is exposed to socially and politically articulated forces…that make possible the body's persisting and flourishing" (Butler 2009, 3). Butler's point here is that the body is neither a purely biological entity nor a socially self-sufficient one. Rather, like the human subject, the body is constituted through "norms, which, in their reiteration, produce and shift the terms through which subjects are recognized" (Butler 2009, 3–4). The set of norms or normative conditions that produce subjects and bodies by making them recognizable have "historically contingent ontologies," which can be analyzed as politically saturated frames.

Butler observes that existing norms allocate recognition differentially, as a function of a given population, nation, or community's political weight, social relevance, and closeness to the global media. As a consequence, since recognition means apprehending the precariousness of the life of the other, there are others whose precariousness is not recognized. These are expendable lives, lives apparently without material needs. These are lives that are reductively presented to us as simply "living" and thus perceived as not belonging to an individuated agent. If precariousness means that life

is subject to social and economic conditions that put my existence in the hands of others, a life perceived as non-precarious is a life whose vulnerability is obscured, and thus a life that cannot be grieved or mourned. Concurrently, lack of recognition of a life's precariousness entails to be relieved of all responsibility for it.

I wish to conclude my analysis of the role of images of suffering as visual iterations by examining two photographs from the Abu Ghraib prison in Iraq, portraying two American officers posing with their thumbs up next to the body of a detainee killed during an interrogation. I will show how, as it has been the case in Iran in 2009 and in the context of the events of the Arab Spring in 2011, also in 2006 the circulation of photographs documenting abuses worked both at a negative dialectical level, by revealing dehumanization as the uneven distribution of grievability, and performatively, by fostering and shaping the development of humanitarian consciousness in global civil society.

In discussing nationalism, Butler claims that it "works in part by producing and sustaining a certain version of the subject…produced and sustained through powerful forms of media." We cannot forget, Butler admonishes, "that what gives power to their version of the subject is precisely the way in which they are able to render the subject's own destructiveness righteous and its own destructibility *unthinkable*" (Butler 2007, 47). The occlusion of vulnerability does not only concern the victim's life but also the perpetrator's life, which is represented as righteous whether the agent is an individual, a group, or a state.

The two pictures I am considering here show Specialist Charles Graner and Specialist Sabrina Harmon posing over the body of a detainee, Manadel al-Jamadi, who was allegedly beaten to death by interrogators in the prison's showers. Both officers are standing and bend down over the al-Jamadi's body, which is immersed in ice and lies in a body bag whose zipper is open in order to show his face. Al-Jamadi has a bandage covering the area of his left eye. We don't see his expression, only his mouth trapped slightly open in the tightness of *rigor mortis*. In both photographs, Specialist Granier and Harmon display a bright smile, their right hand in a green plastic glove posing in a sign of victory: thumbs up.

These images are a paradigmatic expression of the norms regulating the recognizability of life at the height of the so-called War on Terror. Such norms have crafted the "structure of feeling and reference" of the global public opinion so that it would apprehend the spectacle of violence selectively. For example, the practice of "embedded journalism," which was implemented by the Bush Administration since the invasion of Iraq and was accepted by media organizations to get closer to action on the battlefield, crucially contributed to shaping the public's structure of feeling and reference selectively. And it did so by seeking to control not only "what" the public was being exposed to, and shielded from, but also by determining "how" the public was perceiving others and their vulnerability. That perspective, as Butler aptly noted, "is a way of interpreting in advance what will and will not be included in the field of perception." Scenes of war "are meant to be established by the perspective that the Department of Defense orchestrates and permits, thereby illustrating the orchestrative power of the state to ratify what will be called reality: the extent of what is perceived to exist" (Butler 2009, 66). A "frame" is thus in place

that structures as much by excluding what should remain unrecognizable from the perceptual field as it does by including in it what is deemed appropriate or necessary to be recognized. This is what the pictures of two deranged American soldiers express, for, as Butler cogently affirms, agency here "takes place by virtue of the structuring constraints of genre and form on the communicability of affect – and so sometimes takes place against one's will or, indeed, in spite of oneself" (Butler 2009, 67). Like Adorno's identity thinking, framing is active but silent and invisible. As life unfolds, actions and events are figures emerging from a background that cannot be represented comprehensively; only pointed at a background that can in terms of its delimiting and thus negative function.

The ice in which al-Jamadi's body appears immersed denounces the irreducible contingency of his physical death and imminent organic decay, as do the plastic gloves that both soldiers are wearing, which insulated them from touching the cadaver as they were opening the body bag to take the picture. But the highly symbolic choreography of the photograph has the ice contribute to the sharply oppositional framing of enemies and friends that the dominant ideology of the War on Terror was promulgating. Fully demonized enemies ought to be frozen and put away for good. Even though it was shot by a private digital device, these photographs replicate the media representations of the face of the enemy during those years, which seemed to literally antagonize one of the most stunning figures in the post-Holocaust sensibility: Emmanuel Levinas' "face." Although not exclusively human, Levinas associates the face with the sense of the precarious and the injurable.

Both demonized and victimized in the extreme, al-Jamadi's status in the photograph is such that makes recognition of his precariousness hard, if not impossible. Unlike the other images that I discussed in this paper, this is a highly ideological example that makes a statement concerning who is and who is not to be grieved almost explicitly. In this sense, it could lend itself to being considered for exclusion from public viewing alongside other images that either aesthetize the pain of others or expose it for sensationalist purposes.

Ultimately, I do not agree with any kind of censorship on images of suffering, which seems not only morally problematic but practically anachronistic given the acceleration and massive increase in the circulation of images via mobile devices. However, I do believe that a thin normative framework ought to be worked out for both the "ethics of seeing" and the "ethics of showing" human suffering.

The ethics of seeing is minimally discussed by photography criticism and photojournalists and revolves around the responsibility that individual viewers of images of suffering ought to take in establishing the boundaries of legitimacy within which the pain of others enters into their field of perception.

The ethics of showing pertains to the more navigated terrain of decisions made by news organizations but also, and increasingly, by individuals who elect themselves as agents of visual documentation of atrocities. Our visual environment is rapidly changing in new and ever more chaotic ways: not only mobile devices such as iPods and cellular phones have acquired the ability to visually document, but social networking sites are now the premier channels of circulating images. While some have expressed worries about "the democracy of the camera," as Andy

Grunberg has called it, others, such as Gilles Peress, the great photographer and thinker of the image, suspect that it offers unprecedented opportunities for humanitarian theory and practice. As Linfield notices, "the new technologies have also led to the emergence of transnational organizations such as Photo Voice, which teaches refugees and street children to expose the conditions of their lives through photojournalism; Pixel Press, a new media organization and website that collaborates with human rights organizations to disseminate otherwise unseen documentary work; and Demotix, a 'citizen journalism' website and photo agency that promises photographers, whether professional or amateur; "'You take the images, we get them out there'" (Linfield 2010, 61).

If we take Butler's notion of precariousness, defined by the recognition of the other's injurability as a normative standpoint, the first preoccupation from both the perspectives of the ethics of seeing and the ethics of showing should be that such recognition is evenly distributed across different populations. Whenever others are either demonized or victimized to the extreme, their lives are not framed as vulnerable and thus grievable. While those "others" are oftentimes grouped and objectified into a "them," they would need to recover the multifaceted reality that constitutes our shared humanity, vulnerability to suffering, and constant exposure to the risk of loss. But the same reification haunts the "we." The founding obligation of both showing and seeing the suffering of others is thus to disrupt any collective actor's claim of a fixed oppositional identity, such as a "we" or a "them," since a group, a nation, or a culture is not only delimited by other groups but also internally differentiated into singular unique individuals whose identity is crafted and re-crafted constantly by their relations to others and themselves, by the forces shaping the context in which they live or which they left behind; and finally, by all the discursive framings and their distinct effects on each human subject.

The work of self-scrutiny, deconstruction of frames, and reconstruction of mentalities that this commitment to precariousness and injurability entails, does not offer the guarantees of a classical normative ethics, founded on governing principles and individual rights and duties. As Benjamin correctly saw, however, a promise lies in its folds: a promise fed by the irresistible urge we develop when seeing and showing images. The urge to find in them a tiny spark of contingency, "the inconspicuous spot where in the immediacy of that long forgotten moment the future nests so eloquently that we, looking back may rediscover it." This requires perhaps the most difficult kind of recognition: the recognition of the spectrality of freedom not only in an interconnected world, but among interdependent human subjects. In this sense images of suffering keep holding us hostage.

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# Chapter 9
# The Idea of a Charter of Fundamental Human Rights

**Alessandro Ferrara**

After the formulation and subsequent affirmation of the doctrine of the Responsibility to Protect during the past decade as a framework for rethinking humanitarian intervention and as a UN-recognized and supported updating of the task mandated by the UN Charter[1] – to "support international peace and security" – a reflection is also due on the adequacy of the glorious legal sources for the culture of human rights, namely the 1948 Universal Declaration of Human Rights and the subsequent 1966 Covenants on Civil and Political and on Cultural and Social Rights, which taken together are said to amount to a Bill of Rights of the International Community.

## 9.1 The Function and Structure of Legal Sources for Human Rights

If we mentally go back to the historical context of the immediate aftermath of World War II, with the burning impression raised by the discovery of the atrocities perpetrated by the Nazis in the concentration camps, of the horrendousness of what was yet to be called the Holocaust, by the immensity of the destruction and devastation left behind by the world conflict, by the horror of Hiroshima and Nagasaki, we can easily understand the perception, shared at the time by political leaders and men and women of good will, of the urgency of carving in stone an authoritative pronouncement, shared by as many countries of the world as possible, concerning human

[1] See ICISS (2001) for the groundbreaking original document establishing the "Responsibility to Protect" – doctrine. See also Evans and Sahnoun (2002), World Summit (2005) and Annan (2005) for initial discussions and reception within UN policy. For a more recent reception of the doctrine within the UN and further elaboration on it, see Ban Ki-Moon (2009).

A. Ferrara (✉)
University of Rome "Tor Vergata", Rome, Italy
e-mail: Alessandro.Ferrara@uniroma2.it

C. Corradetti (ed.), *Philosophical Dimensions of Human Rights: Some Contemporary Views*, DOI 10.1007/978-94-007-2376-4_9,

dignity and what it means to respect it. In the minds of the main drafters and inspirers of the Declaration – John Peters Humphrey, René Cassin, P. C. Chang, Charles Malik, Eleanor Roosevelt – as well as in the words of the preamble, the Declaration is meant as a kind of compass and stimulus for all those who, wherever in the world they are located, are concerned with the dignity of the human being. The intended function of the Universal Declaration was primarily pedagogical – it was conceived and solemnly promulgated "to the end that every individual and every organ of society … shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance." Needless to say, the structure of the Universal Declaration – 30 articles that are not ranked in any hierarchical order of importance, but rather follow a succession of four areas[2] – is perfectly adequate for this function.

Today, after the Fall of the Berlin Wall in 1989 has dissolved the bi-imperial constellation which for over 40 years had straitjacketed the world, a new sense of urgency has emerged. We now expect documents and sources of the importance of the Universal Declaration to play a new and much more ambitious function: i.e., to draw a line between, on the one hand, practices and conduct that remain *within* the prerogative of the prevailing local political will in each sovereign State, and should not be interfered with no matter whether that political will is formed along democratic or less than democratic lines and, on the other hand, practices and conduct which, because they amount to the massive and continuous violation of human rights, can and should in no case be tolerated by the international community, and thus are ideally located *beyond* the jurisdiction of local State-powers.

The question then is whether the "unstructured structure" of the Universal Declaration – where the expression "to have a right" is indifferently used for the right to life and the right to have paid holidays is adequate also for the *new* function that we expect this fundamental legal source to play in our time and in the foreseeable future. My idea is that it is not. Why not?

Because the grouping of human rights in clusters – first the *Habeas-Corpus-like* rights of the person, then civil and political rights, then the religious and free speech rights, then social and economic rights – is insufficiently clearcut for the new purpose, unforeseable in 1948, of limiting State sovereignty also in those cases when its exercise, in the guise of domestic repression (such as it occurred in Cambodia 1975–1979 and in Rwanda 1994), generates no threat to "international peace and security." There is no explicit distinction of what is tolerable though undesirable and what is downright intolerable, and this lack of a specific indication implicitly paves the way either to the invocation of some abstract moral-philosophical or religious argument, as opposed to a *juridical* interpretation, in order to establish where the boundary between the two kinds of violations of human rights is to be located, or it

[2] The areas include the rights of the individual (Articles 3–11), civil and political rights (Articles 12–17), the rights of religious freedom, freedom of thought, expression and association (Articles 18–21) and social, economic and cultural rights (Articles 22–27).

paves the way to political manipulation. Between the two clearcut extremes, of State sovereignty being trumped by the international community in order to prevent or stop a genocide and in order to secure "paid holidays" for all the workers of a country, there extends a huge grey area of rights that seem too important for leaving their protection to local jurisdiction alone, but whose even massive violation nonetheless somehow falls short of legitimating UN-mandated humanitarian military intervention.

Who is then to draw the line between unfortunate, but nonetheless tolerable, violations and the truly intolerable ones, between what States can do, perhaps at the price of verbal condemnation, and what they cannot under any circumstances do? I start from the premise that for different reasons neither armchair philosophers nor government officials are desirable candidates for that role of adjudicators. To let philosophers draw that line is to privilege moral reasoning over cosmopolitan law, to let governments draw that line is to privilege politics over law. More consonant with the idea of completing the construction of a cosmopolitan rule of law, as distinct both from the present *status quo* of an international community premised on the ban of aggressive wars enforced by cosmopolitan institutions immersed in global juridical pluralism (but often paralized by vetoes), and from the utopian projection of a World State, appears to be the setting in motion of the drafting, discussion and approval – in a special convention convened by the UN General Assembly – of a *new* Charter of Fundamental Human Rights, whose structure could now fully reflect the new function requested of a cosmopolitan legal source on human rights and whose legitimacy would stem from nothing else than the consensus of the representatives of the peoples of the world.

## 9.2 Defending a Charter of Fundamental Human Rights Against Frequent Objections

It may be objected that a new solemn Charter would detract legitimacy from the Universal Declaration of 1948, by implicitly and instantly demoting the rights therein listed to the status of "less-than-fundamental" rights. There is reason to believe that the opposite is true. The promulgation of the new document could be accompanied by a pronouncement, signed by all of its signatories, that identifies the 1948 Declaration as the one which articulates *a full version* of the human rights of the person, with respect to which the new Declaration would represent a *thinner* version made necessary by the shift of historical horizon of the post-Cold-War world. To draw on Walzer's famous distinction (Walzer 1994), the two documents would work in tandem as a *thicker* and a *thinner* version of the same idea of inalienable rights of the human being as such. Furthermore, the new Charter, by way of reasserting world-wide commitment to the defense of a restricted number of fundamental human rights consisting in the protection of the physical integrity and political freedom of human beings, would contribute to strengthen and corroborate the standing of the original Universal Declaration, which has been the object, over the past few decades, of a number of critical attacks.

The idea of human rights is rarely rejected in and of itself, but what has happened over the years has been the coalescing of a number of allegations – rooted in culture specific contexts, such as the Muslim world, the Asian countries, the Russian Orthodox Church – concerning the individualistic, secular, Western-modern bent of certain formulations contained in the Universal Declaration as well as of the overall cultural that emanates from it. Thus during the 60 years of its existence, new documents of regional and civilizational significance have sprung up, such as the Cairo Declaration on Human Rights in Islam, an alternative document that says people have "freedom and right to a dignified life in accordance with the Islamic Shari'ah,"[3] or the Bangkok Declaration of 1993, where a critique of the strategic use of human rights for influencing the policies of target States can be found as well as a reinterpretation of the right of self-determination, or the 2008 statement issued by the Council of the Bishops of the Russian Orthodox Church, very critical of the supposed antireligious values inscribed in the Universal Declaration.[4] This proliferation of alternative documents is arguably also a function of the breadth of scope of what is included in the Declaration of 1948. In fact dissent on freedom of religion and related issues could and should in principle be separated from a more likely universal consensus on the protection of human life.

These differently angled criticisms but especially the general accusation of being, through the very language of "individual rights," the vehicle of a Western liberal individualism which collides with the emphasis on duties and community that many local cultures anchor to their religious traditions, raises the question of how to justify the universality of human rights. A philosophical justification, in fact, which pivots on their indispensability in order to guarantee a full unfolding of the individual capacity to exercise her autonomy could not convince anyone beyond the circle of those who already embrace a comprehensive conception – to use Rawls's phrase – of the human being. If human rights, especially those of the first part of the Universal Declaration, were to be understood as a sort of natural rights that presuppose the primacy of "individual autonomy" and antecede the political will of a self-determining people and mark the limits within which the "sovereignty" of such will has to move, then those who understand them as a vehicle of Westernization could not be dismissed as totally off the mark.

To anchor the justification of the universality of human rights in some kind of comprehensive and perfectionist liberalism would be a triple mistake. First, it would expose the philosophical argument for human rights to the challenge of competing comprehensive views – anchored in traditional, orthodox, radical or fundamentalist forms of religiosity or in cultural traditions steeped in the so-called Asian values. Second, from a *political* point of view the closer the conceptual connection between human rights as such and the culture of individualism, autonomy, and secular detachment from religion, typical of comprehensive forms of liberalism, the greater the risk

[3] See Bangkok Declaration (1993) and Bauer and Bell (1999); Cairo Declaration (1990) and Bielefeldt (1995).

[4] See Russian Orthodox Church (2008) and also Agadjanian (2010).

of unnecessarily alienating also from the "culture of human rights" those local elites, peoples and movements which would only be adverse to a liberal political culture. Third, a comprehensive liberal official justification for human rights, now understood as the standard of political decency, if extended to embrace all the articles of the Universal Declaration, could not be farther removed from the true spirit of liberalism. Differently than universalistic religious worldviews, which incur no difficulty or inconsistency in positing that the world will achieve full justice only when all human beings will have embraced the one right religion, liberalism cannot remain true to its inspiration and posit that full justice in the world will be achieved only when all peoples of the Earth will convert to a liberal-democratic regime. Such aspiration has its legitimate place within the private convictions of some of the most traditional liberals, but certainly cannot be thought of as an enforceable principle with legal consequences – consequences such as, for example, the imposition of sanctions on all those who fail to observe Art. 21.3 of the Universal Declaration, which provides that "The will of the people shall be the basis of the authority of government" and that "this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures," or the imposition of sanctions on those polities which who fail to guarantee to all of its members "freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers" (Art. 19). Turning such provisions into law backed by sanctions would immediately turn liberalism into an oppressive proposition. Why?

For the same reason why a non-perfectionist liberal such as John Rawls in *The Laws of Peoples* has refused to apply the same justificatory device – the hypothetical decision of representatives of peoples choosing principles of peaceful coexistence from behind a veil of ignorance concerning the interests of those whom they represent – to peoples living under a liberal-democratic regime and to peoples who live under a "decent" regime that observes *fundamental* human rights though not all human rights, that embeds a "decent consultation hierarchy," admits a right of emigration and is willing to honor the law of peoples (Rawls 1999, 59–61, 64–67). That is, Rawls chooses to have his eight principles examined and accepted only by representatives of liberal peoples in a first run of the original position, and only subsequently endorsed by representatives of decent peoples in a second original position, because certain modeling assumptions – the absence or presence of a comprehensive moral conception at the institutional heart of society, the assumption that all citizens are free and equal, and that they are self-authenticating sources of valid claims – are typical only of liberal peoples and it would be ethnocentric to request that representatives of non-liberal but decent societies embrace them as well (Rawls 1999, 30–39, 68–69). In sum, in order for any set of principles (and related presuppositions) governing the life of a pluralistic polity – no matter whether composed of free and equal individuals or of free and equal peoples – to be the source of legitimate obligation and if needed of legitimate coercion, rather than oppression, those principles must be accepted by *all* those whose life is to be regulated by them. This is then the third mistake which would be incurred by anyone who wished to turn all the rights mentioned in the 30 articles of the 1948 Universal Declaration into

actionable principles of law world-wide, without due reflection on the fact that the "unstructured structure" of the Universal Declaration was not meant at all for the purpose of turning it into enforceable law but rather to have it function as a pedagogical and legitimating device.

Finally, the idea of redefining human rights along the dual dimension of *fundamental rights* on one hand, in principle actionable and backed up by sanctions, and the rest of the list of rights on the other hand, understood as a plea for human dignity, must finally meet the important objection of favoring indirectly the entrenching of oppressive, patriarchal, archaic or otherwise discriminatory patterns customarily accepted in many parts of the world. It is often said that to draw a line between fundamental and less than fundamental human rights would be tantamount to abandoning to their destiny courageous minorities of men and women who are oppressed and willing to risk their lives in order to affirm the vision of human dignity reflected in the Universal Declaration. The effect of drawing that line would be – this is the objection – to renounce, on the part of liberal peoples, the right to defend those courageous opposers against their oppressors and to undermine their struggle for bringing the promise contained in the Universal Declaration closer to its realization. More specifically, such renunciation would necessarily follow from the indirect confirmation – derived from the very drawing of that line – that important rights as freedom of conscience, of thought, of speech, of association would lie entirely within the jurisdictional capacity of each single State, in a world where some States are of an overtly non-democratic nature and many more are of a pseudo-democratic nature. In sum, the overall result of establishing the difference between fundamental and non fundamental human rights as a *legal* difference would be to entrench the illiberal tendencies present in many States of the world, to jeopardize the chances of democratic movements to induce progressive change, and ultimately thus to undercut the positive pedagogical function that the whole Universal Declaration is ostensibly confirmed to have. Who would any longer take seriously what is provided by the second half of the Universal Declaration if it were to be officially, albeit indirectly, stipulated that the rights therein contained lie within the jurisdictional sovereignty of the States, no matter whether these States are democratic or non democratic regimes?

It is a serious objection, but it contains two points of dubious soundness. First, it is unclear in what respect that States that undersign the new Charter of Fundamental Human Rights would thereby forfeit their right, qua collective actors acting in the global public sphere to fully voice their concerns and their disapproval of certain practices – typical of other contexts – which in their opinion appear to be oppressive. My subscribing, as an individual, to a number of constitutional essentials does not prevent me, legally or even morally, from exercising my freedom to condemn certain comprehensive views or political practices of others in the domestic public sphere. I could express such condemnation individually or in association with others, and political parties are forms of association that are usually devoted to the affirmation and critique of political values, of cultural norms, of clusters of interests and the like. Domestically I could also spend my money, my influence, my personal prestige on behalf of causes that I consider worthwhile. Why should we suppose that the liberal States to which we belong should lose that prerogative of voicing

their concerns and backing up their disapproval with economic, political, cultural pressure – all sorts of means which are fully legitimate to use in the public sphere of a world society?

One answer that is sometimes heard is that individuals and associations embrace comprehensive conceptions, and act on them, in ways that are unavailable to liberal states, which are premised instead on "political conceptions of justice." However, it must be noted that the "political" quality of the values and conceptions of justice at the heart of liberal regimes is such only with respect to the plurality of comprehensive conceptions to be found *inside the regime*. These political conceptions lose their "political" quality and in turn become comprehensive when we move to the global arena – where basic tenets like the "free and equal citizens" or the separation of Church and State no longer are taken for granted as common ground. Consequently, in the global arena liberal States and their free associations – e.g., alliances such as NATO and regional aggregations such as the EU – are like actors in the domestic public sphere, entitled to voice their views and exert legitimate influence.

Second, if we, as members of liberal-democratic polities, take seriously the Habermasian idea of free and equal citizens jointly deliberating, through their elected representatives, which rights they should reciprocally grant one another for the purpose of regulating their life in common through the form of law or, for that matter, the Rawlsian idea of free and equal citizens endorsing, in the light of ethical principles which they endorse as reasonable and rational, the constitutional essentials of the higher law to which legislative, executive and judiciary action is to be responsive, then we cannot even begin to consider the idea that the rights listed in the second half of the Universal Declaration should be enforced through coercive means against the will of those peoples and States who object against them. For such enforcement would not affirm but betray the liberal and democratic notion of legitimacy as bound up with the consent of the governed. In order for the notion of the "consent of the governed" to be metaphorically applicable to the case of States which voluntarily renounce the part of their sovereignty which concerns human rights, we would have to presuppose that such a consent has been explicitly given.

This explicit consent has never taken the form of a direct and formal endorsement of the Universal Declaration, which as such is not a legally binding document in a technical sense. Only in a broader political sense, one could say that the 48 States which originally voted in favor of the Declaration in the General Assembly[5] thereby bound themselves to the observance of *all* the rights therein contained. Some of these States have subsequently not signed or not ratified the Covenants that were to turn the provisions of the Declaration into legally binding clauses of an

[5] These States were Afghanistan, Argentina, Australia, Belgium, Bolivia, Brazil, Burma, Canada, Chile, China, Colombia, Costa Rica, Cuba, Denmark, the Dominican Republic, Ecuador, Egypt, El Salvador, Ethiopia, France, Greece, Guatemala, Haiti, Iceland, India, Iran, Iraq, Lebanon, Liberia, Luxembourg, Mexico, Netherlands, New Zealand, Nicaragua, Norway, Pakistan, Panama, Paraguay, Peru, Philippines, Thailand, Sweden, Syria, Turkey, United Kingdom, United States, Uruguay and Venezuela.

international treaty, and today in the world there exist 144 more States, over and beyond the original approving ones.

To be sure, most of the rights mentioned in the Universal Declaration have found a place in the Covenant on Civil and Political Rights and in the Covenant on Economic, Social and Cultural Rights, and these are meant as legally binding international treaties. However, major States such as China and the United States, along with Myanmar, Saudi Arabia, United Arab Emirates, Malaysia, Laos, Cuba, have not ratified one or the other Covenant and other countries have done so with important reservations concerning single parts and articles. For example, the United States has not ratified the Covenant on Economic, Social and Cultural Rights and has ratified the Covenant on Civil and Political Rights with the reservation that it is not to be understood as a "self-executing treaty." This clause means that the Senate of the United States, upon approving ratification, has denied the very idea of a release of sovereignty up to any instantiation of the international community – a denial which is rendered in even more explicit terms by the concluding clause of the record, where it is said that "Nothing in this Covenant requires or authorizes legislation, or other action, by the United States of America prohibited by the Constitution of the United States *as interpreted by the United States*."[6] Under these conditions, there is clearly no way of maintaining that the rights mentioned in the Universal Declaration, even indirectly through the 1966 Covenants, do have a legally binding priority over State sovereignty in any credible sense of such expression.

Furthermore, the manifest purely declaratory and "pedagogical" function of the rights mentioned in the Universal Declaration and reiterated in "binding" form by the Covenants emerges clearly by comparing the second clause of Article 25 of the ICCPR with the number of States that are parties to the treaty. Clause (B) of Article 25 mentions the right of every citizen of the States that are parties to the treaty "To vote and be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors." This article effectively captures the functioning of a standard democratic system. As of today, 166 States have become parties to the treaty. Not even by the most generous count can one imagine that 166 States out of the 193 recognized and represented at the UN General Assembly are democracies. Obviously this is not a fact that in and of itself can undermine the normative cogency of the Covenants: it unequivocally shows, however, that many States understand their compliance with the terms they undersigned as merely paying lip service to them and do not even bother to formally cast their non-compliance as an official "reservation." However, this discrepancy between formal adhesion and factual lack of compliance contributes to define the overall not encouraging picture of human rights today.

[6] U.S. reservation on the International Covenant on Civil and Political Rights can be found in the Congressional Record, 138, S4781-01 (daily ed., April 2, 1992). For a well grounded argument concerning the inconsistency of this proviso with the general spirit of the covenant, see Henkin (1995). See also Paust (1996).

To sum up, I would describe such picture as one in which human rights have a prominent place in political discourse, exert a powerful influence on political imagination and can be invoked at any time with reasonable expectations of encountering a favorable reception on the part of a worldwide audience, but are articulated in the form of an unstructured list in a non-legally binding document such as the Universal Declaration and then included in two international treaties – the Covenants – which are subscribed to by parties who do not include all the States in the world, often have subscribed to them with fundamental reservations, and sometimes have subscribed but disregard altogether what they have signed.

## 9.3 The Philosophical Basis of the New Charter of Fundamental Human Rights

With this picture in mind I suggest the drafting of a second Declaration, called a Charter of Fundamental Human Rights, which should be given binding legal quality and which should be assigned the new function of articulating the substantive commitments that define the sovereignty of the international community – a kind of cosmopolitan sovereignty which remains not organized itself in a State-like form but can be said to trump the sovereignty of each and every State which will sign the new Charter.

It is not within the scope of this paper to specify the details of the procedure whereby such a legally binding Charter of Fundamental Human Rights should be discussed, drafted and then approved by a special Convention convened by the General Assembly of the United Nations in order to then be ratified by the single States. Nor can the guidelines be addressed that should inspire its application on the part of the Security Council or the adjudication, by the International Court of Justice, of controversies over its application. I will only recall three ideas that could contribute to shape such a procedure. First, in order to ensure its authoritativeness over time, the Charter should contain a clause which commits all the ratifying States to make their own recognition of any future new State contingent on its acceptance of the Charter itself. Second, the document should include a synthetic but explicit and univocal specification of the structure of authority in charge of implementing the universal observance of the principles therein established, in order to avoid the possibility that subsequent compromises or agreements about its implementation could erode or otherwise neutralize its substantive implications. Third, the Charter should ideally be thin in its provisions, in order to allow for maximum cross-cultural convergence, but at the same time should contain a preamble that articulates the idea of human dignity underlying fundamental human rights in a vocabulary accessible and truly shareable by all the main religious and secular cultures of the planet.

Rather, in this section, I would like to address the main lines of a philosophical argument which could justify the up to now only putative universal valence of its provisions and this “political” (in Rawls’s sense) idea of human dignity.

In line with a methodological understanding of universalism as bound up more with exemplarity and judgment than with principles (Ferrara 2008), identity is understood here as a fundamental source of normativity. Luther famously grounded his adhesion to certain principles on the normativity of his identity: "Here I stand. I can do no other." Rawls eloquently said of justice as fairness that its normative appeal on us rests not on its "being true to an order antecedent to and given to us," but on "its congruence with our deeper understanding of ourselves and our aspirations" and consequently on "our realization that, given our history and the traditions embedded in our public life, it is the most reasonable doctrine for us" (Rawls 1980, 519). Along similar lines, I would contend that the universal normativity of the understanding of human dignity incorporated in the Universal Declaration of Human Rights and in the proposed Charter of Fundamental Human Rights, as well as the consequent universality of the human rights, have no other basis than their reflecting the vision of human dignity most conducive to the flourishing of the largest-scale human identity that we can think of: namely, the identity of humanity as such.

At the time when a world society has developed along with a global market, the idea of humanity has ceased to be merely a philosophical projection – such as the Kantian "kingdom of ends" or Nietzsche's "mountainous crest of humanity" – and has become a "concrete universal," an identity which encompasses all other human identities but is no less situated in time than they are. The construction of reason that enshrines the image of a fulfilled humanity is substantively different if we consider it at the time before man-made genuine global challenges to human survival appeared[7] or at times before bio-medical science could interfere with genetic processes, at a time when war was considered a legitimate prerogative of sovereign States and when it is considered legitimate only in self-defense.

In any event, such construction will take the form of a narrative which draws, like any identity-constituting narrative, on a reconstruction of the past (which answers the question "who are we?") and an intended future state (which answers the question "who do we wish to be?"). It is beyond the scope of this paper to address the substance of this narrative. Instead, I will briefly and tentatively outline a methodological reflection. The core of this methodological reflection is the observation that two versions of the idea of a fulfilled humanity must be distinguished, a *political* and a *moral* one.

According to its political notion, humanity is to be taken *as it is* – or as it appears to us from a chosen interpretive perspective. We then conceive of humanity as a society which includes all other societies and consider the "component societies" as they really are, i.e., as the concrete societies known to us, each with its name, structure, geographical location, GNP, institutional order, natural resources, past history, and so on. What we do when thinking of humanity along "political" lines is to imagine an aggregate that contains all these single, discrete societal units, each of which in turn includes millions of individuals. This is the *society of peoples* envisaged by the representatives in Rawls's original position when they interrogate themselves

[7] On the notion of "global challenges," see Cerutti (2009).

about the principles that could regulate the coexistence according to justice of all the peoples of the earth (Rawls 1999, 30–35). The good for humanity, when understood in a *political* sense, amounts then to the notion of the good for a world society composed of all the single societies *taken as they are*. Cultural pluralism is then clearly paid its dues in the construction of such a political idea of "justice among societies" – as distinct from the notion of a mere *modus vivendi*. In fact, from the beginning, the coexistence of peoples is conceived from the perspective of the optimal flourishing of such a society of societies – where "optimal flourishing," in turn, is a normative construct that includes not merely the prudential avoidance of conflict but also the protection of human rights as well as other substantive aspects, like the protection of the environment and the regulation of the global economy. For example, its being something more than a *modus vivendi* is what allows the adherents of a *political* conception of international justice to legitimately exclude those which Rawls calls "outlaw States." If we define "outlaw States" as regimes that pursue their expansion with all possible means and refuse to honor human rights, then to allow the peoples governed by such regimes to be part of the formation of a society of peoples would be tantamount to downscaling the political idea of justice underlying such coexistence to that of a mere truce or a *modus vivendi*.

In this political conception of global justice, however, there remains an ineradicable residue of "facticity," insofar as humanity is conceived as the sum total of existing societies *as they are*, with all their injustices and vices, and "decent" societies can offer a fair number of examples of such injustices.

However, we also make use of another, more critical or normatively demanding, concept of humanity in thinking of what it means for humanity in its entirety to attain fulfillment or the good. When we understand humanity in light of this normatively more demanding concept, we conceive it as the set of all human beings who have lived, are living, and will be living on the earth. Among them, presently living ones are the only human beings endowed with *agency*, yet this does not make them the sole arbiters of what constitutes the flourishing of humanity so understood. The flourishing of humanity, in fact, consists among other things in bringing to fulfillment projects, aspirations, and values typical of the past generations and in preserving the future generations' chances to live a life of quality not inferior to that of their predecessors. Such a normative idea, concrete and based on a reconstructible narrative, of a fulfilled humanity brings to fruition the normative valence possessed by the highest achievements of the past generations and constitutes the basis for the *moral* idea of justice on a global scale.

In the context of such a moral idea of justice on a global scale, societies, peoples, states, *demoi* and *ethnoi*, majorities and minorities are no longer relevant: we are left with the idea of a community of all human beings "as such," that is, of all the beings who have been living, are living, and will live within what we call the *human condition.* This community is held together both by the *human condition* as a common condition and by the precipitate, narratively reconstructed, of the best that has been achieved within this common condition. Such an idea has become thicker and thicker in the course of history, from the very thin Kantian idea of a "kingdom of ends," populated by all human beings *qua* moral subjects endowed with autonomy, all the

way to the contemporary idea, on its way to becoming more concrete and thicker precisely by virtue of the process of globalization, of a human world-community characterized by a reflexive attitude and capable of understanding itself as the heir of past generations and the trustee of future ones.[1]

We need now to combine these two notions of humanity with another distinction that I have drawn in *The Force of the Example*. We can further distinguish an *elementary* and a *full-fledged political* conception of global justice (Ferrara 2008, 136). Elementary is a conception of justice on a global scale that starts from the idea of humanity as a confederation of the existent and recognized peoples and understands the point of justice on a global scale as the identification of the principles capable of averting conflict. This elementary view of justice on a global scale differs from a *modus vivendi* insofar as the orientation of the relevant actors, peoples understood as *demoi*, is not prudential or self-interested but rather is oriented towards the identification and the realization of the requisites for the fulfillment of a superordinate identity: humanity understood as a society of the existent peoples. Nevertheless, this remains an *elementary* conception of justice insofar as the good or realization of this superordinate identity is conceived primarily in the minimal terms of the avoidance of conflict and the loss of human life.

A *full-fledged political* conception of justice on a global scale, instead, focuses not only on the avoidance of conflict or loss of life but also on the realization of other requisites of the fulfillment of humanity in its entirety – for example, the requisite of protecting the ecosystem or of having a minimal threshold of material well-being for all human beings. *Full-fledged* conceptions of justice on a global scale do not cease to be "political" in Rawls's sense; they attribute normative relevance to the requisites of the identity of humanity only insofar as this relevance is recognized by each of the partial identities considered.

Needless to say, the above-mentioned distinctions are merely analytical. They are ideal types of conceptions of justice on a global scale that serve the purpose of *orienting* us within the large variety of existing doctrines. But they have a bearing on our previous discussion. A Charter of Fundamental Human Rights relates to the Universal Declaration of Human Rights as a document reflecting a view of the protection of human dignity conducive and responsive to an *elementary conception of justice on a global scale* relates to a document which rests on a thicker and more robust view of human dignity as part of a *full-fledged conception of justice on a global scale*.

Political philosophy cannot replace – without forfeiting a liberal perspective and becoming an oppressive ideology – the jurisgenerative process of political will-formation taking place at the intersection of the orientations of the relevant actors, in this case once again peoples qua *demoi* and their States. What it can do, however, is to shed light on two presuppositions that enable such a process to get under way – out of which a redefinition, neither abstractly philosophical nor merely on the plane of *Realpolitik*, of fundamental human rights which trump State sovereignty might ensue.

The first presupposition is the existence and cogency of the standpoint of the fulfillment of humanity as a non-parochial, non ethnocentric point of view independent of the specifics of Western modern culture. Unless we presupposed such a

point of view, so conceived, we could not even begin to make sense of the controversy between the received view of human rights, as reflected in the Universal Declaration, and those more specific understandings of human rights embedded in the 1981 *Universal Islamic Declaration of Human Rights* or in the 1993 *Bangkok Declaration on Human Rights.* It remains to be seen how the standpoint of the fulfillment or realization of the identity of humanity can be articulated and what results it would generate, but we cannot reasonably reject the idea that it exists.

The second presupposition consists of the proposition that Westerners, qua members of humanity are certainly entitled to put forward *their own* idea of what it might mean for humanity to realize itself and to oppose those conceptions of the good that, by allowing for genocide, ethnic cleansing, or the systematic elimination of political dissidents, irreversibly foreclose the possibility for humanity to attain a form of realization that includes the idea of human rights. The memory of the Holocaust is of paramount importance in this respect. As in the construction of an individual identity it is impossible to overlook, bypass, or ignore moral violations of the magnitude of murder, so the history of humanity, despite the many massacres and persecutions of the past, is traversed by a fracture called the Holocaust, whose symbol is Auschwitz, after which it has become impossible to think of a future for humanity that does not take what happened at Auschwitz into account. The anticipation of a future identity of humanity predicated on the assumption that "Auschwitz doesn't matter" is foreclosed to "us humans" not just qua Europeans, Americans or Westerners, but qua members of *humanity* – in this case understood as a community of all human beings that have gone, are going, or will go through a human life. In this statement, as in all identity-grounding narratives, descriptive and normative elements are intertwined. To say that humanity cannot project a future identity of its own based on the assumption that "Auschwitz doesn't matter" is the same as saying that someone who's killed her children cannot live the rest of her life as though that event "didn't matter." On the plane of justice on a global scale, the adoption of conceptions that fail to condemn the perpetration of new holocausts under different names (be they the extermination of the Tutsi, ethnic cleansing, the Cambodian Killing Fields) can then be rejected as something that undermines humanity's possibility of maintaining a sense of self-respect, and each of its members' ability to regard humanity within himself as worthy of respect. Whoever then is in a position to stop such crimes and to criticize these conceptions renders a service to humanity not so much in the sense of affirming one comprehensive conception of the good against another, but in the sense of keeping open for humanity a plurality of self-representations and avenues of fulfillment all compatible with a defensible sense of self-respect.

From these two presuppositions corroboration can be drawn for the thesis – susceptible of being shared by *all* as a political conception of justice on a global scale – that the anticipation of an ideal identity of humanity that includes at least fundamental human rights is capable of bringing humanity to a fulfillment *more complete* than other conceptions of its fulfillment that do not comprise human rights, relativize, or deny them explicitly.

This thesis must proceed immanently, by way of deconstructing each conception of the fulfillment of humanity that allows for the violation of human rights and by

way of showing the implausibility of the inequality among human beings, which constitutes one of the central tenets of such conceptions.

This ideal and fulfilled identity of humanity, from which stems the normativity reflected in a Charter of Fundamental Human Rights should not then be understood as resting on a comprehensive conception of the good, like the Christian, the Islamic, or other conceptions. Rather, it must be understood as a "non comprehensive" or "thin" conception of the good of humanity. The basis for including human rights as an ineliminable part of that identity is that while our pluralist intuitions enjoin us to believe that no culture, including Western culture, can claim to possess a definitive vision of what it means for humanity to fulfill itself, the same pluralist intuitions allow us, at the same time, to defend our entitlement to make sure, with all available means, that at least the *possibility* of a universal affirmation of the vision of human fulfillment centered on human rights, which we Westerners see as unrenounceable, not be jeopardized by crimes that may mark the identity of humanity in irreversible ways.

## 9.4 Concluding Remark

To conclude, the idea of a Charter of Fundamental Human Rights presented here is meant to embody the spirit of a "realistic utopia" best expressed by John Rawls in *The Laws of Peoples* and combine it with a pluralistic and antiperfectionist insight, championed by him and by Michael Walzer in his ground-breaking essay "Governing the Globe" (Walzer 2004, 171–91) – namely, the intuition that there is nothing more *anti-liberal* than the notion that a just world will come into being solely when every human being on earth will turn into a liberal.

In the spirit of this pluralistic insight the proposed Charter is designed to remain clear of any assumption that cannot be accepted by the representatives of all peoples of the world in the light of the cultures, religious or secular, which shape their lives. In the spirit of a "realistic utopia," the proposed Charter is designed to extend the truly universal *acquis* of the international community – whose keystone is the ban on the war of aggression inaugurated by the League of Nations, confirmed by the Briand-Kellog Pact of 1928 and finally embedded as a fundamental principle in the Charter of the United Nations – to include also the protection of some fundamental human rights by subtracting them from the exclusive jurisdiction of single States and by committing the international community to their active defense. A world in which a Charter of Fundamental Human Rights were in force could not in and of itself be equated with the world of justice that many religious and secular conceptions legitimately fathom and strive for, but would nonetheless constitute a significant step towards it and an improvement over the world in which we live: a waystation which would in no way preclude further steps from becoming the "realistic utopias" of future historical horizons, as it certainly lies in the hopes of all committed liberals.

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# Part III
# Democracy and Human Rights

# Chapter 10
# Is There a Human Right to Democracy? Beyond Interventionism and Indifference*

**Seyla Benhabib**

## 10.1 Human Rights in Contemporary Discourse

There is wide-ranging disagreement in contemporary discourse about the justification as well as the content of human rights. On the one hand, the language of human rights has become the public vocabulary of a conflict-ridden world which is increasingly growing together.[1] The spread of human rights, as well as their defense and institutionalization, are now seen as the uncontested language, though not the reality, of global politics. Yet "… in recent years, as political commitment to human

*I first developed the themes discussed in this essay in my Presidential Address to the American Philosophical Association, Eastern Division in December 2006. See Benhabib (2007a, 7–32). I have presented this lecture at the University of Kansas at Lawrence upon the occasion of the annual Lindley Lecture (October 26, 2007); during the annual meeting of the Yale Law School's Middle Eastern Seminar in Istanbul, Turkey in January 2008; at Yale's "Law and Globalization Seminar" on March 31, 2008; at Fordham University's Graduate Students in Philosophy Conference on April 12, 2008, and at the People for Women in Philosophy conference at the New School for Social Research on April 23, 2008. I wish to thank participants in these occasions for their lively engagement and comments and in particular, David Alvarez Garcia, for drawing my attention to Joshua Cohen's work on democracy as a human right.

[1] See Ignatieff (2001). I use the concept of "a public vocabulary" to distinguish it from the Rawlsian concept of "public reason." Public reason for Rawls is primarily the deployment of reason as a justificatory enterprise in a pluralistic, liberal society, in which many world-views compete for the allegiance of citizens. See Rawls (1996). A "public vocabulary," by contrast, is a shared normative language for all sorts of actors and agents in civil society, as well as state institutions, within, and often beyond national borders, through which moral and political claims are articulated. It would go beyond the limits of this essay to explore all the epistemological and methodological differences between the Rawlsian concept of public reason and the discourse-theoretic model which I will defend. For my early critique of Rawls, see Benhabib (1996).

S. Benhabib (✉)
Department of Political Science, Yale University, New Haven, CT, USA
e-mail: seyla.benhabib@yale.edu

C. Corradetti (ed.), *Philosophical Dimensions of Human Rights: Some Contemporary Views*, DOI 10.1007/978-94-007-2376-4_10,

rights has grown, philosophical commitment has waned."[2] Some argue that human rights constitute the "core of a universal thin morality," (Michael Walzer); others claim that they form "reasonable conditions of a world-political consensus," (Martha Nussbaum). Still others narrow the concept of human rights "to a minimum standard of well-ordered political institutions for all peoples"[3] (John Rawls) and caution that there needs to be a distinction between the list of human rights included in the Law of Peoples and the Universal made Declaration of Human Rights of 1948.

Different justifications of human rights inevitably lead to variation in their content and to "cherry-picking" among various rights. Michael Walzer, for one, suggests that a comparison of the moral codes of various societies may produce a set of standards, a "thin" list of human rights, "to which all societies can be held – negative injunctions, most likely, rules against murder, deceit, torture, oppression and tyranny."[4] But this way of proceeding would yield a relatively short list. "Among others," notes Charles Beitz, "rights requiring democratic political forms, religious toleration, legal equality for women, and free choice of partner would certainly be excluded."[5] For many of the world's moral systems, such as ancient Judaism, medieval Christianity, Confucianism, Buddhism and Hinduism, Walzer's "negative injunctions against oppression and tyranny" would be consistent with great degrees of inequality among genders, classes, castes and religious groups.

Another suggestion is that a *nonparochial* view of human rights, while it may not be endorsed by all *conventional moralities*, would in fact, find favor in the eyes of main conceptions of *political and economic justice* in the world: understood thus, human rights would constitute the core of a *political* rather than *moral* overlapping consensus. Martha Nussbaum's defense of human rights follows this strategy.[6]

Certainly, the most provocative defense for limiting human rights to "to a minimum standard of well-ordered political institutions for all peoples," has been John Rawls's. Rawls lists the right to life (to the means of subsistence and security); to liberty (to freedom from slavery, serfdom, and forced occupation and to a sufficient measure of liberty of conscience to ensure freedom of religion and thought); to personal property and to "formal equality as expressed by the rules of natural justice (that is, that similar cases be treated similarly)"[7] as the basic human rights. The rights

[2] Mendus (1995, xliii, 10). For two recent contributions to the debate about human rights, cf. also Risse (2008); and Baynes (2009).

[3] Rawls ([1993], 1999, 552). To distinguish this essay from the book of the same title, I refer to each text followed by the dates 1993 and 1999 respectively. For an interesting critique of Rawls along these lines, see also Ferrara (2003, 3ff.).

[4] Walzer (1994). It is unclear to me what a human right against "deceit" would imply? A right not to be lied to? This is a moral claim, not a human right.

[5] Beitz (2001, 272).

[6] Nussbaum (1997–98, 273–300).

[7] Rawls (1999, 65). The earlier list in the 1993 article of the same title presented a slightly different formulation: included here as human rights were "the elements of the rule of law, as well as the right to a certain liberty of conscience and freedom of association, and the right to emigration," Rawls ([1993], 554).

to liberty of conscience and association are pared down in *The Law of Peoples* (1999) such as to accommodate "decent, hierarchical societies," which grant *some* liberty of conscience to other faiths but not *equal liberty of* conscience to minority religions that are not state-sanctioned. Article 18 of the UDHR, by contrast, which guarantees "the right to freedom of thought, conscience and religion," including the right to change one's religion, "to manifest one's religion or belief in teaching, practice, worship and observance," is much more egalitarian and uncompromising vis-à-vis existing state religions than is Rawls's right to the "non-egalitarian liberty of conscience."

Most significantly, Rawls passes over without comment the all-too crucial Article 21 of the UDHR which guarantees everyone "the right to take part in the government of his country, directly or through freely chosen representatives," and which stipulates that "the will of the peoples shall be the basis of the authority of government."[8] There is no *basic human right to self-government* in the Rawlsian scheme.

Given that the Universal Declaration of Human Rights is the closest document in our world to international "public law," how can we explain this attempt on the part of many philosophers to restrict the content of human rights to a fraction of what is internationally agreed to – at least on paper? I am not precluding, of course, the possibility that these documents themselves may be philosophically confused, produced as a consequence of political compromises, as was the UDHR, which was the subject of continuous negotiations between the delegations of the United States and the Soviet Union.[9] As James Griffin has observed, however, it is at least necessary to consider seriously the "discrepancies between the best philosophical account of human rights and the international law of human rights."[10]

In a recent article Joshua Cohen has helpfully distinguished among two kinds of "minimalism about human rights." The first is "substantive," the second, "justificatory" minimalism.[11] *Substantive* minimalism concerns the content of human rights, and is "more broadly, about norms of global justice." On this view, human rights are largely confined to what was once known as "negative liberty." Michael Ignatieff's, *Human Rights as Politics and Idolatry* (Ignatieff 2001, 173), but also Thomas Nagel's

[8] See Rawls ([1993], 553–54, (1999), 79–80).

[9] Cf. Morsink (1999).

[10] Griffin (2001, 1–28). The result of such an examination may be that "Some of the items on the lists are so flawed that they should be given, as far as possible, the legal cold shoulder" (26). I agree, but Griffin proceeds from a rather conventional account of human rights as "centered on the notion of agency…We value our status as agents especially highly, often more highly than our happiness. Human rights can then be seen as protections for our agency – what one might call our personhood" (4). This defense of human rights is subject to the same criticisms as all other agent-centric views: that some condition is necessary for the exercise of *my* agency does not impose an obligation upon *you* to respect this condition, unless you and I also recognize each other's equality and reciprocity as moral beings. This is the first justificatory step in the argument. See fn. 24 below.

[11] See Cohen (2004, 192).

"The Problem of Global Justice" endorse this view.[12] "Justificatory liberalism," by contrast, is about how to present "a conception of human rights, as an essential element of a conception of global justice for an ethically pluralistic world – as a basic feature of … 'global public reason'" (Cohen 2004, 192).

This is an important distinction. The attractiveness of "justificatory minimalism" flows out of a concern with finding an "overlapping consensus" in the international domain that would not be based on comprehensive world-views and doctrines which often are exclusionary or sectarian in outlook; instead, such a global overlapping consensus would need to be "free standing" in Rawlsian language. In a world where the concept of human rights has been much used and abused to justify all sorts of political actions and interventions, such caution is certainly welcome. A "free standing" global overlapping consensus is intended to enhance the prospects of world peace by assuring that the terms of agreement be acceptable to all peoples.

Yet this laudable concern with liberal toleration and peaceful coexistence in Rawls's *Law of Peoples* may also lead to liberal indifference, and even more, to an unjustified toleration for the world's repressive regimes such as many "decent, hierarchical peoples" may be and often are. Joshua Cohen's position vis-à-vis this implication of Rawls's work is complex. Unlike Rawls, Cohen argues that "any reasonable conception of collective self-determination that is consistent with the fundamental value of membership and inclusion, will…require some process of interest representation and official accountability, even if not equal political rights for all" (Cohen 2004, 213). In other words, even if the scope of representation and accountability defended by Cohen goes beyond the "consultative hierarchy" considered sufficient by Rawls, Cohen still considers "the recognition of equal political rights" for all not to be necessary for the condition of universal respect for all to be satisfied. How plausible is this limitation? How cogently can one distinguish "interest representation" and "official accountability" from democratic equality? Why compromise on "equal political rights for all?"[13]

In this essay I wish to shift both the *justification* strategy and the derivation of the *content* of human rights away from *minimalist* concerns towards an understanding of human rights in terms of the "right to have rights" (Hannah Arendt).[14] I will defend a discourse-theoretic justification strategy which seeks to synthesize the insights of discourse ethics with Hannah Arendt's concept. I thereby hope to point the way toward a more robust defense of human rights within a global justice context.

[12] Nagel (2005, 1522). For Nagel, "negative rights like bodily inviolability, freedom of expression, and freedom of religion" are "morally unmysterious" in their defense (1522). To call "freedom of expression" and "freedom of religion" negative rights displays a very limited view of the meaning of human associations and of citizenship. This position completely occludes the problem of "democratic iterations," which I will discuss below. In strict terms, Nagel is both a "substantive" and a "justificatory" minimalist. But I will not be able to pursue this problem here.

[13] It is interesting that Risse and Baynes who enthusiastically endorse a "political conception of human rights" are silent about this particular aspect of Cohen's discussion. See Risse (2008) and Baynes (2009).

[14] Cf. Arendt ([1951] 1968 ed., 177). For an extensive discussion of some of the shortcomings of Arendt's own formulation of this concept, see Benhabib (2004b, 50–61).

Whereas in Arendt's work, "the right to have rights" is viewed principally as a *political* right and is narrowly defined as the "right to membership in a political community," I will propose a non-state-centered conception of the "right to have rights," understood as the claim of each human person to be recognized and to be protected as a legal personality by the world community.[15] This reconceptualization of the "right to have rights" in non-state-centric terms is crucial in the period since the 1948 Declaration of Human Rights – a period in which we have moved away from "international" toward "cosmopolitan" norms of justice. Contemporary rights discourse has sadly failed to take note of these transformations and to develop a justification of and content for human rights consonant with these juridical transformations.[16]

In what follows, I begin with a "discourse-theoretic" account of human rights. (II) This, in turn, leads to the question whether there are some minimal assumptions about human nature and rationality which must underlie any normative account of human rights.[17] I will argue that in any defense of human rights certain normative commitments are crucial and that justificatory universalism and moral universalism are deeply intertwined.[18] (III) I will then return to the problem of "minimalism" in the justification of human rights and claim that a robust right to self-government is essential for being able to make justifiable claims concerning the valid range of variation in the articulation of human rights at all. Cohen's argument that there is no "human rights to democracy" is indefensible and self-contradictory.

## 10.2 A Discourse-Theoretic Account of Human Rights

I want to argue that rights claims are in general of the following sort: "I can justify to you with good reasons that you and I should respect each others' reciprocal claim to act in certain ways and not to act in others, and to enjoy certain resources and services." Some rights claims are about *liberties*, that is, to do or to abstain from doing certain things without anybody else having a moral claim to oblige me to act or not to act in certain ways. Liberty rights generate duties of forbearance. Other rights claims are about *entitlement to resources.* Such rights, as the right to an

[15] Again, there is a fascinating overlap here between Joshua Cohen's claim "that human rights norms are best thought of as norms associated with an idea of membership or inclusion in an organized political society" (2004, 197), and the "right to have rights."

[16] See note 25 below and also Benhabib (2004a, Introduction).

[17] The juxtaposition of a "political" versus "metaphysical" conception of human rights, which Baynes proceeds from (see above Baynes 2009), strikes me as being very narrow. This contrast is by no means exhaustive of the range of justification of human rights. It is completely mysterious to me how one can have a conception of rights without basing it on some conception of human agency. Such a conception of the rights-bearing person as an agent can certainly be based upon metaphysical and other kinds of comprehensive views, but they need not be. The discourse ethics and the view of human agency I articulate here correspond best to what Risse has called "a principle-driven" account of human rights. See Risse (2008, 5).

[18] For further elucidation of these terms, see Benhabib (2007a, 11 ff.).

elementary school education or to secure neighborhoods, for example, entail obligations on the part of others, whether they be individuals or institutions, to act in certain ways and to provide certain material goods. As Jeremy Waldron observes, such rights issue in "cascading obligations."[19]

For the Kantian morally constructivist tradition,[20] rights claims are not about what "exists"; rather, we ask whether our lives within, outside and betwixt polities ought not to be guided by mutually and reciprocally guaranteed immunities, constraints upon each others' actions, and by legitimate access to certain goods and resources. Rights are not about what there *is* but about the kind of world we reasonably *ought* to want to live in.

How can we justify talk of human rights without falling either into the traps of naturalistic fallacy or possessive individualism? The answer is: "In order to be able to justify to you why you and I ought to act in certain ways, I must respect your capacity to agree or disagree with me on the basis of reasons the validity of which you accept or reject. But to respect your capacity to accept or reject reasons means for me to respect your capacity for communicative freedom." I am assuming that *all* human beings who are speakers of a natural language are capable of communicative freedom, that is, of saying "yes" or "no" to an utterance whose validity claims they comprehend and according to which they can act. *Human rights or basic rights are moral principles that need to be embedded in a system of legal norms such as to protect the exercise of communicative freedom.*

Certainly, the exercise of communicative freedom is also an exercise of agency, of formulating what goals and ends we wish to pursue and how to effectuate such pursuits. Unlike agent-centric human rights theories,[21] however, which are still the most commonly subscribed to accounts of human rights, in the discourse-theoretic model, we proceed from a view of the human agent as an individual embedded in contexts of communication as well as interaction. The capacity to formulate goals of action does not precede the capacity to be able to justify such goals with reasons to others. Reasons for actions are not only grounds which motivate me; they are also accounts of my actions through which I project myself as a "doer" on to a social world which I share with others, and through which others recognize me as a person capable of, and responsible for, certain courses of action. Agency and communication are two sides of the same coin: I only know myself as an agent, because I can anticipate being part of a social space in which others recognize me as the initiator of certain deeds and the speaker of certain words. It is the weakness of all agent-centric accounts of human rights that they abstract from the social embeddedness of agency in such shared contexts of speech and action, and instead focus on the isolated agent as the privileged model for reasoning about rights.[22]

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[19] Waldron (1984, xxx). I have also found very helpful, Smith, "The Normativity of Human Rights," (manuscript on file with the author).

[20] For a careful analysis of the self-contradictions of MacIntyre's own appeal to reason, see Forst (2002, 200–215).

[21] See Gewirth (1983) and (1996).

[22] This is the major flaw in James Griffin's otherwise instructive account (2001, 4 ff.).

First and foremost as a moral being capable of communicative freedom you have a fundamental *right to have rights.* The right to have rights involves the acknowledgment of your identity as a generalized as well as a concrete other.[23] If I recognize you as a being entitled to rights only because you are like me, then I deny your fundamental individuality which entails your being different. If I refuse to recognize you as a being entitled to rights because you are so other to me, then I deny our common humanity.[24]

The standpoint of the "generalized other" requires us to view each and every individual as a being entitled to the same rights and duties we would want to ascribe to ourselves. In assuming this standpoint, we abstract from the individuality and the concrete identity of the other. We assume that the other, like ourselves, is a being who has concrete needs, desires and affects, but what constitutes his or her moral dignity is not what differentiates us from each other, but rather what we, as speaking and acting and embodied beings, have in common. Our relation to the other is governed by the norms of *formal equality and reciprocity*: each is entitled to expect from us what we can expect from him or from her. In treating you in accordance with these norms, I confirm in your person the rights of humanity and I have a legitimate claim that you will do the same in relation to me.

The standpoint of the "concrete other" by contrast, requires us to view each and every being as an individual with an affective-emotional constitution, concrete history and individual as well as collective identity, and in many cases as having more than one such collective identity. In assuming this standpoint, we bracket what constitutes our commonality and focus on individuality. Our relation to the other is governed by the norms of *equity* and *complementary reciprocity*. Our differences in this case complement rather than exclude one another. In treating you in accordance with these norms, I confirm not only your humanity but your human individuality. If the standpoint of the generalized other expresses the norm of respect, that of the concrete other anticipates experiences of altruism and solidarity.

Concepts of the generalized and the concrete other do not describe human nature; rather, they are phenomenological accounts of conditions of human experience. Admittedly, the standpoint of the "generalized other," in the very universalistic form which I have given to it, presupposes the diverse experiences of modernity. I am not maintaining, in some Hegelian fashion, that these views are the necessary end-products of the course of history. Rather, they are contestable, fraught and fragile experiences through which the standpoint of "generalized other," as extending to "all of humanity" becomes a practical possibility, but certainly not a political actuality.

Such reciprocal recognition of each other as beings who have the right to have rights involves political struggles, social movements and learning processes within

[23] See Benhabib (1992, 35–37).

[24] See the innovative interpretation of Arendt's "the right to have rights" by Birmingham (2006). Birmingham writes: "The right to have rights is inspired by a new principle of humanity; the principle of publicness that demands that each actor *by virtue of the event of natality* itself has the right to temporary sojourn on the face of the earth" (58). Italics mine. Although I cannot go into greater detail within the compass of this essay, let me simply mention that Birmingham addresses but, in my view, does not resolve, the problem of "the lack of normative foundations" in Hannah Arendt's thought.

and across classes, genders, nations, ethnic groups and religious faiths. This is the true meaning of universalism: universalism does not consist in an essence or human nature which we are all said to have or to possess, but rather in experiences of establishing commonality across diversity, conflict, divide and struggle. Universalism is an aspiration, a moral goal to be strived for; it is not a fact, a description of the way the world is.

Let me emphasize how this justification of human rights through a discourse-theoretic account of communicative freedom differs from others. In the first place, the justification of human rights is viewed as a dialogic practice and is not mired in the metaphysics of natural rights theories or possessive individualist selves. This justification of human rights also differs from *agent-relative* accounts (such as Alan Gewirth's),[25] because in these accounts it is assumed that human rights are enabling conditions of the exercise of agency under some description. This then leaves unanswered the question why the claim that some condition or another is essential to the exercise of *your* agency imposes a moral obligation upon *me* to respect that claim. By contrast, in the discourse model we argue that the recognition of *your* right to have rights is the very precondition for you to be able to contest or accept *my* claim to rights in the first place. *My* agent-specific needs can serve as a justification for you only if I also presuppose that *your* agent-specific needs likewise serve as a justification for me. And this means that you and I have recognized each others' right to have rights.

Does not this discourse-theoretic justification of human rights prove too much or too little: aren't my formulations dependent upon some prior understanding of what constitutes "good reasons" in discourses? Obviously such shared understandings of 'good reasons' can hardly be non-controversial. Surely, discourses, to be distinguished from bargaining, cajoling, brain washing or coercive manipulation, are dependent upon certain formal conditions of conversation: these are the *equality* of each conversation partner to partake in as well as initiate communication, their *symmetrical* entitlement to speech acts, and *reciprocity* of communicative roles: each can question and answer, bring new items to the agenda and initiate reflection about the rules of discourse itself. These formal preconditions, which themselves require reinterpretation within the discursive process, impose certain *necessary* constraints upon the kinds of reasons that will prove acceptable within discourses, but they cannot, nor should they be required to, provide *sufficient* grounds for what constitute "good reasons." Indeed there is a circularity here, but this is not a vicious circle. It is the hermeneutic circularity of practical reason which Aristotle had noted long ago in his *Ethics* to be an essential feature of all reasoning in morals and politics: we always already have to assume *some understanding* of equality, reciprocity and symmetry in order to be able to frame the discourse model in the first place, but each of these normative terms are then open to reflexive justification or recursive validation within the discourse itself. Such "recursive validation" of the preconditions of discourse has been misunderstood by many as indicating a vicious circle. I disagree with these claims which often ignore the "hermeneutical structure" of practical

[25] See Gewirth (1983).

reason and wish to have practical reason proceed as if it were theoretical reason – that is, from uncontested first premises.

This limitation of the range of what can or cannot count as "good reasons" in the light of the necessary conditions of recursively validated discursive structures may still not convince some;[26] nevertheless, let me emphasize the principle that communicative freedom is what makes normative justification at all possible,[27] because if human beings cannot assent to or reject each other's claims on the basis of reasons the validity of which they can accept, then there can be no justificatory enterprise at all. Even if the reasons we invoke in such a practice are utilitarian or Kantian, Nietzschean or Christian, in doing so we must always already presuppose the capacity of our conversation partner to assent or dissent from our claims on the basis of reasons the validity of which she comprehends. At the heart of reason as a reason-giving enterprise then is the recognition of the other as a being entitled to the "right to have rights." There is an unbreakable bond between reason understood as a justificatory enterprise, as reason-giving, and the justification of human rights. Justificatory universalism presupposes moral universalism.

Human rights and the various public law documents in our world define both a *minimum* to be maintained and a *maximum* to be aspired to. There will always be debate about their meaning as well as their comprehensiveness; any list we provide of them will necessarily be incomplete. New moral, political and cultural struggles will bring forth rights that need to be added to the list and will extend the maximum that humans can aspire to. For example, technological developments in human cloning, gene therapy and gene manipulation will most likely result in the formulation of some basic rights protecting human beings' biological and species integrity in the near future.[28] Precisely because they emerge out of such struggles and learning processes, human rights documents cannot simply be said to embody an "overlapping consensus" or "minimum conditions of legitimacy"; they give voice to the aspirations

[26] I wish to thank Richard J. Bernstein for pressing me on this point. In *The Claims of Culture* I addressed this question from within a mode of deliberative democracy and distinguished between "the syntax" and "semantics" of public-reason giving. Reasons, I suggested, would be counted as good reasons because they could be considered as being in the "best interest of all considered as moral and political beings." And to parse X or Y – a policy, a law, a principle of action, to be "in the best interests of all", would mean "that we have established X or Y through processes of public deliberation in which all affected by these norms and policies take part as participants in a discourse" (Benhabib 2002, 140 ff.). I said that there is no way to know in advance which semantically specific claims or perspectives may count as "good reasons." What discourse ethics, as well as deliberative democracy modeled on discourse ethics, rules out are *some kinds of reasons* – these are ones which cannot be syntactically generalizable.

[27] This is not a metaphysical claim. It results from the generally accepted philosophical method of analysis which focuses on the necessary presuppositions underlying many human practices. This kind of analysis was called "transcendental" by Kant, who associated the transcendental with the lack of conceivable alternatives in any universe thinkable by human beings. After Strawson's path-breaking work on *Individuals*, it is more common to refer to this type of claim as "presuppositional" analysis and leave open whether or not any alternative can be conceived to it.

[28] See the very instructive reflections by Bobbio (1996, 12–32).

of a profoundly divided humanity by setting "a common standard of achievement for all peoples and all nations" (Universal Declaration, Preamble).

It will not have escaped notice that defenders of a Rawlsian view would argue that my mode of proceeding amounts to justifying human rights in the light of a "comprehensive moral doctrine." Others, such as Martha Nussbaum and Amartya Sen, will be concerned about my insistence that human rights, although they articulate moral principles, must assume legal form as well. Let me first address this second objection.

## 10.3 Moral Rights versus Legal Entitlements. A Critique of Nussbaum and Sen

Martha Nussbaum suggests that a *nonparochial* view of human rights, while it may not be endorsed by all conventional moralities, may, find favor in the eyes of main conceptions of *political and economic justice* in the world: understood thusly, human rights would constitute the core of a *political* rather than *moral* overlapping consensus.[29] We can indeed view the following public law documents as embodying such "a political overlapping consensus":[30] the Universal Declaration of Human Rights, The International Covenant on Civil and Political Rights, The International Covenant on Economic, Social and Cultural Rights, and the Geneva Conventions of 1951 Relating to the Status of Refugees and Stateless Persons, as well as their Protocol of 1967, the 1948 Genocide Convention, and many other documents such as CEDAW. Nevertheless, Nussbaum's method of philosophical deduction, which ties in rights concepts all too narrowly to a philosophical anthropology of human capabilities, is problematic. No distinction is made in her account between rights as "moral principles" and rights as "legal entitlements," on the one hand, and "the principle of rights" and "the schedule of rights," on the other.

Rights articulate moral claims on behalf of persons, and may be even on behalf of non-human agents such as animals and the environment which can also be deeply and irretrievably affected by our actions. Although to raise a moral rights claim puts pressure on political and legislative institutions to generate a justiciable legal entitlement, not all such rights claims result in "legal entitlements." For example, to speak of the right of endangered species is a moral claim which can eventually be translated into a legal entitlement. *Whether* this takes the form of forbidding whaling off the

[29] Nussbaum (1997–98, 273–300).

[30] The UN Commission on Human Rights, created in 1946, drafted "major international human rights standards, including the two international human rights covenants, which, together, with the earlier adopted Universal Declaration of Human Rights (1948), form what is known as the International Bill of Human Rights," (Terlingen 2007, 168). For the documentation of the Declaration and Covenants, see: Steiner and Alston (2000). Louis Henkin writes: "As of 1999, some 140–145 (of the near 190 members of the United Nations) have adhered to each of the two Covenants, albeit in some cases with significant reservations. Contrary to expectations and earlier trends, about as many are parties to the Covenant on Civil and Political Rights as to the Economic and Social Rights Covenant." Louis Henkin, "Ideology and Aspiration, Reality and Prospect" (2000, 15).

coast of Japan or instituting positive measures to protect the Gold Eagle in the United States is an open question. Moral rights do not directly dictate the specific content of legal entitlements. This is a point which is blurred in Nussbaum's account.

The distinction between the "principle of right" and the "schedule of rights" is related to the differentiation between the moral form of rights and their legal content, but it is not identical to it. When a person's right to have rights is recognized in a duly constituted regime of the rule of law by the acknowledgment of that person as a member, then the "principle of right" is acknowledged; but this leaves open the question as to *what level of variation* in the enumeration, content and interpretation or rights is permissible among different "schedules of rights." Many legislatures which we could consider legitimate by widely shared standards of democratic authorization, transparency, public accountability, etc. can nevertheless proceed from a different schedule of rights. By "permissible" here I mean normatively defensible.[31] Nussbaum envisages a one-to-one correspondence between a philosophically derived list of human rights, based upon a moral theory of capabilities, and the enactments of specific legislatures. She thereby neglects how legitimate variations in the interpretations, contextualization and application of human rights can emerge across self-governing polities.

In "Elements of a Theory of Human Rights," Amartya Sen criticizes Nussbaum's attempt to identify an "overarching 'list of capabilities,'" on the grounds that such a "canonical list," as well as the weight to be attributed to the various items on this list, cannot be chosen without a further specification of context. More importantly, Sen sees in such a procedure "a substantive diminution of the domain of public reasoning."[32] Sen wishes to consider human rights as "primarily ethical demands," which relate to the "significance of the freedoms that form the subject matter of these rights." Although he refrains from an exhaustive listing of these freedoms himself, for Sen freedoms are actualizations of capabilities, both in the sense of opportunities and also of processes requisite for capabilities to be unfolded. "Rather, freedom, in the form of capability, concentrates on the *opportunity* to achieve combinations of functionings…" he writes (Sen 2004, 334).

By situating human rights so centrally within an ethical theory of freedom and capabilities, Sen disregards the political history of the concept of rights which were always closely tied to claims to legitimacy and just rule. Rights are not simply about

[31] Human rights are often considered to constitute that defensible minimum which must be respected by any range of variation. I agree but what I am insisting upon is that the significance of democratic self-government to the articulation of that range of variation among schedules of rights has been neglected. I am grateful to my colleague Alex Stone Sweet for bringing the relevance of Article 29 of the UDHR to my attention on this respect: "(1) Everyone has duties to the community in which alone the free and full development of his personality is possible. (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." (Universal Declaration of Human Rights).

[32] See Sen (2004, 333. fn. 31).

strong moral entitlements which accrue to individuals; they are about claims to justice and legitimacy enframing our collective existence as well. We cannot simply reduce rights to the language of moral correctness. Violating a right is different than inflicting a moral harm on a person. We can do the latter, that is inflict moral harm on a person, without engaging in the former, that is violate their rights; certainly some violations of rights, but not all, are forms of moral harm. By humiliating you in front of your family, friends and your loved ones, for example, I inflict moral harm upon your dignity as a person; but I have not thereby violated your "human right to dignity," which I would be doing if I were to subject you to torture and other forms of "cruel and unusual punishment." All violations of basic human rights, by contrast, that impinge upon the communicative freedom of the person, also inflict moral harms. If I hinder you from exercising your capacity to express your opinion freely within the boundaries set by the law, then I have not only violated your right to freedom of expression, but I have also harmed your moral capacity to be a person capable of communicative freedom in engaging in dialogue with others. I do not see that on Sen's account we can make such necessary distinctions between "moral harm" on the one hand and "rights violations" on the other. The lack of a clear distinction between rights as moral claims and their legal form is common to both Nussbaum's and Sen's approaches for quite different reasons. In this respect the discourse-theoretic justification of rights differs from both.

What about then the Rawlsian argument that the discourse-theoretic justification presented above is by no means a "minimalist one" and in fact presupposes a comprehensive moral theory? Let us recall that Rawls's principal motivation in limiting the list of human rights to certain essentials is to formulate a "political conception" of rights that would or could be endorsed by all the known and recognized moral, religious, scientific etc. comprehensive world-views in the global community. If the core of political liberalism is to formulate a political conception that citizens could endorse despite their widely divergent comprehensive views within a national community, likewise the core of public reason on a global scale is to formulate a "minimalist conception of human rights," which could be endorsed by peoples with divergent religious and moral traditions. Joshua Cohen spells this out clearly: "Justificatory minimalism is animated by an acknowledgment of pluralism and embrace of toleration. It aspires to present a conception of human rights without itself connecting that conception to a particular ethical or religious outlook" (Cohen 2004, 192).

Is a discourse-theoretical approach subject to the objection that it represents a narrow ethical outlook? Let me first observe that there is a methodological divide between the Rawlsian and discourse-theoretic approaches about the use of counterfactual choice and/or dialogue situations. The justification strategy proposed by the discourse-theoretic approach respects the pluralism of world-views not by counterfactually imagining, let us say, what a Buddhist and a Catholic may hypothetically agree to as construed by the theorist, but by framing and encouraging a *real rather than a virtual dialogue* among a Buddhist and a Catholic such that a reasonable agreement among them may result. The emphasis in discourse ethics is on the constraints necessary for the dialogic procedure, which admittedly ought

to be "thin" enough not to be identifiable with any particular worldview, and yet on the other hand, "thick" enough to guide the conversation toward rationally justifiable agreement, even if this is to be understood as a regulative principle. This is at least my aspiration in defending discourse-ethics. Discourse ethics is intimately related to political and institutional practices of communication and justification.

There is a further methodological problem in the Rawls-Cohen approach: When the constituent addressees of global public reason are identified to be "world-views" rather than individuals, or even whole peoples, who are said to ascribe to such world-views, what results is a "methodological holism." Clashes of interpretation and even breaks in tradition within such outlooks are minimized such as to present an overly coherent picture of a particular moral, religious or even scientific world-view and outlook. A Rawlsian would argue that without such a simplification the representation of these positions would be overly complex; but with this kind of oversimplification, the Rawlsian position ends up abstracting from the *lived history* of traditions and world-views to such a radical extent that points of overlap between such worldviews and the liberal tradition and among these worldviews themselves are underestimated.[33] Rawls has made it amply clear that in proceeding in such fashion he wishes to avoid normative cosmopolitanism by insisting that peoples, construed along such idealized devices of representation, and not individuals, are the agents of justice in a global context.

Take a country like Turkey for example to understand how wrong-headed this form of argumentation is: 99% of the population of Turkey are Muslim. If we wished to represent this country in terms of the religious beliefs of its citizens, we would be completely mistaken. Much like the rest of the world, since the sixteenth and seventeenth centuries, Ottoman Turkey has encountered modernity, has struggled with the compatibility of Islam and modernity, in a process which has left neither the Turkish understanding of modernity nor the Turkish understanding of Islam unchanged. Many arguments about human rights, equality, and democratic representation have been part of the political vocabulary of reform and transformation since the early nineteenth century. How can a Rawlsian methodology even account for such complex transformations of worldviews? In case it is argued that Turkey is a special case because of its close and sustained encounter with the West for many centuries, consider Malaysia: at the present an authoritarian form of Islamic orthodoxy rules in this country. But Malaysian history exhibits Buddhist, Confucian as well as forms of liberal secular thinking. These traditions often constitute resources for dissidents to draw form in opposing the regime. How is this complex history to be represented in a "law of peoples"? I fear that it is not represented at all. The assumption that in reasoning about global human rights the relevant units to be considered are comprehensive worldviews simply reduces peoples and their histories to a holistic

[33] For an extended discussion of the problem of "methodological holism" in Rawls's work, see Benhabib, (2004a, 1761–1787).

counterfactual, which then results in the flattening out of the complex history of discourses and contestations within and among peoples.

Far from exhibiting liberal tolerance this approach in my mind displays liberal ignorance. It leads us to assume that individuals from other cultures and traditions have not entertained throughout their histories similar kind of debates and concerns about human rights, justice and equality as we have in ours. It ignores that there have been complex cultural conversations throughout human history and that secular Enlightenment liberal ideas have themselves been a part of the conversation of many peoples and traditions of the world since the inception of western modernity. By not giving this complex conversation its due, the minimalist approach preaches liberal tolerance but results in liberal indifference.

## 10.4 Cohen and the Human Right to Democracy

In "Is There a Human Right to Democracy?" Joshua Cohen responds in the negative. For him a philosophical account of human rights considers them as "entitlements that serve to ensure the bases of membership."[34] "Just membership" in his account is distinct than "mere membership;" while just membership does entail democratic self-government mere membership does not.[35] According to Cohen, "the central feature of the normative notion of membership is that a person's good is to be taken into account by the political society's basic institutions: to be treated as a member is to have one's good given due consideration, both in the process of arriving at authoritative collective decisions and in the content of those decisions" (Cohen 2006, 237–38).

Yet, as Cohen admits, to have one's good to "be given due consideration" must entail freedom of opposition and dissent. So membership is not simply a matter of benevolent despotism but of decent representation. Yet how can the right of dissent and opposition be protected in the absence of representative institutions? What does "decent" representation mean without ongoing institutions of representation? Without an enduring commitment to the independence of institutions which express opinions about the members' good which may not be consonant with that of the regime or of the majority, how can Cohen's demanding conception of membership be satisfied? Cohen does not provide a single empirical example of what such a regime might look like. Of course, in a normative argumentation he is not required to do so. But we do not find the equivalent of a Rawlsian "Kazanistan" in Cohen's work. And indeed we cannot, for Cohen's understanding of membership is more ambitious than Rawls's. So we are left with the uneasy impression that either some

[34] Cf. Cohen (2006, 226–248).

[35] Cohen writes: "The distinction between the rights that must be assured in a just political society and human rights is associated with Rawls's distinction between liberal and decent but non-liberal peoples" (2006, 228).

form of enlightened or benevolent despotism may very well fulfill this criterion of membership, or Cohen must reduce the normative content of what is entailed in such membership to the preservation of the decent life of the members of a polity rather than to "the good of the person," as he wishes to. Cohen's normative account of membership inevitably leads to robust forms of self-government than he is willing to grant; his own account sets him on the slippery slope towards self-government whether through representative or more participatory forms of institutions.

Cohen is aware of this and boldly asserts that since democracy involves a rigorous commitment to egalitarianism and since such egalitarianism cannot be made compatible with major moral and religious worldviews such as Confucianism, Islam, Buddhism etc., a human right to democracy cannot be an aspect of a global conception of justice. Its defense is not "free-standing" but involves recourse to controversial individualistic and egalitarian moral assumptions. He asks: "Is the equal right to participate that I have associated with democracy a human right? And is the democratic conception of persons as free and equal … a plausible component of a conception of human rights comprised within global public reason? We know that the conception of persons as free and equal is not universally accepted by different ethical and religious outlooks…"[36] As I have argued, however, this appeal to what other traditions and worldviews may or may not consent to, would or would not consider acceptable, is based upon a faulty device of representation and a thin methodology. It repeats the Rawlsian mistake that in reasoning about such matters we must proceed from conceptions of moral, religious or other world-views rather than the messy history of concrete collectivities in whose lives such world-views always clash, compete and dialogue with one another. It is of course a poignant historical irony that in 2007–2008, just as philosophers build arguments as to why there is no universal human right to democracy, Buddhist monks in Myanmar and Tibet have abandoned their monasteries and risked death, torture and reprisals by challenging the oppressive Burmese and Chinese regimes on behalf of human rights and democracy. And in Spring 2011, many nations in the Arab world overthrew old regimes and demanded democracy, and end to corruption and free civil societies,

## 10.5 Human Rights and The Right to Self-Government

One further important distinction between my position and those of Nussbaum, Sen and Cohen is the sharp distinction they each make between human rights as "urgent requirements of political morality," in Cohen's words (Cohen 2006, 230), whose

[36] Cohen (2006, 242–43). I am assuming that the equal right of persons to take part in the affairs governing their collective existence through the medium of law and the articulation of their opinions and preferences in a political community is the essence of the democratic form of government. How this is institutionalized – whether through period elections; a multi-party system; proportional representation; mandates and recalls, etc. – belongs not to the idea of democracy but to its concretization in specific socio-historical contexts, and there can be legitimate disagreements about them.

"force does not depend on their expression in enforceable law," and my insistence that human rights must assume legal form. I wish to argue that human rights embody principles which need contextualization and specification in the form of legal norms.[37] How is this legal content to be shaped? The right to have rights seems quite abstract and formalistic and will make many natural right theorists and others uncomfortable since it abstains from prescribing the content of civil and political rights to which one would be entitled once the right to have rights was recognized. In response to this concern, one possible approach may be to proceed from the right to have rights, which I have already claimed to protect the communicative freedom of the person, to the norms of equal respect and concern and to derive a concrete list of basic human rights in this fashion. Human rights then would find their place in moral philosophy.

Basic human rights, although they are based on the moral principle of the communicative freedom of the person, are also legal rights, i.e. rights that require embodiment and instantiation in a specific legal framework. As Ronald Dworkin has observed, human rights straddle the line between morality and justice; they enable us to judge the legitimacy of law.[38] The core content of human rights would form part of any conception of the right to have rights as well: these would include minimally the rights to life, liberty (including to freedom from slavery, serfdom, forced occupation, as well as sexual violence and sexual slavery);[39] some form of personal property; equal freedom of thought (including religion), expression, association and representation and self-governance. Furthermore, liberty requires provisions for the "equal value of liberty" (Rawls) through the guarantee not only of socio-economic goods, including adequate provisions of basic nourishment, shelter and education, but also through the right of self-government.

Let us return at this point to the question of the legitimate range of rights: if we agree on the centrality of a principle such as "freedom of religious expression," are

[37] I have been asked to clarify the force of this "must." If there is a human right to democracy who is responsible for enforcing this right? Or does this mean that the world community ought to intervene in non-democratic societies to enforce this right? As I will argue in the final sections of this essay, human rights violations do no create obligations to intervene except under conditions specified by the Genocide Convention, and as necessitated by self-defense, as formulated in Article II (7) of the UN Charter, and as authorized by permanent members of the UN Security Council. The human right to democracy is "an aspirational claim," which as the formulators of the UDHR very pertinently say, formulates "a common standard of achievement for all peoples and all nations" (Universal Declaration, Preamble). The force of such aspirational claims is manifest in processes of "democratic iterations" which they sometimes set into motion and help sustain.

[38] See the classical essay by Dworkin, "Taking Rights Seriously" ([1970] 1978), 184 ff.).

[39] Since I consider individuals as "generalized" and as "concrete" others, taking into account their embodiment, the protection of the bodily integrity of persons, who are sexed differently, is an important human right. It is not only women who are subject to sexual violence, many gay men are as well; however because of their capacity to become pregnant, forced and arbitrary violence against women affects their personhood and capacities for communicative freedom differently than gay men. The important point is to keep in view the different kinds of violence that one can be subject to as a result of sexual difference and to incorporate this into our understanding of human rights. For example, many governments, including the USA and Canada, now recognize and grant as legitimate, requests for asylum for women escaping Female Genital Mutilation.

we committed to accepting that minority religions are entitled to rights to public expression equally with the majority, as I would argue, or can we maintain that freedom of religious expression is compatible with some reasonable restrictions upon its exercise, as Rawls has claimed? It is at this point that the human right to self-government becomes crucial, and why I would claim that, contra Rawls and Cohen, it is a basic human right. *My thesis is that without the right to self-government which is exercised through proper legal and political channels, we cannot justify the range of variation in the content of basic human rights as being legitimate.* If the difficulty with Martha Nussbaum's conception of human rights is that no distinction is made between the philosophical account of human rights and their legal embodiment, the weakness of the Rawlsian "minimalist position" about human rights is that one is forced to accept whatever a legal regime stipulates to be the content of human rights as legitimate, as long as such a regime meets certain minimum criteria of being a "decent, well-ordered society." Among other things, this is compatible with the denial of equal freedom of religion, expression and association to religious and ethnic minorities, as well as with the rejection of the right to democratic self-government.

Certainly, the juridical, constitutional, as well as common law traditions of each human society, the history of their sedimented interpretations, their internal debates and disagreements will shape the legal articulation of human rights. For example, while equality before the law is a fundamental principle for all societies observing the rule of law, in many societies such as Canada, Israel and India, this is considered quite compatible with special immunities and entitlements which accrue to individuals in virtue of their belonging to different cultural, linguistic and religious groups.[40] There is, in other words, a legitimate range of variation even in the interpretation and implementation of such a basic right as that of "equality before the law." But the legitimacy of this range of variation and interpretation is crucially dependent upon the principle of self-government. Only when this condition has been fulfilled, can we also say that there is legitimate "unity and diversity" in human rights among well-ordered polities.

Only if the people are viewed not merely as subject to the law but also as authors of the law can the contextualization and interpretation of human rights be said to result from public and free processes of democratic opinion and will-formation. Such contextualization, in addition to being subject to various legal traditions in different countries, attains democratic legitimacy insofar as it is carried out through the interaction of legal and political institutions with free public spaces in civil society. When such rights principles are appropriated by people as their own, they lose their parochialism as well as the suspicion of western paternalism often associated with them. I will call such processes of appropriation "democratic iterations."

By *democratic iterations* I mean complex processes of public argument, deliberation and exchange through which universalist rights claims are contested and contextualized, invoked and revoked, posited and positioned throughout legal and political institutions as well as in the associations of civil society.[41]

[40] For further elucidation, see Benhabib (2002, ch. 5 in particular).

[41] See Benhabib (2006, 45 ff.). See also Michelman (1999, 1009–1028).

Every iteration transforms meaning, adds to it, enriches it in ever so-subtle ways. The iteration and interpretation of norms and of every aspect of the universe of value, however, is never merely an act of repetition. Every act of iteration involves making sense of an authoritative original in a new and different context. The antecedent thereby is reposited and resignified via subsequent usages and references. Meaning is enhanced and transformed; in the process of repeating a term or a concept, we never simply produce a replica of the first intended usage or its original meaning: rather, every repetition is a form of variation. When the creative appropriation of that authoritative original stops making sense, then the original loses its authority upon us as well.[42]

If democratic iterations are necessary in order for us to judge the legitimacy of a range of variation in the interpretation of a right claim, how can we assess whether democratic iterations have taken place rather than demagogic processes of manipulation or authoritarian indoctrination? Do not democratic iterations themselves presuppose some standards or norms to be properly evaluated? I accept here Jürgen Habermas's insight that "the democratic principle states that only those statutes may claim legitimacy that can meet with the assent (*Zustimmung*) of all citizens in a discursive process of legislation which has been legally constituted" (Habermas 1996, 110).

The "legal constitution of a discursive procedure of legislation" is only possible in a society that institutionalizes a communicative framework through which individuals as citizens or residents can participate in opinion – and will-formation regarding the laws which are to regulate their lives in common. The right to have rights then is not only a right to conditions of membership but entails the right to action and to opinion in the public sphere of a polity the laws of which govern one's existence. Only through the public expression of opinion and action can the human person be viewed as a creature who is capable of self-interpreting rights claims.[43] To have rights does not mean to possess a physical attribute such as green eyes or to possess an object such as a red shirt. It means the capacity to initiate action and opinion to be shared by others through an interpretation of the very right claim itself. We have had an all-too passive understanding of the agency involved in the entitlement to rights. Human rights and rights of self-government are intertwined. Though the two are not identical, only through institutions of self-government can the

[42] I offer democratic iterations as a model to think of the interaction between constitutional provisions and democratic politics. It may be possible to extend democratic iterations as a model for the "pouvoir constituant," the founding act as well. In this essay, I am assuming that democratic iterations are about ordinary as opposed to constitutional politics; though I am claiming that ordinary politics can embody forms of popular constitutionalism and can lead to constitutional transformation through accretion. There is a lot more that needs to be said about the relationship of a discourse-theoretic analysis of democratic iterations and political liberalism than I can within the scope of this paper. See Rawls's final reflections in his "Political Liberalism: Reply to Habermas" (1995, 172 ff.). Thanks to my student Angelica Bernal for her observations on this problem.

[43] For a discussion of traditions besides liberalism which do not acknowledge that individuals are "self-authenticating sources of valid claims," see Cohen (2004, 207).

citizens and residents of a polity articulate justifiable distinctions between human rights and civil and political rights and judge the range of their legitimate variation.

*Democratic legitimacy* reaches back to principles of *normative justification,* though the two are not identical.[44] Democratic iterations do not alter conditions of the normative validity of practical discourses that are established independently of them; rather, democratic iterations enable us to judge as *legitimate or illegitimate* processes of opinion and will-formation through which rights claims are contextualized and contested, expanded and revised through actual institutional practices in the light of such criteria. Such criteria of judgment enable us to distinguish a *de facto consensus* from a *rationally motivated* one.

## 10.6 The Political Dilemmas of Human Rights

The 1948 Universal Declaration and the succeeding era of human rights reflect the moral learning experiences not only of western humanity but of humanity at large. The World Wars were fought not only in the European Continent but also in the colonies – in the Middle East, Africa and Asia. The national liberation and anti-colonization struggles of the post-World War II period, in turn, inspired principles of self-determination.[45] The public law documents of our world – the UDHR; the various international human rights covenants, the Genocide Convention of 1948, and the Geneva Conventions of 1951 Relating to the Status of Refugees and their Protocol of 1967 – are distillations of collective struggles as well as of collective learning. It may be too utopian to name them steps toward a "world constitution," but they are more than mere treaties among states. They are global public law documents which, along with many other developments in the domain of *lex mercatoria*, are altering the terrain of the international domain. They are constituent elements of a global and not merely international civil society. In this global civil society, individuals are rights-bearing not only in virtue of their citizenship within states but in virtue of their humanity as well. Although states remain the most powerful actors, the range of their legitimate and lawful activity is increasingly limited. We need to rethink the law of peoples against the background of this newly emergent and fragile global civil society, which is always being threatened by war, violence, and military intervention.

We should free human rights discourse from the interventionist rhetoric that so often accompanied it in recent times. Undoubtedly, much of the philosophical reticence in arguing for a human right for democracy is related to the wish to distance oneself from the disastrous foreign policy of the Bush Administration which has

[44] I have elucidated this distinction further in: Benhabib (2007b, 445–463).

[45] For an account of how the decolonization struggles inspired the "right to democratic self-governance," see Frank (1992, 46–91).

deployed the language of human rights as fig leaf to justify its preemptive and interventionist foreign policy ambitions.

But it will be asked, in appealing to civil society and the public sphere as the privileged arenas for norm-articulation and democratic iteration, isn't one ignoring the frequent cases of such grave human rights abuses that intervention via the use of military force maybe be essential to maintain any allegiance to legal cosmopolitanism? First, let me note that Chap. 2 (7) of the United Nations Charter permits wars of self-defense on the part of members, while Article 51 of the United Nations Charter authorizes military actions in the event of an armed attack against a member of an organization such as NATO.[46] Both these Articles were appealed to after the attack on the World Trade Center. The Genocide Convention obliges states to undertake military action such as to prevent genocide, slavery, and ethnic cleansing – provided that the UN Security Council authorizes such actions. As most students of international affairs admit, therefore, we are now poised on a slippery slope, where judges seem to be creating law, while statesmen are clamoring for the need to make new laws in this arena.[47] The grounds for humanitarian intervention are expanding into the principle of "the responsibility to protect" (Kofi Annan.) Who the responsible parties for such an obligation to protect are is all too unclear. If it is the United Nations which is thus responsible, then in fact the current practice of considering military intervention on behalf of the United Nations legitimate only when authorized by the permanent members of the Security Council would need to be revised. The obligation to protect could not be simply subject to the veto power of the five permanent members of the Council; these commitments are pulling the United Nations in opposite directions with no clear resolution in sight.

We have entered uncharted waters in the international arena. On the whole, I am opposed to the creeping interventionism behind the formula of the "responsibility to protect," placing my hope for as long as possible, and for as long as necessary, upon the forces of civil society and civilian organizations to spread cosmopolitanism norms and move all societies closer together to compliance with the UDHR. My commitment to global civil society actors in this arena should not be mistaken for neo-liberal anti-statism. Within the boundaries of existing polities, the state is the principle public actor that still has the responsibility to see to it that human rights norms are both legislated and actualized. However, many states have willingly undertaken to commit themselves to the various public human rights documents, with the consequence that they are also subject to the criticisms and demands of a range of cross-border and transnational actors and groups that are the principal agents of spreading legal respect for, compliance with, and the monitoring of human rights.

When, why, and under what conditions military intervention to stop massive human rights violations is justifiable remains a question in political ethics. By

[46] Cf. Doyle (2001, 219–241).

[47] See Holzgrefe and Keohane (2003); for the view that judges are creating law in this domain, see Marsten Danner (2006, 2–63).

"political ethics," I mean the balancing between intentions and consequences, between an ethics of responsibility and an ethics of conviction (Max Weber). Particularly when states are considered the unique agents of intervention and when intervention means the use of military force, *only* the prevention of genocide, slavery and ethnic cleansing can justify such acts. Regime change is not justified. As members of a global community, there are myriad other ways in which we can work across borders to spread democracy, civil society and a free public sphere. The range of activities of global citizens go much beyond military intervention and the use of force.

There is need for a new Law of Humanitarian Interventions which is clearer about the conditions under which intervention by the UN in the affairs of a country is justified. As cases of recent interventions, as well as failure to intervene, in Kosovo, Rwanda, Iraq, Darfur and others prove, the Genocide Convention and the United Nations Charter alone are not adequate for this task in guiding the world community. Yet these will remain hard choices that will always entail the exercise of political judgment. As Allen Buchanan asked, "is illegal international legal reform" in the international arena possible through unauthorized interventions?[48] Such questions impose upon citizens, leaders, and politicians the "burden of history." I think that philosophy can neither guide us all the way down in such deliberations nor can it guarantee that our good intentions will not be destroyed by contingent events and turn into their opposite. Nor should it do so. Nevertheless, as Kant observed,[49] there is a distinction between the "political moralist," who misuses moral principles to justify political decisions, and a "moral politician," who tries to remain true to moral principles in shaping political events. The discourse of human rights has often been exploited and misused by "political moralists"; its proper place is to guide the moral politician, be they citizens or leaders. All that we can offer as philosophers is a clarification of what we can regard as legitimate and just in the domain of human rights themselves.

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[48] See Buchanan (2001, 673–705).

[49] Kant ([1795] 1994). Second and enlarged edition, appendix II.

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# Chapter 11
# Dialectical Snares: Human Rights and Democracy in the World Society

**Hauke Brunkhorst**

In the following paper I begin with a general definition of the specific character of the western legal tradition, which is dialectical in at least two respects. Modern law is not only related to a general function of modern society, but also ought to be interpreted as the respectively concrete existence of the universal idea of freedom. The emancipatory character of the concrete existence of law now can be in accordance or in contradiction with the functional requirements of a society that is not only functionally differentiated but still (and depending on functional imperatives) has a hegemonic structure of power, class, and other relations of dependency and exploitation. On the other hand, there exists ample empirical evidence that the respective concretization of the idea of equal and universal freedom by processes of legislation and jurisdiction regularly leads to new and more sophisticated forms of exclusion and oppression, even if this is not a conceptual necessity, as it seems to be in the legal philosophical work of Derrida's or Adornos' analysis of the antinomy of freedom that is modern (I). The development of the modern idea of law today must be related to a single global or world society (II) which is the product of the revolutionary changes of the twentieth century. The twentieth century, therefore, cannot be reduced to a totalitarian century, but was more precisely the age of extremes (Hobsbawm), and not only for the worst (III). Following this general definition is a brief analysis of the ambivalent (or dialectical) structure of public international and world law (IV). Finally, I will try to develop the basic contradiction of present world law a bit further in the direction of probable change by reform (V).

Before I begin, let me provide one remark on dialectics: The thesis on the dialectical structure of law here is meant historically and sociologically (empirically) and not – as in Derrida, Adorno, or Kant and Hegel – logically or conceptually. There is no inescapable antinomy or paradoxical structure of law or the legal system, and if there appears to be a paradoxical or contradictory constellation in legal

H. Brunkhorst (✉)
Institute of Sociology, University of Flensburg, Flensburg, Germany
e-mail: brunk@uni-flensburg.de

C. Corradetti (ed.), *Philosophical Dimensions of Human Rights: Some Contemporary Views*, DOI 10.1007/978-94-007-2376-4_11,

history or within the legal system, it can become productive and the contradiction overcome, or it can lead to self-destruction and an evolutionary dead-end would be reached, or a turn in another direction or revolutionary change will follow. If a contradictory structure (which can be observed by a sociological or philosophical observer, such as Marx, Luhmann, or Derrida) is overcome or repressed, it always can come back because the meaning of contradiction or dialectic here (as in classical Greek philosophy) is dialogical, and that means it has to be perceived, articulated, and expressed as a contradiction by social subjects (persons, groups, classes). It will come back the moment someone refers to the contradiction to contradict an unbearable social structure of domination, oppression, or exclusion. Therefore, a dialectical contradiction exists only if it is performed and articulated by social actors, social movements, or at least a single individual person. A whole past of repressive silencing comes to existence only once it is made explicit as such by communicative speech acts.

## 11.1 The Ambivalence within the Western Legal Tradition

If there is anything specifically characteristic of the 'Western legal tradition' (Berman), it is the dialectical dual structure of law, which is on one hand a medium of repression and stabilization of expectations (the Luhmanian immunity system of society), and on the other hand an instrument made to change the world, and a Habermasian medium of emancipation, which is why Kant and Hegel even identified law with egalitarian freedom, or defined law as the 'existence of freedom' (*Dasein der Freiheit*).[1] The Declaration of Independence is a medium of emancipation which declares that all men are created equal, and (against the King of Great Britain) it claims open access for all emigrants. Rawls is right when he reminds us that the democratic revolutions of the eighteenth century have triggered an impressive process of social and institutional learning, which has regularly led to the inclusion of formerly excluded voices, persons, groups, classes, sexes, races, countries, regions, etc.: 'The same equality of the Declaration of Independence which Lincoln invoked to condemn slavery can be invoked to condemn the inequality and oppression of women.'[2] Yet, at the same time, the Declaration is a document of bloody oppression that legalizes the genocide of the aboriginal population of America – not only the British King but also his supposed allies, the merciless Indian Savages are declared to be public enemies of civilized nations, or illegal fighters.

What is now so specifically characteristic of Western constitutional law is the fact that the deep tensions, and even the contradiction, between these two faces of repression and emancipation have been 'reconciled' by legal institutions which

[1] Kant ([1870] 1996); Hegel (2001 [1821] § 4); Marx, K. ([1842] (1988), 58 and 109–47).

[2] Rawls (1993).

have learned to coordinate conflicting powers, and to make use of the always risky and fragile 'productivity of the antinomy.'[3] Harold Berman speaks in this regard of a dialectical reconciliation of opposites,[4] but we should also add that it is a dialectical (or procedural) reconciliation of lasting opposites, of lasting conflicts, differences, and contradictions.[5] The very point here is that the Western legal tradition emerged from the terror and fanaticism of the Revolution. But the constitutional regimes which were the final outcome of all great and successful European Revolutions established legal conditions for a struggle for equal rights within the right.

The constitutional *spirit* of the revolutions of the eighteenth century became *objective* for the first time within the borders of the modern nation state. This state always had many faces. These include the Arendtian face of *violence*, the Habermasian face of *administrative power*, the Foucaultian face of *surveillance and punishment*, the faces of imperialism, colonialism, war-on-terror and so on. However, the nation state, once it became democratic, possessed, not only the *administrative power of oppression and control*, but at the same time the *administrative power to exclude inequality* with respect to *individual rights*, *political participation* and *equal access to social welfare and opportunities.*[6] The nation state has solved the crises of early modernity which came to the fore in political revolutions, economic class fights and religious war, and it has solved these crises by introducing the freedom *of* political participation together with the freedom *from* state control, the freedom *of* religion together with the freedom *from* religion, the freedom *of* markets together with the freedom *from* its negative externalities. Only the modern nation state not only was under the claim by the normative *idea* of freedom and equality, but also based on the administrative *power* to implement that idea. Up to the present all advances in the reluctant *inclusion of the other*, and so also all advances of cosmopolitanism, are, to a greater or lesser degree, advances that have been accomplished by the modern nation state. Despite this, however, the impressive normative *and* functional advances of the Western democratic nation state were obtained at the price of its original cosmopolitan claims. It is here where the dialectic of enlightenment comes in.

The classical paradigm case, a *locus classicus* of the dialectic of enlightenment, here is the case of the declarations of rights by the French or the American Revolutions of the eighteenth century. In the beginning the rights of declarations and amendments were *mere declarations* without any specific legal meaning, and at least in the French case they had an undoubtedly *universal* character, including all men, and

[3] On the latter: Kesselring (1984).

[4] Berman (2006, 5 ff.).

[5] Law of collision or 'Kollisionsrecht' (Joerges, Teubner, Fischer-Lescano) has deep roots in Western constitutional law. One can describe this with Chantal Mouffe also as transformation from antagonism to agonism – if one keeps in mind (against Mouffe) the constitutive role of constitutional law in this transformational process.

[6] On the exclusion of inequalities as a condition of a successful nation-state see: Stichweh (2000, 52).

equating semantically even the extension of civic and human rights (human rights were rights men already possessed in the state of nature, and they became civic rights and were completed with other civic rights once the population of the state of nature entered the societal state and natural men under law of the nature became artificial citizens under positive law[7]). But in the course of the nineteenth and twentieth century these rights were more and more understood as legislative programmes or (in the American case) even as legally binding basic norms. Human rights now became legally equated with their concretization by normal legislation and jurisdiction. This made them hard law, but once they had become hard law the exclusion of foreigners, prisoners, bad citizens, women, blacks and others from civic and human rights, and in some cases from humanity as such, became hard law and with every step of concretization of rights the status of the excludes non-bearers of rights was also concretized. Hence, the more the normative promise of the nation-state to exclude inequalities was realized, the more stable and real the legal exclusion and legal oppression of the non-bearers of rights became. In the end the exclusion was so stable that in some cases it needed bloody wars and revolutions to change it.

## 11.2 Decentering Eurocentrism

The modern nation state up to 1945 was the state of the regional societies of Europe, America and Japan, and the rest of the world was either under their imperial control or kept outside. The *exclusion of inequality* until the mid of the twentieth century did mean internal equity for the citizens of the state, and external inequality for those who did not belong to the regional system of states. There was not even a serious or legal demand for a *global* exclusion of inequality. The global world order in particular during the nineteenth and (early) twentieth century was a universal *Doppelstaat* (double state) (Fraenkel and von Brünneck 2001), "jurisdiction" (and *Normstaat*) for us civilized Europeans, "authority"[8] for the others in the "heart of darkness" (Conrad 2005). Guantanamo has a long Western pre-history. However, during the time from 1945 to the present day, colonialism and classical imperialism vanished[9] and Euro-centrism completely was decentered (Brunkhorst 2005b). Western rationalism, functional differentiation, legal formalism and moral universalism are *no longer something specific Western*. For the good *and* for the

[7] This hangs together with the premises of the theory of the social contract, see: Kersting (2002).

[8] Article 35 of the concluding protocol of the Berlin Conference on West Africa on West Africa in 1884/85. See: Koskenniemi (2004, 126).

[9] The best point of a poor book is the thesis that neither old nor new notions of imperialism with a territorial centre make sense in a functionally differentiated world society and have to be replaced by a more and more de-territorialized and flexible kind of (systemic) hegemony: Hardt and Negri on Empire (2000). For a much better account the systemic transformation of hegemony: Fischer-Lescano and Teubner (2005); Buckel (2007); for an interesting thesis on the emergence of a new and imperial world state see: Chimni (2004).

bad, everybody, every single human being today has to conduct his or her life under the more or less brutal conditions of the selective and disciplinary machinery of markets, schools, kindergartens, universities, life-long learning, traffic rules, jails, hospitals, military barracks, and other "total institutions" (Ervin Gofmann). At the same time state sovereignty was legally equalized, and the state went global. The last square meter of the globe became state-territory, at least legally (Oeter 2008). In conjunction with the globalization of the modern constitutional nation state, therefore, all functional subsystems, which – from the sixteenth century until 1945 – were bound to state power and to the international order of the regional societies of Europe, America and Japan, became *global systems*.

Sociologists rightly and successfully have criticised the "methodological nationalism" (Beck and Grande 2004, 14f)) of their own discipline, and have started to replace the pluralism of *national societies* by the singular concept of a *global social system* (Parsons 1969) or a *world society* (Luhmann 1971, 1998) which (a) includes all communications (Luhmann 1971), is (b) normatively integrated (Parsons 1969; Stichweh 2000), and has (c) transformed all political, legal, economic, cultural differences, and all differences of class, region, centre and periphery or of functional spheres into *internal differences* of the one and only world society, and these differences now depend totally on the global societal basic structure (Brunkhorst) of the world society and its cultural constituents (Meyer 1997) alone.[10] Whereas the function of the *basic structure* primarily is *selective and constraining*, the function of the *superstructure* of the *global secular culture* (or the background of global knowledge, the global *Lebenswelt*) is *shaping and constituting* for the behaviour and the subjectivity of everybody everywhere on the globe, and allows no exception. Everybody (whether he or she wants it or not) is shaped by the individualism and rationality of a single global culture which includes Rortys 'human rights culture' as well as the culture of individualized suicide bombing.[11] All the deep cultural differences and conflicts are now differences and conflicts of the same society and of individualized persons who have to organize and reorganize, construct and reconstruct their ego and their personal and collective identity life-long, and to do that they only can rely on the (weak or strong) means of their own autonomy. Sartre was right: Everybody now is condemned to be free, yet, not looking with Sartre into the abyss of nothingness but acting before a dense and common background of relatively abstract, highly general and formal, through and through secular, nevertheless substantial global knowledge that is implicit (global social life-world with a growing global common ground). This is so, simply because traditional identity formations no longer and nowhere are available without a permanently growing and changing variety of alternative offers, in Teheran as well as in New York, in the Alps of Switzerland as well as in the mountain regions of Afghanistan, Pakistan, or Tibet.[12] These developments now are reflected more and

[10] On societal structure: Brunkhorst (2009); on global culture: Meyer (1997, 144–181 and 2005).

[11] Rorty (1993, 111–20); Roy (2006).

[12] Parsons (1969, 17); Parsons and Platt (1990); Döbert et al. (1980).

more by the scientific superstructure, not only in social sciences but also in history and philosophy. In history, for more than 20 years we have been able to observe a strong turn from national to European and world history, and in philosophy suddenly Kant's essay On Eternal Peace is in the center of the discussion, no longer a marginal subject of his theory, best be used by students who need a philosophical degree in a subsidiary subject. Even jurists recently have started to follow Hans Kelsen's insight from the 1920s that there is no dualistic gap between national and international law but only a continuum.[13] During the last decade, there was a mushrooming of national international hybrids and new branches of legal disciplines like transnational administrative law.

## 11.3 Revolutionary Advances of the 20th Century

The twentieth century strikingly has been called an "Age of Extremes" (Hobsbawm), and every attempt to bridge the abyss that separates these extremes, would be "false reconciliation" (Adorno). This century was, at the latest, the catastrophe that has incurably "damaged life" (Adorno). But it was *also* the century of a great legal revolution, which transformed not only law but society as a whole; a revolution that triggered experimental-communicative productivity in new social and cultural practices, political and legal institutions and scientific and philosophical discourse. If we call the twentieth century the *totalitarian century*, then this is right *and* wrong at once. In the end, after disastrous revolutionary and counterrevolutionary world wide wars, after battles for material and battles of attrition, bombing wars and civil wars, pogroms, genocides, concentration and death camps, national uprisings, racist excesses, terrorism and counter-terrorism, the destruction and founding of states and fascist, socialist and – not to forget – democratic grand experiments – totalitarianism was not the winner but the looser. In particular the World Wars by their winners were not only fought for national interest alone but also for democracy, global peace and human rights. At the end of the day, the twentieth century was not only the century of state-organized mass terror (Reinhard 1999); it was *also* the century of ground-shaking *normative progress*, through which democracy was universalized and *constitutional law* transformed *into global law*, national *human rights into global civil rights*, the *constitutional state sovereignty into democratic sovereignty*, and *the state of the bourgeoisie into a social welfare state*. Between Europeans and Non-Europeans there always existed for hundreds of years the *formal* and *legal* unequal distribution of rights: *Jurisdiction* for us, *authority* for the others. Now, for the first time in history, the *rights are* at least *formally equal*. Admittedly, the massive human-rights violations, social exclusion and outrageous, unequal treatment of entire world regions have not disappeared. But only now are human-rights violations, lawlessness and political and social disparity considered as *our own problem* – a

[13] Brunkhorst (2008b, 30–63 and 37).

problem that concerns *every single* actor in this global society. Only now are there serious and *legally binding* claims to the *global* (and not any longer just national) *exclusion of inequality.*

The world law and the "human rights culture" (Rorty) of the late twentieth century was not only the result of the negative insight from 1945 that Auschwitz, and that war should never happen again, but was also the positive result of a great and successful *legal revolution*, which began at the end of the First World War with the American intervention in the war (and not to forget the tragic Russian Revolution) in 1917, and was fought *for* progressive, new and supposedly more inclusive *rights*, and more and expanded individual and political *freedom*.[14] In 1917 President Wilson forced the reluctant Western allies to claim revolutionary war objectives, and from this moment on the war (and later the Second World War, again as a result of American intervention) was fought, not only for self-preservation and national interest, but also for global democracy and global legal peace: "To make the world safe for democracy" (Wilson).

At the end of World War II the Soviet Union had to get on board with international politics, found the United Nations *together* with the United States, their European allies and some representatives of the then emerging later so called Third World. From this point of time the Soviet Union was in the web of international law and human rights. Up until the Conference on Security and Cooperation (KSZE) they had to sign human rights declarations and pacts that contributed a lot to choke on (or made it implode) in the end. The radical changes in the twentieth century lead to – in the East, pre-constitutional and pseudo-democratic, and, in the West, democratic-constitutional – variants of the *same* legal reforms (Cf. Berman 2006, 16 ff.). They

- Repealed the bourgeois centering of equality rights around property and turned these rights into a *comprehensive system of anti-discrimination norms*.[15] Franklin D. Roosevelt's famous "Second Bill of Rights" from January 1944 is the beginning of a *rights revolution* whose waves of anti-discrimination legislation continues on, way into the 1970s and 1980s, extending rights of equality to other spheres. In his address to Congress, Roosevelt declared the existing "inalienable political rights" of the constitution to be valid but insufficient for dealing with a complex society. Rather, he says, we need to "assure us equality in the pursuit of happiness." Equality in the pursuit of happiness has to be assured by social rights(a list of which the Second Bill of Rights then presents directly after that. In this speech – and this "absence" (Kracauer) is the most significant aspect of the text – he mentions "free speech," "free press," "free worship," "trial by jury" and "freedom from unreasonable searches and seizure" but does not refer to property rights with a single word. The revolutionary reforms further
- Changed the legislation from *conditional to final programming*,[16]

[14] For a first account of this thesis: Brunkhorst (2008a); Brunkhorst (2008b).

[15] See only: Sunstein (1993), Roosevelt, cited in Sunstein (1993, XI). On the development of social anti-discrimination rights in the Soviet Union, see Berman (1963).

[16] Grimm (1990); see also Grimm (1991); Luhmann (1981a); classically: Neumann (1937).

- Developed a comprehensive administrative *planning law* (tried and tested in the World Wars),[17] and
- Introduced a new system of regulative *family, socialization* and *conduct law.* To phrase it with Luhmann, one could call it *"alteration of persons" law* ("Personenänderungsrecht"); with Berman, "parental law" and speak of a "nurturing" or "educational role of law"; and with Foucault one could speak of the law of discourse police and bio-power.[18]

The legal revolution ended in 1945 with the constitution of the United Nations in San Francisco. A new system of basic human rights norms, coupled with a completely new system of inter-, trans- and supranational institutions and organisations, was created during the short period from 1941 to 1951. This system in fact included international welfarism, which was – as Lutz Leisering has shown – invented *before* the great triumph of national welfare states (Leisering 2007).

The development of international law has changed deeply since the founding of the United Nations. It has witnessed a turn from a law of coexistence of states to a law of cooperation (Bast 2008), the founding of the European Union, the Human Rights Treaties from the 1960s, the Vienna convention on the law of the Treaties, and the emergence of international *ius cogens*, etc. The old rule of equal sovereignty of states became the "sovereign equality" *under* international law (Art. 2 par. 1 UN); individual human beings (in the good and in the bad) became subject to International Law; democracy became an emerging right or a legal principle that can also be made valid against sovereign states; the right to have rights, whose absence Arendt lamented in the 1940s, is now a legal norm that binds the international community.[19] All these legal rules are of course broken again and again. However, this is not a specific feature of international law: it happens with national law as well (and also a lot of national law is soft, symbolic or dead law). What is new today is *that international and cosmopolitan equal rights have become binding legal norms*, and they can thus be taken seriously. There is no longer any space for any actions outside the law or outside the legal system (Byers 2003, 189). Every single action of every kind of actor, individuals, states and organizations is either legal or illegal – *tertium non datur*. In consequence, if there once was any difference in principle between national and international law, there is no longer any such difference. This is in fact what Hans Kelsen, Alfred Verdross and other cosmopolitan international lawyers had already claimed during the First World War.

[17] Historically instructive is an activist of the New Deal: Seagle (1941). More up to date: Maurer (2006, § 16).

[18] Luhmann (1981a); Berman (1963, esp. 277 ff.). On an astonishing and peculiar parallel between the Soviet educational law and the Puritan codex of the Massachusetts Bay Colony, the "Body of Liberties" of 1641, see: Berman (1991, 64 ff.). Concerning the beginning in the 1930s, see Joerges and Ghaleigh (2003).

[19] For a more comprehensive overview: Brunkhorst (2008a).

## 11.4 The Struggle for the Global Exclusion of Inequalities

Nonetheless, the international (and national) legal and revolutionary progress is as deeply ambivalent, and fragile as all other things in a highly accelerated and complex modern society (Rosa 2006). There exist now, on the one hand, the basic legal principles of the *global inclusion of the other* and the *global exclusion of inequality*. Yet on the other hand there exist global functional systems, global actors and global spheres of value, which emerge with great rapidity, and which *tear themselves off from the constitutional bonds of the nation state*. This is a double-edged process that has caused a *new dialectic of Enlightenment*. The most dramatic effect of this process of the formation of the global society is the decline of the ability of the nation state to exclude inequalities effectively – even within the highly privileged OECD-world. This has three very significant consequences.

These consequences are observable, first of all, in the *economic system*. In this respect, we can observe the complete transformation of the *state-embedded markets of regional late capitalism* into the *market-embedded states of global Turbo-capitalism*.[20] The negative effect of economic globalization on our rights is that the freedom *of* markets explodes globally, and again at the cost of the freedom *from* the negative externalities of disembedded markets, and it is combined with heavy, sometimes war-like competition, and to be sure, this will be reinforced strongly by the present economic crisis: *There will be Blood*.[21]

Surprisingly enough, in questions regarding the *religious sphere of values* we can make a similar observation and identify similar consequences. Global society makes the proposition that is true for the capitalist economy equally true for the autonomous development of the religious sphere of values. In consequence, second, we are now confronted with the transformation of the *state-embedded religions of Western regional society* into the *religion-embedded states of the global society* (Brunkhorst 2008c). Since the 1970s, religious communities have crossed borders and have been able to escape from state control. Again the negative effect of this on our rights is that the freedom *of* religions explodes whereas the freedom *from* religion comes under pressure. At the same time the fragmented legal and administrational means of states, inter-, trans- and supranational organizations seems not to be sufficient to get the unleashed destructive potential of religious fundamentalism under control: *There will be Blood*.

Last but not least the (internally fragmented) executive branches of the state have decoupled themselves from the state-based separation, coordination and unification

[20] Streek (2005). As we now can see, the talk about late capitalism was not wrong but should be restricted to state-embedded capitalism, and state embedded capitalism indeed is over. But what then came was not socialism but global disembedded capitalism which seems to be as far from state embedded capitalism of the old days as from socialism.

[21] There Will Be Blood, USA 2007, Director: Paul Thomas Anderson. One-sided but in this point striking the neo-Pashukanian analysis of international law by Mieville (2005).

of powers under the democratic rule of law, and they too have gone global.[22] As a result of this, the new globalized executive power seems to be undergoing the same transformation as markets and religious belief systems, and it is thus transformed, third, from *state-embedded power to power-embedded states*. This leads to a new privileging of the globally more flexible second branch of power vis-à-vis the first and third one, which jeopardizes the achievements of the modern constitutional state (Wolf 2000). The effect of this is an accelerating process of a global *original accumulation of power beyond national and representative government*. Instead of global *democratic government* we now are approaching some kind of directorial global *bonapartist governance*: that is, soft bonapartist governance for *us* of the North West, and hard bonapartist governance for *them* of the South East, the failed and outlaw states and regions of the globe (Anghie 2005): *There will be Blood*.

The deep division of the contemporary world into two classes of people – that is, into people with good passports and people with bad passports (See Calhoun 2005) – is mirrored by the constitutional structure of the world society. Today there already exists a certain kind of global constitutionalism, which is one of the lasting results of the revolutionary change that began in the 1940s, and observed already by Talcott Parsons in 1960, a sociologist who never was under suspicion to be an idealist (Parsons 1969, 126). However, the existing global constitution(s) is (are) far removed from being democratic.[23] All post-national constitutional regimes are characterized by a *disproportion between legal declarations of egalitarian rights and democracy* and *its legal implementation by the international constitutional law of check and balances*.[24] Hence, the legal revolution of the twentieth century was successful, but it was unfinished. The one or many global constitutions are in bad shape, and they are based on a constitutional compromise (Franz Neumann) that mirrors the hegemonic power structure and the new relations of domination in the world society.

## 11.5

What could radical reformism or *Reform nach Prinzipien*[25] mean today? I don't know. But before posing the hard questions of constitutional change and institutional design which often fail because conceptually they fail to recognize the level of complexity of

[22] On transnational administrative during the last few years a whole industry of research emerged, see only: Tietje (2003), Möllers (2005a), Krisch and Kingsbury (2006), Kingsbury et al. (2005), Möllers et al. (2007), Fischer-Lescano (2008). On the globalization of executive power: Wolf (2000), Dobner (2006), Lübbe-Wolf (2008).

[23] For the thesis that the UN-Charter is the one and only constitution of the global legal and political order, see: Fassbender (1998). Different approaches in: Bogdandy (2003), Albert and Stichweh (2007), Bogdandy (2006), Brunkhorst (2002), Brunkhorst (2005a); For the thesis of constitutional pluralism see: Teubner (2003).

[24] For the original version of this thesis: Brunkhorst (2002).

[25] [Reform according to Principles. –Ed. Trans.].

modern society, we should start again with concepts and principles, and that means with a critique of dualism and representation in legal and political theory.

Dualistic and representational thinking already has been deconstructed completely by the revolutionary philosophy (and scientific praxis) of the twentieth century, in particular by philosophers like John Dewey, Ernst Cassirer (after his symbolic turn), early Heidegger, late Wittgenstein, or W.O. Quine.[26]

Yet, representational thinking that is deeply based on dualism still prevails in political and legal theory. In particular, in international law and international relations dualism covers a broad mainstream of opposing paradigms. From international relations realism to critical legal studies, from German *Staatsrecht* to critical theory, from liberalism to neoconservatism, state-centered dualism is tacitly accepted – that is, the dualism between *Staatenbund* and *Bundesstaat*, international law and national law, constitution and treaty, public law and private contract, state and society, politics (or 'the political') and law, law-making and law-application, sovereign and subject, people and representatives (action-free), legislative will-formation and (weak-willed) executive action, legitimacy and legality, heterogeneous population and (relatively) homogenous people, *pouvoir constituant* and *pouvoir constitué*, etc. All these dualisms prevent us from constructing European and global democracy adequately and, finally, to join the *civitas maxima*.

Yet, what Dewey and the pragmatists did with classical idealistic and metaphysical dualisms in philosophy, Kelsen and his students did with the dualisms in political, legal, and constitutional theory. They have replaced each of them by a continuum. Kelsen's and Merkl's paradigm case was the legal hierarchy of steps (*Stufenbau des Rechts*).[27] The doctrine of *Stufenbau* transforms the dualisms of legislative will and executive performance, of political generation and professional application of legal norms, of general law and specific judgment, and last but not least of international and national law into a continuum of concretization.[28] Hence, if on all levels of the continuum of legal norm concretization are politically created, then the principle of democracy is fulfilled only if those who are affected by these norms are included fairly and equally on all levels of their creation.

Moreover, if we follow Jochen von Bernstorff one step further than Kelsen and drop the transcendental foundation of a legal hierarchy and the Grundnorm,[29] then we are left with an enlarging or contracting circle of legal and political communication which has no beginning and no end outside positive law and democratic willformation.[30] Only then could democracy replace the last (highly transcendentalized and formalized)

[26] A paradigmatic account is: Rorty (1980). For recent developments cf. Brandom (1994); Habermas (1997).

[27] Merkl (1927, 160, 169), Merkl (1968, 252–94).

[28] Von Bernstorff (2008, 167–90, at 181).

[29] Von Bernstorff (2001).

[30] This comes close to Habermas' normatively strong or Luhmann's normatively neutralized idea of circulations of communication without a subject (subjektlose Kommunikationskreiläufe). Habermas (1992), Luhmann (1983); in conjunction with: Neves (2000).

remains of the old-European legal-hierarchy and natural law that is higher than democratic legitimization, and that means getting rid of the last inherited burden of dualism which 'weighs heavily like a nightmare on our brains' (Marx). We should read Kelsen's theory no longer primarily as a scientific theory of pure legal doctrine, but as a practically orientated theory that anticipates the global legal revolution of the twentieth century. It should also be read as a hopeful message – an attempt to change our worldview and vocabulary to fit a praxis that emancipates us from ideological blindness and helps us to get rid of the old international law of 'sorry comforters' (Kant).

Post-representation, democratic institutions should be designed to enable the expression of political and individual self-determination in a great variety of different governmental bodies at all levels, and through a variety of procedures of egalitarian will-formation: participatory, deliberative, representative, or direct. Although Kelsen is sometimes read as a strong defender of representational democracy and parliamentary supremacy, this reading is wrong because Kelsen, like Dewey, made a powerful criticism of representation and replaced it with the idea of a continuum of different practical methods to express political opinions and make egalitarian decisions.[31] Radical criticism of representational democracy is not directed at parliamentary democracy. It leads, first, to a re-interpretation of parliamentary democracy as one (possible[32]) part of a comprehensive procedural method of egalitarian will-formation, deliberation, and decision-making,[33] and, secondly, to a relativization of parliamentary legislation. Parliaments no longer can be interpreted as the highest organs of the state, or as the one and only true representative of the general will of the people, or as the expression of the essential, higher or refined will of the better self of the people (the one that better fits with the ideas of intellectuals), or as the representation of the *Gemeinwohl* or commonwealth (whatever that is). Although parliaments may be the best method of achieving democratic willformation in a given historical situation, this is contingent.

To conclude: the double criticism of dualism and representation has far-reaching implications for theories of democracy and constitutional design which are Kelsenian but go far beyond Kelsen's advocacy of parliamentary democracy:

(1) If all levels of the continuum of legal norm concretization are politically created, then the principle of democracy is only fulfilled if those who are affected by these norms are included fairly and equally on all levels of their creation (local, national, regional, and global,) and in all institutions (political, economic, social, and cultural levels; hence, the whole Parsonian AGIL-schema (A = Adaption, G = Goalattainment, I = Integration, L = Latency) is open for democratization[34] as far as it does not destroy either private or public autonomy).[35]

[31] Kelsen ([1920] 1981), Kelsen ([1925] 1993), Kelsen ([1934] 1967).

[32] Nothing is necessary in a democratic legal regime except the normative idea of equal freedom: Kant ([1870] 1996), Maus (1992), Brunkhorst (2005b, 37 and 67–77), Möllers (2008a, 13–14 and 16).

[33] Kelsen ([1920] 1981).

[34] Möllers (2001, 423).

[35] Maus (1992), Habermas (1992).

(2) The different institutions (public and private) and procedures of legislation, administration, and jurisdiction are all in equal distance to the people, and no institution or procedure is taken to represent the people as a whole: 'No branch of power is closer to the people than the other. All are in equal distance. It is meaningless to take one organ of democratic order and confront it as the representative organ to all others. There exists no democratic priority (or supremacy) of the legislative branch.'[36] Instead of one substantial sovereign democracy, the regime must express itself in '*subjektlosen Kommunikationskreisläufen*' (circulations of communication without a subject).[37]

(3) Whereas the concept of the higher legitimacy of a ruling subject (the king, or the state as *Staatswillenssubjekt*) is as fundamental for power limiting constitutionalism as it was for medieval regimes of 'the king's two bodies,'[38] democratic and power founding constitutionalism replaces legitimacy completely by a legally organized procedure of egalitarian and inclusive legitimization.[39] The procedures of legitimization become nothing other than the products of democratic legislation; legitimization is therefore circular in the sense of an open, socially inclusive hermeneutic circle, or loop of legitimization without legitimacy.[40]

(4) Democracy is not, as the young Marx once wrote, the 'solved riddle of all constitutions' but, as Susan Marks has objected, the 'unsolved riddle of all constitutions.'[41]

Hence, a constitution that is democratic has to keep the riddle open. It belongs to the necessary modern meaning of democracy that the 'meaning' of 'democratic self-rule and equity' never can be 'reduced to any particular set of institutions and practices.'[42] Without the normative surplus of democratic meaning which always already transcends any set of legal procedures of democratic legitimization, the people as the 'subject' of democracy would no longer be a self-determined group of citizens, or a self-determined group of 'all men'[43] who are affected by a given set of binding decisions.

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[36] Möllers (2008b, 160–82).

[37] Habermas (1992, 170 and 492–3).

[38] Kantorowicz (1957).

[39] Habermas (1992, 170 and 492–3), Möllers (2005b).

[40] Democratic legitimization is inclusive because it governed by the one and only constitutional principle of democracy, and that is the principle of self-legislation or autonomy. This principle is socially inclusive because it presupposes that a procedure of legitimization that is democratic has to include everybody who is concerned by legislation and jurisdiction. Consequently, all exceptions (e.g. babies) have to be justified publicly and need compensation through human rights; cf.; Müller (1997, 76), Marks (2000).

[41] Marks (2000).

[42] Ibid., 103, 149.

[43] 'All men' can mean many different things, e.g. all men in a bus, all men on German territory, all men with US passports (which is far less than all US citizens), all men on the globe, all men in the universe, all men who are French citizens, all men who are addressed by a certain legal norm. Democracy and democratic legitimization is only concerned with the last two meanings, and the possible tension between them.

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# Chapter 12
# The Normality of Constitutional Politics: An Analysis of the Drafting of the EU Charter of Fundamental Rights*

**Richard Bellamy and Justus Schönlau****

"Constitutional" and "normal" politics are often treated as distinct species of the same genus (Ackerman 1991, 3–33). Whereas the latter supposedly involves a focus on policy considerations and the promotion, balancing, and aggregation of sectional interests, the former is portrayed as a more high-minded affair. It consists of deliberation on the common good to arrive at a consensus on those principles required to show each person equal concern and respect (Elster 1996; Cohen 1996). As such, it comes as close as possible to the ideal politics of an original contract between free and equal citizens. Proponents of this interpretation maintain that if everyone is constrained to reason in an open and equitable manner, uninfluenced by purely private advantage, prejudice or other kinds of unjustifiable partiality, the contractors will converge on a conception of justice that is both fair and in the public interest. By contrast, normal politics is said to be the realm of shabby compromises, in which self-interested parties bargain for personal or sectional gain, only accepting what they have to in order to get as much of their way as they can (Habermas 1996, 127, 165–7, 181–83). Consequently, the outcomes of constitutional politics – most notably constitutional rights – provide the preconditions for normal politics and may legitimately constrain it (Dworkin 1996, introd.).

* Earlier versions were presented at the Universities of Chiba, Edinburgh, and Essex, the Wissenschaftskolleg zu Berlin, and the LSE. We are grateful to Ariyoshi Ogawa, Jo Shaw, Lynn Dobson, Niamh Nic Shuibhne, Jason Glynos, David Howarth, Aletta Norval, Albert Weale, Dieter Grimm, Grazyna Skapska, Ulrich Preuss, Antje Wiener, Daniel Halberstam, John Gray, and Rodney Barker for their comments.

**Richard Bellamy and Justus Schönlau, 'The Normality of Constitutional Politics: An Analysis of the Drafting of the EU Charter of Fundamental Rights', Constellations: An International Journal of Critical and Democratic Theory, 11.3 (2004) pp. 412–33

R. Bellamy (✉)
Department of Political Science, School of Public Policy, University College London, London, UK
e-mail: r.bellamy@ucl.ac.uk

J. Schönlau
Advisor of the Committee of the Regions, European Union, Brussels, Belgium

C. Corradetti (ed.), *Philosophical Dimensions of Human Rights: Some Contemporary Views*, DOI 10.1007/978-94-007-2376-4_12,

We dispute this contrast and the relationship it proposes between these two political settings. Constitutional politics are typically linked to dramatic "moments" such as a civil war, revolution, military defeat, or some other national disaster or major turning point (Ackerman 1991, 266–94). In these cases, it is necessary to rebuild the structures of normal politics and normalize the antagonisms of opposed groups. Less dramatic instances, such as the three rounds of constitutional politics in Canada since the mid-1960s, have had similar aspirations – namely, to bring antipathy to the prevailing regime within the fold of normal politics. We contend this process of normalization arises not because constitutional politics stands outside and differs from normal politics, but on the contrary because it reveals that conflicts on matters of principle are amenable to the normal political processes. Disagreements about constitutional principles are frequently well founded and reasonable, both reflecting and lying at the heart of normal political divisions. Consequently, a consensus beyond these political disputes is not available. Rather, mechanisms have to be found whereby people can live with their disagreements. As a result, constitutional politics reaches an accord not through some or all disputants being converted to a common point of view, but via a normal political process of give and take that allows the parties to reach mutually acceptable compromises in which each recognizes the views of others without necessarily agreeing with them. As with ordinary legislation, there need be nothing shabby about such deals.[1] They involve a complex mix of bargaining and principled argument that belies attempts to distinguish normal from constitutional politics by associating the former exclusively with the first and the latter with the second. Politics *tout court* necessarily employs elements of both, combining them in different ways according to the nature of the issue being discussed, so as to find solutions all can live with.

We shall illustrate our thesis via a detailed analysis of the debates in the Convention that drafted the EU Charter of Fundamental Rights. Section one considers the nature of constitutional rights. We argue that because rights are subject to reasonable disagreements about their substance, scope, and sphere, the subjects to whom they apply, and the ways they might be specified and secured, the conditions of public reason held to typify "constitutional" politics will be insufficient to produce a consensus. The second section explores how these differences may nevertheless be resolved through various types of normal political compromise. The third section illustrates these points through an analysis of the Convention. We conclude by suggesting the success of this, as with other, conventions lay not in its extraordinary character so much as its normality. As a consequence, we ought perhaps to treat its conclusions as part of, and reformable by, normal politics too, rather than according them the superior status standardly attributed to the Charters and other agreements resulting from such meetings.

[1]While we can only examine the normality of constitutional politics here, we would equally wish to insist on normal legislative politics having many of the qualities reserved by some to abnormal constitutional deliberations; see Waldron (1999a, b). However, we would also want to stress that even on matters of principle, politics cannot be too high-flown. To resolve principled disagreements that defy any consensus, we often need to use a range of bargaining and procedural techniques to achieve a compromise.

## 12.1 Rights and the Circumstances of Politics

Though most people agree that rights are rendered necessary by the limited altruism and resources that Rawls (following Hume) termed the "circumstances of justice" (Rawls 1971, 126–30), many disagree about which rights these are, their nature, bearing, and relationship to each other. Does the right to life rule out abortion; how far does the right to property restrict transfer payments for welfare; when, if ever, should freedom of speech give way to privacy? The list of potential divisions over the meaning and application of rights appears endless. This predicament poses a problem for the constitutional rights project. If we need rights because of the "circumstances of justice," it appears that we have to identify and interpret them in what Jeremy Waldron, among others, has called the "circumstances of politics": namely, a situation where we require a collectively binding agreement because we will suffer without it, yet opinions and interests diverge as to what its character should be and no single demonstrably "best" solution is available (Waldron 1999a, 107–18; Weale 1999, 8–13). Many proponents of constitutional rights seek clear and settled answers that brook no debate because based on a consensus on justice. As such, they are supposed to be beyond politics, offering legitimate constraints upon it. However, if there are reasonable disagreements about truth and justice, then a political process will be needed to resolve them. Constitutional rights will not be outside or even, as may be partly the case, presuppositions of politics.[2] They will be products of the very political bargaining they are supposed to frame.

It is sometimes objected that such disagreements over rights arise solely from self-interest, ignorance, or prejudice leading people to seek to perpetuate various sources of injustice. Wittingly or unwittingly, this is no doubt often the case. Yet, as John Rawls has observed, they also arise from what he calls "the burdens of judgement, […] the many hazards involved in the correct (and conscientious) exercise of our powers of reason and judgement in the ordinary course of political life" (Rawls 1993, 55–56). Rawls lists the following six "more obvious" (and, in his view, least controversial) factors as contributing to a divergence of judgment among reasonable people: (1) the difficulty of identifying and assessing often complicated empirical evidence; (2) disagreement about the weighting of different considerations even when there is agreement about which are relevant; (3) the vagueness and indeterminacy of our concepts, which makes them subject to hard cases; (4) the effect of the different life experiences of people, which in complex societies vary widely, on the ways they assess evidence and weigh moral and political

[2]Habermas's *Between Facts and Norms* probably represents the most sophisticated attempt to derive rights from democratic procedures. However, though certain rights can be regarded as implied by politics, such as the right to vote, even these can be subject to reasonable disagreements as to whom they apply and how they might be institutionalized; for detailed criticisms of this thesis, see Bellamy (1999, ch. 7); Waldron (1999a, b, ch. 13). As we shall see, these debates arose in the Convention. Meanwhile, not all rights are tied to political procedures, even when broadly conceived.

values; (5) the different kinds of normative consideration, each with different force, on both sides of an issue, which make overall assessments problematic; and (6) the impossibility of any social and political system being able to accommodate all values (Rawls 1993, 56–57).

Rawls cites these six factors as making it impossible to base a stable political settlement on a consensus around a comprehensive conception of the good. Yet, as a number of commentators have remarked (Bower 1994, 21), they raise equal doubts about a consensus on the right. For example, think of the debates over breaches of privacy. It is often difficult to identify such breaches not only because the empirical details may be unclear, but also (and most importantly) because people differ over the boundaries of the concept, hold different accounts of the public interest and where it overrides the right to privacy, view personal responsibility differently, and so on. As a result, they may even have different views of when a right exists to be breached in the first place. Indeed, the laws in many states diverge on this point. For example, France and Germany protect the privacy of public figures more than Britain or the United States.

Thus, rights appear subject to many of the divisions animating political debate more generally. Indeed, these disagreements extend to the very concept of a right. For example, "choice" and "benefit" approaches produce very different accounts of the nature of rights, with this theoretical debate mirroring many political arguments among the wider public, such as those between libertarians and welfarists.

Broadly speaking, we can say that disagreements can arise over:

- the *substance* of rights, or which rights we have and why;
- the *subjects* of rights, or who may possess them;
- the *sphere* of rights, or where they apply – only in the public sphere, or also to private associations;
- the *scope* of rights, or how they relate to other rights and values; and
- the *securing* and *specification* of rights, or the type of political or judicial intervention and the precise set of entitlements that are needed to protect them, both in general and in particular cases.

Though analytically distinct, these dimensions are related so that the interpretation given of any one of them will have knock-on effects for how all the others are conceived.[3]

To some degree, these six dimensions of rights can be seen as defining the contours of the political. A given view of rights will, explicitly or implicitly, identify certain sorts of agents and groups of people as citizens and describe the public realm in a particular way. For instance, moral and economic libertarians will be likely to have a narrower view of the legitimate range of political activity than social democrats, even if in some respects they might be willing to extend citizenship within this severely circumscribed range to a wider group of people. As such, one could describe arguments about rights as a form of "constitutional" politics since they concern the

[3]For a full analysis of debates over these dimensions of rights, see Bellamy (2001, esp. 17–21).

very constitution of the political. Yet, as the example given above illustrates, they are also intimately related to the issues that engage people within "normal," everyday politics. To a greater or lesser degree, most policies involve taking a view on one or more of the dimensions of rights and this stance will reflect the ideological position, interests, and experiences of those concerned. In other words, the standard divisions of "normal" politics, which lead conservatives and social democrats to divide over education, health, immigration, and so on, are related to many of the reasonable disagreements people have about rights. Indeed, these latter disagreements about rights inform their debates on policies. Consequently, "normal" and "constitutional" politics are intertwined. A constitutional settlement will tend to reflect what could be "normally" agreed at the point at which it was framed. As such, it is likely to be at issue and subject to subsequent reinterpretation as normal politics evolves. Thus, we should not be surprised if normal divisions and strategies enter constitutional politics or that normal politics proves more adept at dealing with constitutional questions than many have supposed. Indeed, the very purpose of constitutional politics may be to appreciate the normality of these divisions and the need to live with them.

## 12.2 The Politics of Compromise

In circumstances of reasonable disagreement, deliberation will not produce consensus. There is no better argument none can reasonably reject and no compelling reason for anyone to transform their position to adopt another's. We submit that people overcome this impasse by dropping consensus for mutual acceptability and employing the arts of compromise to reach an agreement.[4] Compromise is usually characterized as the product of shabby deals based on self-interest. By contrast, we argue it reflects a willingness to "hear the other sides" by acknowledging their reasonableness, without necessarily denying that of one's own position, and addressing the often competing claims of the parties concerned.

Roughly speaking there are three kinds of compromise, with the version adopted depending on the character of the parties and the differences dividing them. The first kind seeks a direct compromise between the different viewpoints. One of the commonest methods consists of *bargaining* and arises in what Albert Hirschman has called "more-or-less" conflicts (Hirschman 1994, 203–18). In these cases, the disputants are either arguing over a single good whose meaning they share, or are able to conceive their various demands as being translatable into some common measure – usually money. Thus, when employees haggle over wages or house buyers over the price of their prospective home, they may have issues other than money in mind – such as the need to work late or the proximity of a railway line in these two examples – but they can nevertheless put a price on their concern that enables the parties to agree a

[4]This section summarizes Bellamy (1999, ch. 4). See too Benjamin (1990).

mutually satisfactory deal. However, many conflicts cannot be resolved so easily because the positions are incommensurable or incompatible with each other. In these instances, more complex compromises are required. A more sophisticated style of bargaining involves *trading* to mutual advantage, whereby each gets some if not all of what they want. For example, most political parties have to engage in a degree of log-rolling to get elected. This procedure brings into a single party various groups that may disagree over many issues but prioritize them differently. If three groups are split over the possession of nuclear weapons, development aid, and a graduated tax, but each values a different one of these more than the others, it may be possible for them to agree to a package giving each the policy they value most while putting up with another with which they disagree in an area that matters less to them. Of course, sometimes the result can be a programme that is too inconsistent to be tenable or attractive. Here, it might be better for the groups to shift to an agreed *second best*. Some conflicts appear intractable at the level of abstract principle but can be resolved through the *negotiation* of the details. What appear to be stand-offs between incompatible views sometimes arise through the various positions being under-articulated. Thick description may help clarify the distinctive weight of different demands. Each party may agree that reasons of different weight or involving different sorts of consideration are involved. Or it may be possible to reason casuistically and by analogy from those cases where there is agreement to others where abstractly there appears to be a stand-off. Judges often use precedents in this way (Sunstein 1996).

The second kind of compromise consists of various attempts to skirt around the disagreement. For example, people often employ *trimming* to avoid talking about the issues that divide them and seek either to find agreement on other grounds or to take them off the agenda altogether. This technique resembles the way neighbours of opposed religious beliefs steer clear of discussing religion so as to remain sufficiently friendly to cooperate on school runs. It is partly employed by Rawls when advocating the avoidance of "comprehensive" moral theories in politics (Rawls 1993, xvii, 141–4), and is familiar in constitutions in the form of "gag-rules" (Holmes 1998, 19–58; Rawls 1993, 151 n. 16). From this perspective, the very decision to have a Bill of Rights can be regarded as a compromise agreement to remove certain divisive issues from the political agenda. A variation of this technique is *segregation*. Here the attempt is to contain potentially conflicting issues or differing groups of people by placing them within distinct spheres. Granting ethnic or national minorities limited forms of self-government and consociational forms of democracy provide examples of this approach.

The third kind of compromise employs a procedural device to overcome deadlock. Third-party arbitration is one common mechanism of this kind, where trust is placed in the arbitrator to do the balancing in an impartial manner according to a fixed set of rules. Majority voting is another example of this approach. In this case, the disputants compromise on a procedure they all accept as fair even if they will continue to disagree on the merits of the actual decision itself. Such methods appear justified wherever agreement on substance seems unlikely because of time constraints or the character of the differences dividing the parties.

All three kinds of compromise, along with their variants, are standard political techniques and frequently combined. Each has its respective merits and demerits, according to the issue and the perspectives of the people concerned. Take religious education in a multicultural society. Trading might yield ecumenical solutions or concessions in other areas that certain religious groups regard as more important, such as special rights like Britain's exemption of Sikhs from wearing crash helmets on motorcycles. Or it might be better to trim or establish as a shared second best that schools are strictly secular. Societies that are deeply segmented along religious lines have often adopted various forms of segregation, such as consociationalism (Lijphard 1968). Sometimes a minority group engages in negotiation to get accepted. For example, British Muslims have pointed to analogies with established liberal or Christian practices to get certain of their claims recognized as legitimate and to promote understanding of them (Modood 1993, 87–91).

Whereas the ideal of consensus suggests that constitutional politics should act as a funnel to produce agreement on some ideally just arrangement, the need to compromise simply acts as a filter, weeding out the most blatantly unjust and self-serving positions that fail to treat others with equal concern and respect. Moreover, while consensus aspires to a fixed point above normal political divisions, compromises necessarily reflect them. They differ according to context and evolve as people's circumstances and views change. Therefore, if compromise rather than consensus has to form the goal of constitutional politics, it will resemble normal politics not just in its processes but also in its decisions. For they will mirror the prevailing differences.

It will be objected that compromise will only be fair if the relative power of the parties concerned is so divided that all get a hearing but none has the ability to force concessions to meet perverse or unjust claims. In fact, compromise shares the concern with political equality that animates democracy. Namely, it "requires the view that we must recognize everybody with whom we communicate as a potential source of argument and reasonable information" (Weale 1999, 57). It is vital, therefore, that different view points are fairly represented in the decision-making process.

One advantage of constitutional over normal politics may be that this is more likely to be the case. As we shall see was the case in the Convention, different view points tend to be so represented that even minority positions get a hearing, while the public character of their deliberations and the need for near unanimity encourage participants to appeal to shareable reasons rather than prejudice or self interest when making their arguments. However, here too the difference between constitutional and normal politics is largely a matter of degree rather than of kind. Most political systems seek to ensure fair and reasonable decision-making through adopting a suitably proportional electoral system, drawing constituency boundaries in certain ways, dividing legislative power, and so on.[5]

The critique of majoritarianism, the most common objection to normal politics, needs qualifying in this regard. An insistence on unanimity may give small groups

[5]For a survey of how different forms of representation ensure minorities reach a sufficient threshold to have a voice, see Phillips (1995).

an effective veto over decisions that amounts to minority tyranny – a fear we shall show some voiced in the Convention. By contrast, majority voting can be the fairest decision procedure, as May famously showed (May 1952, 680–84), and, as Condorcet revealed (Condorcet 1976), may be more likely to be right than individual judgment. Of course, both these results assume ideal conditions that rarely obtain in practice (Dahl 1989, 144–50, 160–62). However, for this reason strict majoritarianism is unusual in real political systems. Most legislatures are elected via systems that produce multiple parties and a degree of representativeness that makes coalition-building necessary.[6] As pluralists have long noted, even within dominant parties majorities get constructed from minorities. Legislative majorities are often in reality super-majorities of the population as a whole, reflecting a wide spectrum of public opinion. Thus, the structures of constitutional politics are also closer to those of normal politics than is sometimes granted.

## 12.3 Compromising on Rights: An Analysis of the Charter Convention

We have argued that constitutional politics raises normal political disagreements and so must adopt the procedures of normal politics to overcome them, albeit refining some of its structures to do so. This section presents a case study to show how the Convention to draft the Charter of Rights employed the politics of compromise. The decision to draft the Charter originated during Germany's Presidency of the EU in 1999 and reflected a growing sensitivity to rights issues within the Union (de Búrca 2001, 128–31). This concern had numerous sources – the long-standing challenges to the European Court of Justice (ECJ) on this issue from the constitutional courts of member-states (Weiler 1997, 97–131), the desire to uphold human rights standards in the face of the rise of far-right parties and the prospective enlargement to the new democracies of Central and Eastern Europe (Merlingen et al. 2001, 59–77), and the belief that highlighting rights would demonstrate the EU's commitment to the central principles of good governance (European Commission 2001, 428). Though these triggers do not amount to a constitutional moment of a dramatic kind, they were aspects of a widespread feeling that the EU faced a legitimacy crisis that would inhibit its capacity to confront the challenges posed by the deepening and widening of the EU occasioned by the Euro and enlargement. However, like other EU attempts to legitimize itself, the Charter was originally conceived as addressing supposed weaknesses of popular perception more than of policy.[7] As the

[6] Lijphart's analysis of 21 stable democracies revealed only six as conforming to this pattern; see Lijphart (1984) and Dahl's remarks (1989, 156–60).

[7] Reports in 1998 and 1999 had proposed improving the attention paid to rights by setting up a specific Commission directorate for human rights and formally acceding to the European Convention on Human Rights (ECHR); European Parliament "Leading by Example – A Human Rights Agenda for the European Union in the Year 2000," (Lalumiere Report), Brussels 1998; Alston and Weiler, eds. (1999). However, neither proposal met with political support.

conclusions of the Cologne European Council meeting of June 1999 establishing the initiative made clear, the Charter was to be addressed to European citizens rather than EU institutions and personnel. Its purpose was to make the Union's existing "obligation […] to respect fundamental rights," as "confirmed and defined by the jurisprudence of the Court of Justice," "more visible to the Union's citizens" (European Council 1999, Annex IV). Accordingly, drafters were directed to those sources the ECJ currently employed when adjudicating on rights, notably the supposedly "common constitutional traditions" of the member states, the European Convention, the European Social Charter, and the Community Charter of Fundamental Social Rights of Workers. Whether the Charter would become legally binding was left open (European Council 1999).

Such attempts to constrain constitution-making bodies are not untypical (Elster 1998, 99). Established authorities rarely welcome a potential subversion of their existing powers. However, like most past constituent assemblies, the Convention refused to be bound by upstream authorities (Elster 1998, 105–07). The very adoption of the term Convention to describe itself, the official documents having referred simply to a "body," was a declaration of intent to draft a founding document rather than just showcase existing entitlements, though how far it could go was a point of contention throughout its proceedings. Meanwhile, the status of the document was neatly shelved by the Convention President's decision to draft the Charter "as if" it would become binding.[8] Though this policy was also contested, it lead to all the participants taking the process seriously enough to avoid it becoming simply a wish-list of campaigning groups, a fate that can befall international declarations that lack the backing or involvement of governments.

The Convention conformed to the ideal conditions for a democratic deliberative setting as nearly as is realistically possible.[9] Its size was reasonably optimal. With 62 members it was not so large that it favored oratory over argument, with those speakers most versed in rhetoric coming to the fore. Rather, all members could participate in discussion. Even if there was minimal direct consultation with the electorate over their deliberations or its conclusions, the Convention was more than usually representative of European public opinion in terms of the range of ideologies and interests it included and consulted. Like EU decision-making more generally, the Convention involved national, transnational, and supranational representatives, along with formal and informal consultations with subnational groups.[10] However, unusually the weighting was towards parliamentarians in the national and European parliaments, who accounted respectively for 30 (or two

[8]Roman Herzog set out this idea in Convention Document "Body 3" of January 20 2000.

[9]The discussion that follows employs the criteria Elster derives from his analysis of the Philadelphia, Paris, and Frankfurt conventions in "Deliberation and Constitution Making," 107, 117. For a similar appraisal, see de Búrca (2001,131–34).

[10]Given that regions often have some constitutional independence, their involvement was weak – the only formal requirement being to consult the Committee of the Regions (Conclusions of the Tampere Council October 15–16 1999, Annex, A iv). However, where, as in Germany, the second house is a federal chamber, the national parliamentary delegations included a regional representative.

each, usually from the main government and opposition parties) and 16 of the 62 representatives. By contrast, member-state governments and the Commission only had one representative, making 16 in all. Nevertheless, only 16% were female and all were white. Two representatives each from the Council of Europe and the ECJ had observer status, and the European Council had indicated that other European bodies, such as the Ombudsman, the Committee of the Regions, and the Economic and Social Committee, be invited to give their views and an "appropriate exchange" be entered into with the candidate countries for Union membership (European Council 1999, Annex IV). In addition, the Convention was encouraged but not required to invite "other bodies, social groups, or experts" to give their views (European Council 1999, Annex IV, spelled out further in Conclusions of Tampere European Council 1999). Though most Convention members belonged to institutions potentially affected by the Charter, most lacked a strong interest in preventing it from undermining these bodies. They were either senior figures nearing retirement, middle ranking politicians unlikely to achieve major office, or, in the case of certain governmental representatives, relatively independent academics or lawyers.

The European Council specified that the debates and hearings of the body and the documents submitted to it should be public, and a dedicated website made the proceedings reasonably easy to follow from outside and allowed submissions from any interested individual or group. Most debates were held in open, plenary sessions. As a result, the process was public enough to ensure transparency and oblige participants, however hypocritically, to employ the language of impartial reason rather than of mere self-interest. But its meetings were not so publicized as to encourage grandstanding and rhetorical overbidding aimed at courting or palliating groups outside the Convention. Moreover, if total secrecy encourages bargaining, partial secrecy can allow free and frank discussion. A key role in this respect was played by the praesidium, which met in secret and placed drafts before the Convention to amend or accept. It consisted of a chair, Roman Herzog, a former president of both the Federal Republic of Germany and its Federal Constitutional Court, who was chosen by the Convention, and three vice-chairs chosen respectively by the national parliamentarians, the European parliamentarians, and the representatives of the member-state governments (who were represented by the delegate of whichever state held the rotating EU presidency at the time). It acted as a third-party arbitrator, brokering compromises that their declared commitments hindered the participants from reaching directly themselves.

Finally, the Convention had a strong incentive to reach a mutually acceptable outcome. The Council had ordained that a draft Charter was to be presented for approval "when the chairperson […] deems that the text of the draft Charter elaborated by the body can eventually be subscribed to by all the parties" (Conclusions of Tampere European Council 1999). The Convention's chair, Roman Herzog, took this instruction to mean that votes on individual proposals were to be avoided and that decision-making should be as consensual as possible. This interpretation was not uncontentious, and was felt by some to obscure real divisions and by others to

give too much power to minority opinions.[11] Still, the final draft was approved by a "consensus minus two" at the plenary.[12]

However, notwithstanding these near optimal discursive conditions, this apparent constitutional consensus actually consisted of a series of normal compromises aimed less at normative agreement than mutual acceptability. The Convention debates reveal cleavages over all six dimensions of rights. A major divide concerned the legitimate sphere of the Union's activity. Some, like the British government's representative Lord Peter Goldsmith, maintained "the task of this Convention is to make existing rights at European Union level more visible."[13] They wished to restrict the Charter to those rights derived from the sources to which the Council had referred them for guidance. Others, like the Italian government's delegate, Stefano Rodotà, thought the Charter should go beyond the ECHR and give "substance to European citizenship."[14] They wanted to draft a new and substantially wider document that extended into areas not covered by earlier instruments, such as biotechnology, and that might even provide the foundation of a future federal European polity. As a result, the debate over the EU's sphere partially overlapped with familiar philosophical and ideological differences over the substance of rights. Some wanted social rights included, others viewed them as policy choices that lie within (and must be compatible with) a domain established by civil and political rights. This debate was also related to discussions over whether all rights, some or none should extend to subjects other than citizens of the Union (a status currently restricted to nationals of the member states). Some considered fundamental rights as logically including all humans, others considered them as attributes of citizenship. Different accounts of the nature of rights also tend to produce divergent understandings of the scope of various categories. Not surprisingly, conservative parties tended to emphasize market-based and process rights protecting formal equality, while social democrats favored placing social rights on a par with traditional civil and political rights as necessary to ensure these were of equal worth to all. These differences also informed the major divisions over the status of the Charter and how, if at all, it should be secured. Some insisted the Charter should be legally binding, others contended the Cologne conclusions had made clear it would only be declaratory. Naturally, all these issues had an impact on the way the various rights came to be specified.

[11] For a critical view, see Voggenhuber (2001). On one occasion, the attempt by the acting chairman Méndez de Vigo to put a praesidium proposal to a vote nearly led to a walk-out of a large number of Convention members who insisted that votes were not allowed under the Cologne/Tampere mandates (debates on document Conv 36/00 on June 6, 2000, as summarized in Deutscher Bundestag, *Die Charta der Grundrechte der Europäischen Union* (Berlin 2001, 285).

[12] The last plenary meeting of the Convention took place on October 2, 2000 during which the "consensus of the Convention on the draft Charter of Fundamental Rights" was declared by the Convention's president to the applause of all but two delegates.

[13] Lord Peter Goldsmith in an interview on July 17, 2000 and his "Consolidation of Fundamental Rights at EU-level – the British Perspective," in Feus (2000). Interview data comes from Schönlau (2001).

[14] Stefano Rodotà in an interview on April 4, 2000.

Significantly, the Convention did not divide into two distinct groups of minimalists and maximalists, with debates so polarized between them that compromise became difficult. Because a maximalist on matters of substance might be a minimalist over which subjects or spheres should be included, there were crosscutting divisions. The groups who agreed or disagreed about one dimension differed from those who agreed or disagreed over another. Nor was a maximalist position necessarily always the most just, with all detractions from it being motivated by national or group self-interest rather than principle. To a large extent, disagreements took place in the context of general agreement on the importance of rights. All member states are signatories of the ECHR, along with other international instruments, and possess some form of domestic bill of rights. Though special interests may have motivated some arguments, this applied as much to maximalist as to minimalist positions. However, most divisions mirrored, albeit at a lower level of sophistication, debates in the academic literature between cosmopolitans and liberal-nationalist communitarians, Kantians and utilitarians, choice and benefit theorists, and so on. In other words, they are rights-based differences between and over the nature of rights rather than between proponents and opponents of rights.

The solution to these disagreements lay in the types of compromise outlined above. Forms of bargaining that simply split the difference proved possible to a remarkable degree. For example, the substantive debate between proponents and opponents of workers' rights reached a compromise whereby the proposal for a "right to work," in the sense of an entitlement to a job, became modified to the more free-market sounding "freedom to choose an occupation and a right to engage in work" (Art. 15). Other compromises in this area involved trading, whereby a package was agreed giving each side some of what it wanted. Thus, a deal was done whereby Article 29 establishing a right of access to a free placement service was included in return for a relatively open-ended "right to own, use, dispose or bequeath his or her lawfully acquired possessions" and the recognition of the "freedom to conduct a business" (Arts. 17 and 16 respectively).[15] Part of the controversy surrounding social rights arose from many aspects of social policy not falling within the EU's current competence.[16] Consequently, even those who substantively favored social rights did not necessarily support them in the Charter because they did not wish to expand the Union's sphere. Here too trading offered the solution, with Articles 51 and 52 representing a compromise of this kind that gave something to

[15] This "trade-off," explored below, was struck by Iñigo Méndez de Vigo in the European Parliament delegation between the Socialists and Social Democrats, on the one hand, and the Conservatives and Christian Democrats, on the other.

[16] See Convention debate on April 3, 2000 as summarized in Deutscher Bundestag (2001, 253–54). The Cologne mandate had stated that social rights from documents like the European Social Charter should only be included "insofar as they do not merely establish objectives for action by the Union," a view supported by the head of the Convention secretariat, J.P. Jacqué, who argued that the Community could not promote human rights but only uphold a minimum set of judicially enforceable standards; de Burca (2001, 134–5). As we shall see, the Convention partly dissented from this restricted view.

both minimalist and maximalist stances on this issue. The former gain by the first article, which limits the Charter's application to EU institutions and the implementation of EU law by the member states (51.1) while explicitly ruling out the creation of any new competence (51.2). However, the latter gain by the second article, which indicates that limitations on these rights are not justified by the subsidiarity principle (52.1) and that when they coincide with rights in the ECHR, acceded to by all member states, have the same scope as there (52.3), though allowing the Charter and Union law to exceed them. This concession to the sphere minimalist in the event allowed a fairly maximalist view of the scope of social rights to enter into the Charter, even when it was doubtful if they did fall within the EU's competence, as was the case with social security (Art. 34) and health care (Art. 35) (though these were only granted "in accordance with the rules laid down by Community law and national laws and practices").

When it came to the tricky issue of the subjects of Charter rights, segregation provided the solution. The Cologne mandate had been ambiguous on this question, listing not only the supposedly universal rights contained in the ECHR, but also "the fundamental rights that pertain only to the Union's citizens" (Conclusions of the Cologne European Council Meeting 1999), thereby implying not all the rights included in the Charter would automatically be rights of "every person." Many Convention members expressed their concern about limiting rights to EU citizens, which some saw as incompatible with the substance of human rights as universal entitlements.[17] However, it was also possible that extending EU rights to all persons would result in a minimalist position as regards both their sphere and scope. The resolution of this complex dispute was a multi-layered compromise involving distinguishing five categories of rights according to their subject. So the "classical" fundamental rights and freedoms (i.e. those taken mainly from the ECHR) are formulated as "rights of every person," those rights based on the EC/EU Treaty provisions on citizenship are rights of "every EU citizen," then there are rights, such as for example "social security and social assistance" (Art. 34) which are addressed to "everyone residing and moving legally within the European Union," while some other rights (for example Arts. 27, 28, 30, and 31) provide rights for "every worker" or for "every child" (Art. 24.3). Finally, the Charter introduces a new category of rights addressed to "any Union citizen and any natural or legal person residing or having its registered office in a member state" (Arts. 42, 43, and 44). So, by segregating between different categories of rights and stipulating carefully who could hold them, the classes of people counting as subjects of EU rights could be expanded.

Nevertheless, not all issues relating to the identity of the subjects of rights could be dealt with in this way. A particularly pertinent example was the right to join and found political parties at the European level. Compromise on this right was only achieved by a form of trimming that involved moving from the particular policy to

[17] Johannes Voggenhuber was most clearly against any restriction (interview October 10, 2000). Most other Convention members accepted that for practical reasons, and with reference to the Cologne mandate, the Charter would include different categories of rights holders.

a higher level of abstraction. Originally the praesidium had proposed a separate article specifying that "every citizen" had the right to join and found parties (Convention 17 of March 20, 2000). This proposal sparked a controversial debate over whether such an important political right could and should be restricted to EU citizens, and what provisions ought to be made for immigrants. In response, the praesidium proposed a second draft of this article which drew a distinction between the right to join a political party, which it gave to "everyone," and the right to found political parties, which was to be restricted to "every citizen" (Convention 28 of May 5, 2000). After another debate and a number of written alternative proposals, the praesidium withdrew this idea and decided to drop the whole article from the Charter's chapter on citizens' rights. Instead, parties are now referred to only in the abstract in the second paragraph of Article 12, which covers the much less controversially universal right of "freedom of assembly."

As the above examples show, compromises over one dimension of rights tended to interact with, and often ease, compromises in other dimensions. As a result of this process, agreement on the Charter as a whole gradually developed. However, there was always a danger of the various compromises coming apart whenever the ways they fitted together as part of a composite package came under close scrutiny. For reasonable disagreements remained, particularly over the substance of many rights and the status of the Charter. These differences were largely overcome by concentrating on particular issues and treating the decisions as the product of a pragmatic attitude of give and take rather than a consensus on rights. Indeed, sometimes the language of rights was dropped altogether.[18] For example, in the areas of consumer and environmental protection, it proved impossible to settle on a formula based on individual rights. Instead, agreement was reached on a general policy aim or "principle," as it was termed. Thus, Article 37 does not give a right to a clean environment but merely declares "A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development." Likewise, Article 38 states "Union policies shall ensure a high level of consumer protection."[19]

The debate over the preamble to the Charter illustrates well the tensions dividing the Convention and the political mechanisms employed to resolve them. There was a general discussion early in the Convention about whether the Charter needed its own preamble, since it was to become either a part of the Treaties (in which case it would be preceded by their preambles) or a mere political declaration to which a prologue of some sort could be added later and not necessarily by the Convention. Yet, in the spirit of Herzog's view that the Charter should be a self-standing document that kept all options open, several individual Convention members proposed

[18] See the June 5, 2000 debate over whether the Charter could distinguish between "genuine rights" and "mere principles"; Deutscher Bundestag (2001, 279–84).

[19] In the June 5 debate (previous note) Herzog used the protection of the environment as an example of a "principle" which was not an individual right, but should still bind the member states. Summarized in ibid., 279–80.

drafts for a preamble, as did the praesidium.[20] The exchanges that followed once more brought to the fore the different visions among Convention members of both European integration and the role and basis of the Charter, threatening to block final acceptance of even those articles which had already been agreed to.

By the time the preamble came to be debated, it had been agreed that the European Convention of Human Rights (ECHR) should provide the minimum standards on a number of civil and political rights. Nevertheless, disagreements still existed over the role, scope, extent, and legal function of social rights within the Charter, and more generally about the source and substance of rights. With regard to the first issue, the praesidium's introduction into its first preamble draft of "solidarity" as one of the "indivisible, universal principles" on which the Union is founded was a major step. However, though it reflected the discussions thus far, it remained contentious (Praesidium's draft preamble contained in Document Convent 43, July 14 2000). Moreover, it became entangled with a debate over the second issue when a further controversy arose on July 19, 2000 over the suggestion that the preamble should identify Europe's cultural and, in particular, its religious heritage as the source of fundamental rights.[21] In response to the written contributions and discussions that followed, the praesidium's third draft proposed to open the text with the phrase, "Taking inspiration from [Europe's] cultural, humanist, and religious heritage, the Union is founded on the principles of […]" (Praesidium third draft preamble, contained in Document Convent 47, September 14, 2000). However, this suggestion aroused such profound political disagreement that it appeared compromise would be impossible. On the one side, the French government's representative, Guy Braibant, apparently argued within the praesidium that any reference to religion would be unacceptable to France and lead it to veto the whole Charter at the Intergovernmental Conference following the Convention. On the other side, the proponents of the religious reference (mainly German Christian Democrats from the EP delegation) were equally adamant. Given the tight time schedule (the impasse became apparent on September 14 and the Convention was due to present a complete draft to the Biarritz European Council meeting on October 11) and the large number of issues still outstanding, two parallel dynamics evolved around this question: on the one hand, the praesidium attempted to construct a compromise based on its proposed text but involving linguistic segregation and trimming; on the other hand, the EP delegation, where disagreement was most pronounced, arranged a compromise by constructing a trade-off.

These two strategies emerged in part because of the praesidium's decision that for the Convention to express a consensus on the Charter, each of its four components, namely the delegates of the 15 national parliaments, the European Parliament, the 15 national governments, and the European Commission, had to agree to it separately. Consequently, the first three held group meetings to discuss a draft of

[20] For example draft preamble by Manzella et al. (Contrib. 175, May 17 2000).

[21] Some Christian Democrat members of the Convention, especially Ingo Friedrich and Peter Mombaur, arguing in favour, some socialist/social democratic members, notably Elena Paciotti and Ieke van den Burg, against. See Deutscher Bundestag (2001).

the whole Charter on September 25 and 26. The types of compromise each adopted to resolve their remaining disagreements reflect important differences in their composition, purpose, and style of politics. Trading came naturally to the EP delegates of the two main factions, the Party of European Socialists (PES) and the European People's Party (EPP), who were used to doing deals with each other to resolve ideological disputes, especially as many votes within the EP require majorities of around 70% of those voting to be carried. Moreover, the need for some sort of compromise was inevitable given that the president of the EP delegation, Iñigo Méndez de Vigo (a Spanish Christian Democrat), had decided to follow the Convention's method of reaching agreement without recourse to a vote. Faced with a division between the socialist (PES) and the conservative (EPP) blocs, Méndez de Vigo decided to tie the preamble problem to a number of other outstanding controversial issues as part of a package deal. The reference to Europe's rootedness in religion as demanded by the right thereby got linked to the demands by the left for the inclusion of a right to strike in the Charter and their desire for limitations to the right to own property. Though to some degree the motivations of the various actors have to be inferred from the available materials, it would appear that this package proved acceptable because each side gave a higher priority to getting their way on the issues they felt important than to preventing the other side achieving its goal. As a result, each could gain concessions from the other in their preferred policy area in exchange for agreeing to their opponents demands. The EP delegation thus "agreed" on the Méndez de Vigo package, although two members (Kaufmann and Voggenhuber, neither members of the two large party families) registered their dissent. Therefore, Iñigo Méndez de Vigo took this as a mandate to "negotiate" a solution within the praesidium.

Meanwhile, the praesidium sought to trim the religious issue by replacing the controversial word "*religieuse*" in the French original with the word "*spirituelle*," thereby finessing the debate (Document Convent 48 of September 26 2000). While some Convention members, especially in the EP delegation, were still unhappy with this formula (which was too weak for some and too strong for others), the prevailing feeling was one of relief that a solution had been found to a problem which had, in the views of many, grown out of all proportion to its importance. In yet another twist to the story, which bears witness to the complexity of the decision, two German and one Dutch Christian Democrat members of the EP delegation (Friedrich, Mombauer, and van Damme) argued in direct consultation with the praesidium that the word "spiritual," when translated into their respective languages, would be too ambiguous and should therefore be rendered as "spiritual-religious" in the German and Dutch versions. The German members apparently found support from Roman Herzog (himself a Christian Democrat) for their case, and the German version of the Charter preamble consequently reintroduces the notion of "religious," although the Dutch version follows the other nine official languages in not mentioning it. Thus, a form of "segregation" occurred between the different language communities. Several other German-speaking members of the Convention objected to such special treatment, but by this stage the issue was no longer sufficiently important to generate much debate.

**Table. 12.1** Rights compromises at the European charter convention

| **Dimension of Rights** | **Type of Compromise** | | | | |
|---|---|---|---|---|---|
| | *bargaining* | *trading* | *segregation* | *trimming* | *third-party arbitration* |
| *substance* | right to work (Article 15) | Article 29 in return for Articles 16/17 | linguistic segregation on the religious issue in preamble (German text is different) | question of legal status of the Charter – Herzog's "as if" approach | overall agreement on the Charter as a package (final decision about Charter was left to IGC) |
| *subjects* | | | five categories of rights holders in the Charter | question of political parties (now only mentioned indirectly) | question of application to member states "only when they are implementing Union law" left to the ECJ |
| *sphere* | "solidarity" as principle in preamble in return for less substantive social rights | Article 51/52 setting limits to Charter applicability | principles rather than rights on environment and consumer protection | agreement that Charter would only be applicable to EU institutions, not directly to member states | |
| *scope* | | Article 51/52 setting limits to Charter applicability but making Charter "minimum standard" | | linguistic trimming: earlier drafts spoke of EU "guaranteeing rights"- replaced by "recognizes rights" | |
| *securing and specification* | | introducing the reference "under the conditions provided by Community law and national laws" in contested articles | Article 51/52 | later addition of "explanatory statements" by praesidium (now part of the Charter text in draft Constitution) | |

As Table 12.1 shows, the Charter involved multiple compromises over each dimension of rights. A "constitutional" consensus could not be found through convergence on a uniquely reasonable position. Instead, mutually acceptable concessions between reasonable and occasionally incompatible views were sought and found. These compromises involved bargaining as much as deliberative argument, although the latter more often than not informed the former, which were founded as much in conflicts of principle as in competing interests. In many cases, it was not

the right itself that was in dispute so much as the policy implications that might be drawn from a given interpretation of it. Sometimes, as in the debate over the right to join and found parties, the issue was resolved by trimming to a level of abstraction that left the right sufficiently fuzzy as to allow a variety of interpretations. However, in most cases the desire was to reduce the scope for judicial discretion by either segregating the right to protect national jurisdictions or specifying a given interpretation, in which case a trade-off usually was necessary over some other right in another policy area. As a result, the Charter came to resemble a piece of ordinary legislation not just in the way it was framed, but also in its substance.

The need for compromise might be attributed to the absence of voting producing the search for near unanimous decisions. As we noted, however, within the context of normal EU politics super-majorities are not unusual.

Moreover, use of majority voting can itself be regarded as a form of compromise – the acceptance of a procedural device when it proves impossible to do any more than agree to disagree while accepting the need to reach a decision by a fair means. Indeed, on at least one occasion during the debate over social rights, some members felt a vote would have been more suitable than conceding ground to what many believed had become an unreasonable minority view. Several also argued that indicative votes at various points would have given a clearer picture of the state of debates in the Convention and could have speeded up the process (e.g. Voggenhuber 2001). Ultimately, the search for unanimity was itself a compromise position that was felt necessary to reach agreement on the Charter and secure its long-term acceptance.

## 12.4 Conclusion

The Convention to draft the Charter was thought in many quarters to offer a new method for legitimating European integration – one that differed from the normal politics of compromise held to characterize intergovernmental conferences where principle was allegedly subordinated to national interests (Deloche-Gaudez 2000). The decision to employ a Convention to discuss the Future of Europe and draft a new European constitution was partly motivated by this supposed difference between constitutional and normal politics (Shaw 2003, 53–54). We have argued this contrast is overdrawn. The convention setting can help filter out overtly self-serving arguments, but it cannot funnel reasoning towards a consensus that abstracts from and rises above normal politics. To a great extent, this is because matters of principle, such as rights, are subject to the reasonable disagreements that animate normal political debate. Moreover, given that these disagreements result from the complexity of people's circumstances and experiences, compromises not only are achieved using the stratagems of normal politics but also reflect the prevailing normal political divisions on the issues of the day. The main achievement of constitutional politics is not to resolve or go beyond these divisions so much as to render people aware of them and to normalize them within mutually acceptable agreements that take

them into account. In this respect, the comparative representativeness of both conventions has been crucial, as has been their relative openness to civil society.[22] Yet this inclusiveness makes the need for compromise more rather than less likely, since it almost certainly increases the diversity of views and interests that need to be accommodated.

Are the results of such processes compromised as a result? Those disappointed by what they regard as the unfortunate political maneuvering of both the Charter Convention and more especially that on the Future of Europe might be tempted to argue that academics, bureaucrats, or members of the judiciary rather than politicians should draft constitutional documents. Such a proposal would be misguided. First, there is no reason to believe that any group containing the standard range of views on these questions would be any less likely to diverge on the points that have divided these (and other) conventions. After all, constitutional courts frequently split and have to make decisions by majority vote, while their agreements are often "incompletely theorized" and either trim from their principled disagreements or involve negotiation on the basis of analogies with other cases (Sunstein 1996, ch. 3). Second, a frequent complaint about the EU is that too many important decisions get taken by experts and technocrats. As the elected representatives of citizens, politicians arguably have greater standing legitimately to make what are necessarily political choices on their behalf. Indeed, António Vitorino, the Commission representative, went so far as to argue the "wise combination of the Community and national sides and, above all, the parliamentary predominance will help bolster the draft Charter's legitimacy in the eyes of a public that is often critical of the complex decision-making machinery at European level" (quoted in de Búrca 2001, 131 n. 17). A supposedly ideal normative consensus would simply have indicated the exclusion of a number of widely held positions from the drafting body and so delegitimize its conclusions.[23] Finally, this argument misconceives the role of a constitution. The necessary employment of normal politics within constitution-making reflects the purpose of constitutions themselves as much as the process of drafting them. Rather than treating constitutions as somehow superior to and literally constituting normal politics, they should be seen as a form of mutual recognition that normalizes political divisions (Shaw 2003, 47–52 and Tully 1995, 30). Their success lies not in remaining outside normal politics but in informing it – and not merely via blind obedience to constitutional norms but also through citizens

[22] For an assessment of how far these virtues are to be found in the Convention on the Future of the Union (see ibid., 53–67). See too Bellamy and Schönlau (2004).

[23] It is noteworthy how often the term compromise has been used approvingly with regard to the draft EU constitution, just released at the time of writing (the Convention on the Future of Europe agreed the draft on June 13, and, with respect to Part III, on July 10 and it was submitted to the member states on 18 July 2003). For example, the pro-EU *Le Monde* June 15–16 2003, even headlined its report "Un texte de compromis pour un Union á 25."

critically challenging and defending them. In other words, perhaps the prime virtue of the normality of constitutional politics resides in turning the resulting constitution into part of the basic vocabulary of normal political debate.[24] It achieves this effect not through by-passing everyday political divisions but by engaging with and reflecting them using the resources of normal politics.[25]

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[24] Rights-foundationalists, who advocate far-reaching judicial review, often make similar claims for Bills of Rights; e.g., Dworkin (1986, 32). However, if the advantage of constitutional politics lies in its normality, this may be an argument for doing away with Bills of Rights altogether. In fact, the evidence is that such Bills often have the effect of encouraging legislatures either to leave principled issues up to courts or to seek to anticipate their judgments; see Stone Sweet (2000). Either way, politicians (and to some degree ordinary voters too) will have ceased to think about rights and discuss them for themselves. If we wish the true advantages of the normality of constitutional politics, then we ought perhaps to ensure rights belong within legislatures rather than the courts; see Tushnet (1999).

[25] The Charter has been adopted almost unchanged as Part II of the draft EU Constitution. The main change is that the British have pushed through the incorporation of the praesidium's explanatory notes into the body of the Charter (Part II, Title VII, Arts II-51-54, CONV 850/03, 59–60), largely because these were taken as limiting its 'scope' more clearly to EU institutions and policies; see the White Paper (2003, Cm5934, 39 para 102). During the IGC to approve the draft, a new reference to the explanation was included in the body of the Constitution (Art. II 52.7). There is also now a commitment to attempt to accede to the European Convention on Human Rights (Part 1 Title II Art 7 para 2, CONV 850/03, 8).

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# Chapter 13
# Rights in Progress. The Politics of Rights and the Democracy-Building Processes in Comparative Perspective

**Lorella Cedroni**

> Democracy and human rights are inextricably linked. The fundamental freedoms of expression and association are the preconditions for political pluralism and democratic process, whereas democratic control and separation of powers are essential to sustain an independent judiciary and the rule of law which in turn are required for effective protection of human right.[1]

Philosophical skepticism about human rights poses a threat to the politics of rights. The aim of this contribution is to provide an integrated theory of human rights by showing how a progressive rapprochement between different positions and paradigms is possible in terms of theory and practice. I will focus on the success (or failure) of the politics of human rights in bringing about social change within those countries where the democracy-building process is going on, showing in particular, how economic, cultural, and political rights of minorities are implemented. Human rights in democratization processes play a vital role in setting up transitional justice mechanism, establishing the rule of law and monitoring democratic procedures. They are an explicit goal for democracy-building processes, and the move from formal rights to the enjoyment of rights is often uneven. The establishment of the rule of law and the acknowledgement of human rights in countries in transition in Eastern and Central Europe as well as in Latin America and Africa will be examined, showing the role that politics plays in generating them, and analyzing the strategies that are currently being advocated to more effectively reduce the high level of human rights violations.

[1] EC regulation no 1889/2006, para. 8.

L. Cedroni (✉)
Faculty of Political Science, University of Rome "La Sapienza", Rome, Italy
e-mail: lorella.cedroni@uniroma1.it

C. Corradetti (ed.), *Philosophical Dimensions of Human Rights: Some Contemporary Views*, DOI 10.1007/978-94-007-2376-4_13,

## 13.1 Are Human Rights a Pre-condition for Democracy?

Any consideration of the objectives and effectiveness of and the potential for democracy building in the developing countries must start by acknowledging the challenges posed – and exploring the opportunities presented – by the conceptual and operational implications of the interrelations between democracy and human rights. David Beetham has showed the multi-faced relation between democracy and human rights, focusing on human rights as a model for cosmopolitan democracy (Beetham 1999).[2]

In this contribution I would like to analyze the dependency of democracy on human rights, in theory and practice. I will focus on the success (or failure) of the politics of human rights in bringing about social change within those countries where the democracy-building process is going on, showing in particular, how economic, cultural, and political rights of minorities are implemented.

Since the ambiguity of terms – such as democracy-building, democracy, and democratization – and the difficulty of using them to implement and assess development policies and projects, limit their effective use, I want start by briefly explaining the significance of democracy-building, human rights and democratization. Democracy-building is about creating the conditions that allow the principles of democracy to be put into practice. In order to be effective, such efforts must be led from within a country – though they can also be supported from the outside. Democracy does not develop in a vacuum: international relations and actions by external countries may affect national and local realities. Democratization is a long-term and never-ending process, aiming to increase the quality of democratic institutions, and processes and to build a democratic culture.

Human rights have achieved more clarity as a concept and a doctrine, thanks to the definition and refinement provided by universal and regional international instruments, and the case law developed by international tribunals. The interdependence, integrity and indivisibility of human rights are widely recognized and underlined by the 1993 Vienna World Declaration on Human Rights. This presents an opportunity to establish a matrix that combines civil, political, economic and social components in a more coherent way, thereby providing routes for international cooperation to explore, and provide an initial approach to the understanding of, the relations with and between democracy and human rights.

The literature suggests that human rights abuses are connected to resource distribution as "rent-seeking" elites in the government try to maintain their disproportionate share of resources. While the literature contains numerous studies connecting resource inequalities to political violence, it has not directly tied resource inequalities to human rights abuses. An empirical model was recently created by Landman and Larizza to test this theory (Landman and Larizza 2009). It includes five control variables drawn from cross-national human rights literature and two test variables; income inequality and land inequality.

[2] Beetham (1999).

They analyzed the empirical relationship between inequality and the protection of personal integrity rights using a cross-national time-series data set for 162 countries for the years 1980–2004 (Landman and Larizza 2009, 715–736). The data comprise measures of land inequality, income inequality, and a combined factor score for personal integrity rights protection, while the analysis controls for additional sets of explanatory variables related to development, political regimes, ethnic composition, and domestic conflict.

This model revealed a definite correlation between resource inequality and human rights violations. Significant findings indicate that: (1) income inequality and land inequality have negative and significant effects on human rights protection. Of the two, income inequality has a stronger correlation; (2) democracy has a positive and significant effect on human rights protection. This is probably because democratic processes provide mechanisms for citizens to voice grievances and challenge the concentration of resources; and (3) domestic conflict and size of population have negative and significant effects on human rights protection.

Other recent reports on the poor human rights situation in Latin American countries – e.g.: Brazil – Africa and Central and Eastern Europe, suggest a connection between poverty, social exclusion, access to land and human rights abuses (2009 Country Reports on Human Rights Practices 2010; Amnesty International 2010, Human Rights Watch 2010). In Latin American countries most problems are connected not to the legitimacy of origin, since successive electoral processes have regularly been held in states across the region, but to the "legitimate exercise of power," which is equally important and refers to the correct and effective use of power to address the most pressing issues that affect the everyday lives of citizens (Carrillo-Flórez and Petri 2009).

In Africa, democracy building and development are at various stages and levels in the different states. The main challenges to democracy building must be seen in the context of colonialism and neo-colonialism. These produced administrative and institutional structures that were not conducive to the promotion of sustainable development and democracy building. The colonial powers left many African states with systems of authoritarian values and norms that weakened public administration and the education system – both essential for effective democracy building (Report on Democracy in Development 2009).

From 2005 to 2009 there were more than 50 democratic elections in Africa. The rise of democracy in Africa is not solely due to external influences, such as pressure from multilateral institutions and development partners, its democracy movement was not imported from outside – it has its roots in African history. Democracy cannot have a uniform format in all the 53 African states – it must take different forms in different countries to reflect national variations and other local circumstances. Nonetheless, genuine democracy in Africa should be judged by a number of essential universal characteristics. It is possible to identify a number of endogenous and exogenous factors that influence the success of democracy building in African states.

Democratization and democracy building are still too often seen in many African states as just elections and electoral processes. But democracy consists of more than just elections. A deepened understanding of democratization and democracy building

by the people of Africa is not being promoted through education, and this prevents an acceleration of democracy building and sustainable development in many African states. Democracy in Africa is still young, weak and fractured opposition parties and effective one-party states in some African states impede democracy building. In addition, a number of other factors contribute to the challenges of democracy building.

Recent global crises in the financial system, food security and the energy sectors pose potential threats to democracy. These events could lead to discontent and political instability in African states, even though it is commonly understood that African states are victims rather than perpetrators of these crises. Furthermore, in the present unstable global economic and financial climate, elections might also become a vehicle for competition over resources and conflict among groups and factions – see the Ivory Coast case – which could further impede democratic gains and support for democracy building.

African states are, and will continue to be, challenged to manage economies in distress, and many will face new risks to democracy and the stability of fragile states where the violations of human rights of minorities in the country have increased. In spite of the participation of African nations in the United Nations and the Organization of African Unity, which approved the famous African [Banjul] Charter on Human and Peoples' Rights (ACHPR) – adopted on June 27, 1981, which was entered into force on October 21, 1986 represents the superstructure of African convention on Human Rights – African countries, overall, have been unsuccessful in implementing the tenets of the documents they signed.[3] Moreover, African governments seldom respect their national constitutions on the issue of human rights.

## 13.2 Minority Group Human Rights

The question of minority group human rights in both national and international politics has become a major issue of intellectual and political discourse. In Europe the collapse of communism in Eastern Europe and the implosion of the Soviet Union sharpened the human rights problems of minority groups and brought the issue to

[3]The covenant states that: this convention of the Organization of African Unity, which stipulates that freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African people…and the Universal Declaration of Human Rights; Taking into consideration the virtues of their historical tradition and the values of African civilization which should inspire and characterize their reflection on the concept of human and peoples' rights;… Convinced that it is henceforth essential to pay a particular attention to the right to development and that civil and political rights cannot be dissociated from economic, social and cultural rights [as] a guarantee for the enjoyment of civil and political rights; …Undertaking to dismantle all forms of discrimination, particularly those based on race, ethnic group, color, sex, language, religion or political opinion; …Firmly convinced of their duty to promote and protect human and peoples' rights and freedoms taking into account the importance traditionally attached to these rights and freedoms in Africa.

the fore. Despite European Convention on Human Rights and Fundamental Freedoms (ECHR, 1953), does not include specific provisions on minorities, rights to equal treatment and non-discrimination may reflect many minority concerns.

At present, the only specific reference to minorities is to be found in Article 14 of the ECHR: "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status." Although "national minority" is undefined, it is contrary to the ECHR to treat "any person, non-governmental organization or group of individuals" in a discriminatory fashion. Article 14 is not a free-standing right to non-discrimination, and it may be raised only in connection with the alleged violation of another Convention right. Discrimination is not limited only to those cases in which a person or group is treated worse than another similar group. It may also be discrimination to treat different groups alike: to treat a minority and a majority alike may amount to discrimination against the minority.

According to the Court of Human Rights, "a minority group is in principle entitled to claim the right to respect for the particular life-style it may lead as being 'private life,' 'family life' or 'home'" under Article 8 of the Convention. If a minority group tries to assert "minority rights" *per se*, the claim might be dismissed as beyond the scope of the Convention. Moreover, the European Court has held that if a State takes positive measures to enhance the status of a minority group (for example, with respect to their participation in the democratic process), the majority cannot claim discrimination based on such measures. In general, "a balance must be achieved which ensures the fair, and proper treatment of minorities and avoids any abuse of a dominant position," Council of Europe (2010).

Minority groups need to be able to participate effectively in cultural, religious, social, economic, and public life (Article 11 and Protocol 1, Article 3). Formal, or *de facto,* exclusion from participation in the political processes of the State is contrary to the democratic principles that the Council of Europe espouses. It is the essence of democracy to allow diverse political projects to be proposed and debated, even those that call into question the way a State is organized, provided that they do not undermine democracy or human rights.

As in the past, the struggle for human rights today is the ongoing struggle of specific groups to be considered "human," to be counted among those to whom human rights apply. Through the *Universal Declaration*, governments committed themselves to respecting and guaranteeing human rights. Nonetheless, governments remain the greatest violators of human rights. The struggle for human rights is largely the struggle to have human rights respected by those in power, paralleling the struggles that were necessary to have them defined and recognised in the first place (Hankin 1990). The standards set in the *Universal Declaration* grew largely out of the experiences of modernisation, such as industrialisation, urbanisation, privatisation and the emergence of markets. Social and cultural change in the most modernised countries gave rise to and supported the development of human rights standards. However, even in the most modernised countries, values and traditions are not always in line with the standards set in the Universal Declaration (Cassese 1990).

Nevertheless, according to many analysts, the "Strasbourg system" remains perhaps the most legally powerful mechanism for protecting human rights in the world.

## 13.3 The Democratic Building Processes and the Practice of Human Rights

The Charter of Fundamental Rights of the European Union is mainly focused on human rights protection, it also includes several provisions on elements of democracy. Democracy is, under the Treaty on European Union, a general objective but also an explicit objective to be applied to development cooperation and economic, financial and technical cooperation with third countries. The Lisbon Treaty, as well as the existing Treaty on European Union, also refers to other relevant documents such as the Paris Charter for a New Europe (1990) where democracy is referred to and defined in greater detail. It is stressed that human rights and democratization are closely linked. Human rights play a prominent role in EU policy documents related to democracy. The emphasis on the link between human rights and democracy sometimes goes so far as to equate human rights activities with support for democracy building. In general terms, policy documents dealing with development policy focus on 'good governance' and the related delivery aspects of democracy while the Common Foreign and Security Policy (CFSP) focuses more on democracy promotion and support for human rights, political institutions and citizens' participation by means of civil society and elections. Election observation and electoral assistance are emphasized as important components of the EU's support for democracy building.

A Commission Communication has proposed democratic governance as a broader understanding of democracy which could link the EU's development cooperation to its external relations. In 2006 the EIDHR was established as part of the European Community's external cooperation programmes tools and it replaced an initiative established already in 1994. The aim is to provide support for the promotion of democracy and human rights worldwide.

There are five objectives for the EIDHR for the period 2011–2013 (European Commission, Strategy Paper 2011–2013):

(1) enhancing respect for human rights and fundamental freedoms in countries and regions where they are most at risk; (2) strengthening the role of civil society in promoting human rights and democratic reform; (3) supporting actions on human rights and democracy issues in areas covered by EU Guidelines, including on human rights dialogues, on human rights defenders, on the death penalty, on torture, and on children and armed conflict; (4) supporting and strengthening the international and regional framework for the protection of human rights, justice, the rule of law and the promotion of democracy; (5) building confidence in and enhancing the reliability and transparency of democratic electoral processes, in particular through EU Election Observation Missions.

The general objectives of EIDHR are to contribute to the development and consolidation of democracy and the rule of law, and respect for all human rights and fundamental freedoms, within the framework of the Community's policy on development cooperation, and economic, financial and technical cooperation with third countries, and consistent with the EU's foreign policy as a whole. The EIDHR offers independence of action, allowing for the delivery of assistance in principle, without the need for government consent, which is a critical feature of cooperation with civil society organisations at national level, especially in the sensitive areas of democracy and human rights.

Though the spread of formal democratic political systems has led to increased respect for basic political rights world-wide, a variety of problems remain in many countries. Constitutions often give excessive power to the executive branch of government, at the detriment of the legislature and judiciary. The activities of human rights activists and the independent media are undermined through intimidation and legal and administrative regulations. Access to information is sometimes restricted. Elections are held but with technical irregularities and intimidation of the political opposition.

Within these countries, many factors underlie human rights violations. Corruption is a growing problem. Economic liberalisation and privatisation are considered to have contributed to the growth of the problem in recent years. Government corruption has serious consequences for development and weighs heaviest on the already poor and marginalised, including women. Local people and organisations in these countries see corruption as a crucial obstacle to development and the realisation of human rights (See Hivos Human Rights Policy Document 2002).

## 13.4 Human Rights Approach and Developing Democracy: What Is Wrong?

In many countries, human rights awareness remains minimal. The Vienna Declaration calls on states "to include human rights, humanitarian law, democracy and rule of law as subjects in the curricula of all learning institutions in formal and non-formal settings." Nonetheless, states often neglect their obligation to educate their populations about human rights. A lack of awareness and information undermines informed political participation. Citizens do not know what the obligations of their government are, what their own rights are, and what they can do if their rights are violated.

Impunity for human rights violations creates a climate in which further violations are encouraged. In many countries, attacks on human rights defenders, journalists and opposition political parties are stimulated by the fact that the perpetrators of these violations are not held accountable before justice. Other factors undermining human rights include armed conflict, the growing importance of cultural, religious, national identities translating into intolerance for diversity, and a lack of civilian government control over military and police forces.

Though human rights standards are ratified by most states, the enforcement of human rights at the international level is very weak. There are few penalties for countries who do not respect these rights. With a few exceptions, legal action at the international level produces few results. Victims of human rights violations have little recourse at the international level. Enforcement and implementation depend on the translation of international human rights standards into *legal* rights through regulations and national laws, such as a Bill of Rights in the constitution. In this manner, they become justiciable, and can be claimed if they are being denied, however the effectiveness of legal action is usually limited. More often than not, it is political action and change that bring about the realisation of human rights as defined in international agreements.

In some countries, especially those less transformed by modernisation or where religious influences dominate, the great contrast between the standards established at the international level, and local social and cultural values, is one of the factors conditioning the interpretation of international human rights and hindering their full implementation.

Although more countries than ever have democratic political systems, consolidating democracy remains difficult, and specific groups of people still face human rights violations. Many factors at the national and international levels underlie continuing human rights violations, however the activities of civil society organisations, including human rights organisations, have increased both within countries and globally to meet these challenges. International factors affecting the human rights situation are of increasing importance. While the United Nations has excelled at producing declarations and agreements, the UN machinery has been ineffective in enforcing them. Instead, implementation of these standards depends on their translation into laws and policies and their enforcement and implementation at the national level. Nevertheless, the establishment of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda in the first half of the 1990s represented a major step in international enforcement of accountability for human rights violations.

The place of human rights in the policies of some donors and the United Nations is growing, as reflected by commitments to the integration of human rights concerns into wider areas of policy and the adoption of a "human rights-based approach" which emphasises the right of poor and marginalised groups to participate in the formulation of government policies. While on the one hand Northern countries espouse democracy and human rights, on the other hand their policies often lack coherence, and these countries are often selective in the violations they criticise. Geopolitical and economic interests often override concerns for human rights. At worst, human rights are abused as a foreign policy tool. The selective attention to human rights issues undermines the credibility of international action in favour of human rights. In the aftermath of the attacks of 11 September 2001, some national governments, including the United States itself, are introducing laws which undermine human rights.

States are the key actors in the area of democracy and human rights, but globalisation has diminished their ability and even their jurisdiction in shaping their

national policies and economy, including policies affecting human rights. Concern has been growing about the so-called 'democratic deficit': the lack of influence on and democratic control of global economic processes and financial markets by elected bodies, and the apparent powerlessness of politics in the face of major world problems. Decisions and policies of international institutions such as the World Bank, the International Monetary Fund, and the World Trade Organisation reflect the interests of Northern countries and hardly integrate concerns for human rights.

Human rights are both a component and tool to achieve development, as it address both process and outcome. "Rights as goals" means the importance of making an appropriate strategy to reach the desired state – a strategy that can achieve along the way. Moreover, rights imply goals for individuals, and realizing rights is the process of pursuing a strategy to reach a goal, and it happens if citizens are active participators in all processes (Kent and Ziegler 2005, 86–92).

Development is about meeting basic needs and values in a reproducible way, and it is also a human right according to the Declaration on the right to Development and the *Millennium Declaration*. The latter has the following goals: eradicate poverty and hunger; achieve universal primary education; gender equality; reduce child mortality; improve maternal health; combat diseases; environmental sustainability; global partnership of development.[4]

Using human rights to achieve the Eight Millennium goals is argued as the human rights approach offers: enhanced accountability, empowerment and participation; improving situation of the poor; safeguards against unintentional harm from development projects; a more authoritative basis for advocacy and for claims on resources.

The Millennium Development goals recognise explicitly the interdependence between growth, poverty reduction and sustainable development. But development should be at nobody's expense (Galtung 1996, 127–129).

Human rights principles for the process-part to achieve the development goals are: participation by people in policy issues, development and nation-planning; accountability for states, legal and non-legal means; non-discrimination to vulnerable groups, disaggregate data to see who enjoys what rights; equality in law, opportunities and outcomes; State-transparency in political processes by the media and public; human dignity-respect; empowerment-of people, and rule of law-tool for accountability.

There is a big discussion on accountability outside states especially on the accountability of "development institutions" (World Bank, International Monetary Fund, etc.), not only in current and future developments, but also clean up their mess from the past. Imperialist and colonialist states should of course do the same. As George Kent mentions, there should be more focus on *Global Obligations* for action, or else human rights agents will fail to reach the goals (Kent and Ziegler 2005, 25–26).

[4] *Eight Millenium Development Declaration*. On the implementation of democracy and human rights see Løvåsen (2010).

States and law are crucial part in the human rights approach, but they are – as Johan Galtung has showed – also two of the biggest violent features present (Galtung 1996, 269). The principle of helping people able to feed themselves is central to human rights. Development should entail empowerment and autonomy for all. Development assistance should shift its focus from growth and rather take form in removing the current structural barriers, through people-people dialogue rather than states, as this is closer to basic needs and there is more openness for reciprocity (Galtung 1996, 134–136).

To summarize: I indicate the following points.

First, human rights could be viewed as a never-ending process. The principle of reversibility should be the legitimizing factor (Galtung 1996, 127–129).

Second, there should be a strict rule not to go to war "in the name of human rights," and misuse human rights in any way. Force is incompatible with the human rights principle of consent, constructive dialogue, and the universal fact that change comes from inside.

Third, knowledge of deep culture is the most crucial factor as it conditions unconscious perceptions on conflict cycles and behaviour, and is especially important in relation to conflict transformation (Galtung 1996, 37). Human beings are characterized by being able to challenge the "code" of behaviour because of our spirit. Here we talk about a "common human code" (Galtung 1996, 188–189).

Fourth, the Universal Declaration of Human Rights could be viewed as a draft of such a code, and last, new economic and development theories are required, which make equality, and sustain nature.

I like to conclude reminding that "one more step" is necessary: reaching "cultural equality in human rights" (Galtung 1994). Cultural equality in human rights is the motor of democracy-building processes.

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# Chapter 14
# Ethnopolitics. The Challenge for Human and Minority Rights Protection

**Joseph Marko**

## 14.1 Culture, Politics, and Law: How to Reconcile Political Unity and Legal Equality with Cultural Diversity?

Any overview on the intricate relationship between human rights, minority rights and ethnopolitics – quite often omitted in philosophical analyses of human rights and their history of legal institutionalization[1] – has to give first an exposition of the epistemological problems and ideological underpinnings in understanding the 'meaning' of these concepts.

The concept of "fundamental" human rights cannot be understood without taking the legacy of Enlightenment philosophy into account, which is crystallized in the famous phrase of the American Declaration of Independence of 1776: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed. That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government…"[2] Hence, the underlying notion is the "universalist" idea that, first and above all, every human being as a "person" enjoys "unalienable rights" which are not "created" by the State and its legal system and, second, that every human being "is" equal

[1] See the quotation of Moyn (2007) by Flynn in this volume. The former, when hypothesizing that "it was liberal nationalism, which sought to secure the rights of citizens resolutely in the national framework," totally neglects the history of minority rights protection on the basis of international treaties and the "supra-national" minority rights regime already developed after WWI within the League of Nations.

[2] Cf. the text of the Declaration of Independence, in O'Connor and Sabato (2008, 734).

J. Marko (✉)
Faculty of Law, Graz University, Graz, Austria
e-mail: Joseph.marko@uni-graz.at

C. Corradetti (ed.), *Philosophical Dimensions of Human Rights: Some Contemporary Views*, DOI 10.1007/978-94-007-2376-4_14,

irrespective of any personal traits. This revolutionary and universalist claim was taken over in 1789 in the Declaration of the Rights of Man and Citizens for the French Revolution as well as by the Revolutions of 1848 in Continental Europe and became the normative backbone of 'liberal' human rights bills entrenched in state constitutions all over the world in the nineteenth and twentieth Centuries.

It goes without saying that the claim of universal human rights never mirrored social and political "reality." Starting with the Augsburg Treaty of 1555, which had created the infamous formula "cuius regio, eius religio" in order to end the religious wars in Continental Europe, and the Treaty of Westphalia of 1648, finally establishing the normative principle of state sovereignty as an axiomatic base of "international" law, it is "obvious" that social and political reality, both within and between states, was and is not structured by the universality of human rights, but a political and cultural plurality of states, "peoples" and/or "nations" coming out of the state- and nation-building processes in Europe since Medieval Ages. To put it in a nutshell, the European history of state-formation and nation-building can be summarized in theory into two "ideal-types" of the relationship of the concepts of "state" and "nation" – namely, the "French" model of a "state-nation" based on "cultural indifference" and the "German" model of the "nation-state" by constructing "ethnic difference" and ascribing to it political and legal significance.

As we can see from the case law of the French conseil constitutionnel,[3] the French, or better put "Jacobin" model of state-nation is firmly based on the notion of "citoyenneté," which is in itself intimately linked with the notion of "abstract" individuals who are equal before the law irrespective of their "differences" because of gender, economic or social status, or "ethnic" or "national" origin in order to overcome the feudal, political hierarchies of the ancien régime.[4] No longer feudal corporations, but only equal "citizens"[5] form the whole "nation" as legitimation for the exercise of state power, constitutionally entrenched under the principle of "people's sovereignty." At the same time, the additional doctrine of "national sovereignty" was developed by the French revolutionaries, based on the original concept of "territorial indivisibility" of monarchic inheritance law. The idea of "indivisibility" of the territory was thereby applied to the abstract category of the (whole) "nation." In reality, the "state", through military service and public education in French only, turned "peasants into Frenchmen" to take up this famous book-title[6] summarizing the centuries-long

[3] See Conseil Constitutionnel, Decision 91–290 DC, 9 May 1991. The Conseil thereby declared the phrase "le peuple corse, composante du peuple français" of Article 1 of the Draft Autonomy Statute of Corsica unconstitutional. Cf. also Conseil Constitutionnel, Decision 99–412 DC, 15 June 1999 declaring the ratification of the Council of Europe´s Charter of Regional and Minority Rights unconstitutional.

[4] This political and cultural context is again neglected by those authors like Barry (2001) who represent a form of liberalism which is labeled "orthodox civil liberterian" in this volume by Sadurski because of their hostility to cultural particularism and group-based identities of individuals.

[5] As can be seen, the universalistic term "citoyen" is thereby reduced to the "realistic" term citizen in the dual meaning of "member of a certain state" and "bourgeois."

[6] See Weber (1976).

process of French nation-building. In conclusion, due to the interplay of the strictly individualistic-liberal interpretation of the principle of equality before the law and the unitary-national concept following from the principle of national sovereignty, the "imagination" of an "other" people within the French nation is inconceivable. Consequently cultural and political pluralism of groups, formed on an ethnic basis and claiming rights as such, is prohibited[7] and social upward mobility possible only through assimilation into "la civilization française."

The model of the "ethnicized" nation-state, which has its ideological roots in the writings of philosophers of German idealism,[8] is normatively based on the so-called "nationality principle." Since in Central Europe there was no such development of territorial concentration and bureaucratic centralization under the auspices of monarchic absolutism, there was a need to "construct" a mobilizing and legitimizing formula for political unification. Herder "imagined" the "existence" of a German "people" to be defined by the seemingly "objective" and "common" trait of persons who speak German. Combined with the political claim that such a "people" defined by a cultural marker like language must have a "natural" right to form its own state, what is summarized in the normative "nationality" principle, this obviously leads to a different concept of nation, namely an "ethnically" conceived nation based on the ideal of cultural/ethnic homogeneity in contrast to the French concept of a "civic" nation based on ethnic indifference. Hence, the individual person is no longer conceived of as an "abstract" citizen, but defined by its membership[9] in a certain ethnic group. However, nowhere can we find a state whose population is culturally homogenous in terms of religion or language as cultural markers. The fact of cultural diversity is thus translated by the nationality principle into an "ethnic difference" of groups and their power relations based on the categorical distinction of majority/minority. Also the equality principle gets a different context: the theoretical and constitutionally entrenched principle of individual equality before the law can – under the premise of ethnic indifference – no longer ignore the factual inequality of those who do not speak the language of the state-forming nation with regard to access to public education, the labor market or public service. Again, what are the consequences of this model of the ethnic nation-state?

The "minority protection regime" established by the peace treaties after WW I under the auspices of the League of Nations tried to "help" members of minority groups to "adapt" to the new situation of living in newly emerged nation-states after the collapse of the multi-ethnic empires in Central and Eastern Europe. The language of the Treaty of St. Germain for minority protection is "revealing" in this regard by declaring: "…notwithstanding" the introduction of German as an official language, citizens who do not speak German will be "granted adequate relief"

[7] For a detailed analysis see in particular Caps (2008, 12–3) and Marko (2008b, 256–7).

[8] For the following see my detailed analysis in Marko (1995, 147–162).

[9] In this respect – and contrary to the history of human rights institutionalization – membership, even in legal terms of citizenship, does not entail the equal right to political participation for minority members. Cf. Flynn quoting Forst (2010) in this volume.

(angemessene Erleichterungen geboten[10]) for the use of their language before courts or for instruction of children in primary education. At best, what follows from this language is "adaptation" in the form of assimilation as in the French model. As the history of the twentieth century proves, however, the nationality principle was frequently used for expulsion of minorities from the territory, i.e. "ethnic cleansing" which was, between and immediately after the two world wars, even seen as a legitimate practice under public international law following the Treaty of Lausanne, concluded in 1923 between Greece and Turkey and legalizing the "voluntary exchange" of about two million people between these two states. At worst, the model of the ethnic nation-state is combined with the ideology of racism, based on the notion of a biological predetermination of social behaviour, as in the case of Nazi Germany, ending up in genocide and the Holocaust.[11]

So is the "lesson of history" that ethnic conflict with these effects can only be avoided by either assimilation, i.e. by giving up one's cultural identity in order to be treated equally in terms of access to equal opportunities with the members of the majority population,[12] or institutional segregation and/or territorial separation?[13] The burning banlieues of French cities over the last decade and the creation of smaller and smaller statelets following the violent disintegration of the former communist multi-national Yugoslavia and multi-ethnic Serbia from 1990 until 2008 gave ample evidence that assimilation, segregation and separation do not provide any resolution of the "dilemma of [ethnic] difference"[14] as will be demonstrated by the empirical analysis in the third chapter of this article in detail. Moreover, from the perspective of political theory and institutional-constitutional design for ethnically divided societies,[15] the concepts and policies of assimilation, segregation and partition must be considered not to be a contribution to conflict-resolution, but even part of the "dilemma" which they are supposed to cure.

First, all "primordialist" social and political theories which identify "ethnic diversity" as such as the root-cause of conflict are based on what I call the "naturalization of difference." However, any attempt to address "ethnicity" based on the traditional normative-ontological approach with the question what the "essence" of

[10]The text of Article 66 paragraph 3 and Article 67 quoted here can be accessed at www.vfgh.gv.at/cms/vfgh-site/english/downloads/englishverfassung.pdf. It is in particular the German text which confers the restrictive and paternalistic meaning.

[11]See, Mann (2004).

[12]In the human rights discourse this is called "substantive minimalism" by Benhabib in this volume.

[13]See Muller (2008), who argues that "ethnic disaggregation or partition is often the least bad answer" once "ethnic nationalism has captured the imagination of groups in a multiethnic society."

[14]I borrow this concept from Minow's seminal study (1991) where she argues that it is "essentially" the power of definition by certain groups which constitutes "the norm" as "normalcy" so that the "other(s)" seem to deviate. See in a very similar vein Azamova in this volume when she argues that "the structural features of the sources of social injustice are encoded in the very operation of judgement…"

[15]See Laden and Owen (2007) and Choudhry (2008).

an ethnic group, people or nation "is" will end up in the "essentialization" or even "naturalization" of ethnicity as if this were a personal trait.[16] The twin-ideologies of racism and ethno-nationalism make use of this essentialization for their policy prescriptions by legitimizing segregation or partition as the "natural consequence" of the allegedly biologically or culturally predetermined, i.e. "natural" trait of ethnicity.[17] But also the ideologies and theories of civic or liberal nationalism come to the conclusion that any seemingly "objective" characteristic can be used as defining element of a nation and end up, at best, in binary normative judgements of "right" or "wrong" for ideologies and concepts along dichotomies such as "romantic-collectivist" versus "liberal-individualist," "ethnic" versus "civic" or "nationalism" versus "patriotism" and policy prescriptions such as a "modus vivendi pluralism" or "muddling through" the "inescapable conflict between man and citizen."[18]

Hence, as long as ethnicity is "seen" as a "primordial given of human existence" which stands in dichotomical opposition to political unity and legal equality, ethnic diversity must be tamed or at least tempered by a strong state and "muddling through" is indeed the best what can be achieved for re-construction or reconciliation after violent ethnic conflict. However, as empirical studies demonstrate, "ethnic difference" is not a "natural given," but a "social construction of reality,"[19] which is created by "ethnic entrepreneurs" as an instrument in their power-plays, whereby ethnic "diversity" is transformed into an antagonistic We – they structure of ethnic "difference" through a process of political mobilization.[20] In the final analysis, all primordial theories want to eliminate ethnic "diversity" as the root-cause of conflict by assimilation, suppression, or separation. Only "constructivist" and "instrumentalist" theories and a de-constructivist and neo-institutional approach can thus claim to offer the basis for ethnic diversity management, which recognizes ethnic identity formation and cultural pluralism as a positive value for individuals, groups and society at large and looks for ways and means how to reconcile political unity, legal equality and ethnic diversity on a legal-institutional basis. "Tolerance" is thus no longer seen as a necessary moral prerequisite for negative peace based on further antagonistic co-existence and which the legal system cannot provide, but only hope for, but as the result of a legally institutionalized, nevertheless dynamic system of rights and obligations for co-operation and living together.[21]

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[16] See, for instance, Smith (1991, 39 and 20), where he states that ethnicity as "primordial quality exists in nature, outside time. It is one of the 'givens' of human existence."

[17] I have analyzed these ideological underpinnings in detail in Marko (2008b, 251–270, fn 7).

[18] See Canovan (1996, 83–100) and Levy (2007, 173–197).

[19] The social-constructivist approach has been developed as a comprehensive approach long before Peter Berger and Thomas Luckmann by Hermann Heller (1983).

[20] See my summary of a 3 year long research project under the 6th EU-Framework program with ten partners from all over Europe on the break-down of Former communist Yugoslavia: Marko (2010, 1–38).

[21] Also Benhabib argues in this volume from the philosophical perspective against Rawls claim for "liberal toleration and peaceful coexistence" that "human rights embody principles which need contextualization and specification in the form of legal norms."

In contrast to the process of "naturalization of difference," we "construct" social, political and legal categories such as "people" or "nation" through three analytically distinct, though, in practice, intimately linked steps:

First, on the epistemological level, we have to make a choice based on the binary code of identity/difference;
second, on the normative level, we have again to make a choice based on the binary code of equality/inequality; and
third, on the empirical level, we make a choice based on the binary code of inclusion/exclusion.

All forms of racism and ethno-nationalism are based on the same structural code, which is characterized by the unilinear equation of identity = equality = inclusion, or, the other way round, difference = inequality = exclusion. Hence, only if the ideologically constructed, and in no way "natural" antagonism of equality and difference is transformed into a triadic structure of identity, equality and diversity without the alleged predetermination for conflict or cooperation,[22] is institutional diversity management possible in order to reconcile political unity, legal equality, and cultural diversity within one social and political system.

## 14.2 Legal Developments: Standard-Setting and Monitoring

The same problems discussed above, can also be observed in the legal developments of standard setting for human and minority rights and their effective protection in the "triangle" of normative principles and legal instruments characterized by the axiomatic endpoints of human rights – state sovereignty – self-determination of peoples.

### *14.2.1 The Problem of Definition and the "Right to Self-Determination of Peoples"*

With regard to the function of law, i.e. to limit and to regulate the exercise of power, conventional juridical wisdom will tell you that you must first define what or who should later be protected by law. However, all efforts to give a "general" definition of the term "minority" as the "object" of protection, which would universally be recognized under public international law, have been failing so far. The defining element can simply not be an "objective" criterion, the subjective will of persons or

[22]This is also the underlying premise of Azamova's "theory of critical political judgement" developed in this volume when she argues that "social interactions are processes of cooperation-within-conflict."

the number of the members of a group, but always has to do with power relations. Consequently the first OSCE High Commissioner on National Minorities, Max van der Stoel, declared: "Even though I may not have a definition of what constitutes a minority, I would dare to say that I know a minority when I see one."[23]

Moreover, when looking back into the history of the twentieth century, the critical question arises what else distinguishes a "people" with a right to self-determination from an "ethnic or national minority," but the (re-)drawing of territorial boundaries by the victorious parties of a war? And anyway, is it even theoretically possible to reconcile the *prima facie* mutually excluding principles of state sovereignty and self-determination of peoples?

A first important test case came to the fore already after WW I with the dispute between Finland and Sweden concerning the legal status of the Åsland Islands, inhabited by Swedish speakers. When Finnish nationalists had declared the independence of Finland in October 1917, which was recognized by the Bolsheviks in January 1918, the Åsland Islanders declared their wish for union with Sweden through several unofficial plebiscites. In 1920 the dispute was brought before the League of Nations' Council which appointed a Commission of Jurists to explore the underlying legal problems. The Commission stated in its Report that, first, a right to self-determination is not "a positive rule of the Law of Nations" and, second, that "positive international law does not recognize the right of national groups, as such, to separate themselves from the State of which they form part by the simple expression of a wish…," adding, however, that "the formation, transformation and dismemberment of States as a result of revolutions and wars creates situations of fact which, to a large extent, cannot be met by the application of normal rules of positive law… Under such circumstances, the principle of self-determination of peoples may come into play."[24]A Commission of Rapporteurs, appointed the same year after the Commission of Jurists had delivered its report, found that Finland was "definitively constituted" as a state, thereby ruling out any application of self-determination. Since they considered that the Åsland Islands form a part of Finland, they concluded that the Åsland Islanders were not a "people," but simply a "minority" without a right to self-determination: "To concede to minorities, either of language or of religion, or to any fractions of a population the right of withdrawing from the community to which they belong, because it is their wish or their good pleasure, would be to destroy order and stability within States and to inaugurate anarchy in international life. It would be to uphold a theory incompatible with the very idea of the State as a territorial and political entity." However, at the same time, the Commission of Rapporteurs addressed also the question of oppression by a government and concluded that oppression would indeed be a factor allowing a minority to secede, but only as a "last resort when the state lacks either the will or

[23] Van der Stoel, address given at the CSCE Human Dimensions Seminar (1993). The very same phrase was – in order to circumvent the epistemological problem – developed long before by the US Supreme Court Justice Stewart with regard to obscenity in a concurring opinion in Jacobellis v. Ohio 378 US 184 (1964).

[24] Report of the International Commission of Jurists (1920), LNOJ Spec Supp. 3, 5 and 6.

the power to enact and apply just and effective guarantees"[25] for religious, linguistic, and social freedom. Finland had already offered guarantees in the form of the Law of Autonomy of 7 May 1920 so that the Commission made only additional recommendations with regard to Swedish as language of instruction in education, ownership of property by the inhabitants, and the appointment of a Governor only after approval by the local General Council. The report of the Commission of Rapporteurs was accepted by the League of Nations' Council, which adopted a resolution on 24 June 1921 recognizing Finland's sovereignty over the Islands. Finland also entered into an international obligation to the League of Nations to respect the territorial autonomy of the Islands.[26]

Hence, instead of drawing conclusions only in a formalistic-reductionist way on the basis of terminology, i.e. playing with the difference of the terms "peoples" and "minority,"[27] the Commission of Rapporteurs, through a functional interpretation, opened the way to reconcile the seemingly antagonistic principles of state sovereignty and self-determination of peoples by reference to the human rights aspect of democratic governance and thereby de-constructing the alleged dichotomy and problem through a transformation into a triadic structure.

Despite the change of the paradigm from minority protection under the League of Nations to the protection of human rights and the process of decolonization after WW II under the umbrella of the United Nations, nothing has changed in substance. The right to self-determination became legally entrenched by the UN General Assembly Resolution 1514 in 1960 "Granting of Independence to Colonial Countries and Peoples" and the respective Articles 1 of the UN's International Covenant on Civil and Political Rights (ICPPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) of 1966. The same triadic structure of state sovereignty – self-determination of peoples – human rights as element of democratic governance can then be found in the preambular provisions concerning the principle of equal rights and self-determination of peoples of the "Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations," annexed to UN General Assembly Resolution 2625 of 1970.[28] But due to the political premises

[25] Report of the Commission of Rapporteurs (1921), League Doc. B7.21/68/106, 28.

[26] Cf. generally Musgrave (1997, 32–37).

[27] This is in general the seduction for the method of legal positivism when giving priority to strict "textual" interpretation, because this is the easiest way to find a "solution" or to bend the law in the interest of a party [the German term for this accusation is in short "Begriffsjurisprudenz"].

[28] "By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development…"; "Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour."

of the Cold War, the mainstream of public international law scholars was of the opinion that the right to self-determination was only applicable within the colonial "context," not in Europe.

With the disintegration of the Socialist Federal Republic of Yugoslavia in the course of 1991 and the declarations of independence of its former federal units Slovenia and Croatia in 26 June 1991, the problem of self-determination returned to the European continent. After a fully-fledged war had broken out in Croatia in summer 1991, a "Yugoslavia conference" was established in September 1991 under the chairmanship of Lord Carrington. But neither this peace conference nor the UN Security Council were initially successful to stop fighting. SC-Res 713 (25 Sept 1991) did, however, confirm the condemnation of use of force also in the internal relations of a state and the possible applicability of the *uti possidetis* principle outside the colonial context by confirming the principle, which had been established before by an EC European Political Co-operation ministerial meeting, that territorial gains or changes within Yugoslavia brought about by violence are inacceptable. In November Lord Carrington asked the meanwhile established EC arbitration commission, the so-called Badinter Commission, to deliberate on the questions whether the Serb population in Croatia and Bosnia-Herzegovina had the right to self-determination and whether the internal boundaries between Croatia, Serbia, and Bosnia-Herzegovina could be regarded as frontiers in terms of public international law. In Opinion Nr. 2 of 11 January 1992, the Commission responded that "whatever the circumstances, the right to self-determination must not involve changes to existing frontiers at the time of independence (*uti possidetis juris*) except where the States concerned agree otherwise" and, secondly, "where there are one or more groups within the State constituting one or more ethnic, religious or language communities, they have the right to recognition of their identity under international law." In conclusion, after the Commission had already concluded in Opinion Nr. 1 of 29 November 1991 that "Yugoslavia was in a process of dissolution" because the "federal institutions do no longer meet the criteria of participation and representativeness inherent in a federal state," thereby echoing the UN General Assembly Friendly Relations Declaration, the Badinter Commission argued that the Serb population in Croatia and Bosnia-Herzegovina must be afforded every right accorded to minorities under public international law. With Opinion Nr. 3 of 11 January 1992, the principle of *uti juris possidetis* was confirmed as a "general principle" of public international law with reference to the ICJ judgment in Burkina Faso v. Mali (Frontier Dispute, 1986) where the Court had stated: "Its obvious purpose is to prevent the independence and stability of new States being endangered by fraticidal struggles…"

Are critics of the Opinions of the Badinter Commission therefore right in light of the functionality of the *uti possidetis* principle established by the ICJ, when they argue that the application of the principle of *uti juris possidetis* was a "cosmopolitan diktat" instead of the necessary "territorial adjustments" and that a double-standard was applied against Serbs and their demand for self-determination insofar as at least Bosnia-Herzegovina had been – like the SFRY – also in a process of dissolution so that – as they claim – the recognition of the independence of Slovenia, Croatia and

later BiH in April 1992 caused the following wars in the Balkans?[29] However, in light of the facts that the respective Serb political parties (under the acronym SDS) in Croatia and BiH had resorted to extra-constitutional measures and even violence long before the respective declarations of independence and that the non-recognition of Slovenia and Croatia in summer and fall of 1991[30] had encouraged Milosevic and the insurgent Serb parties and para-military forces created by them to reject all mediation proposals by the EC and the Yugoslavia conference and to disregard the resolutions of the UN-Security Council to stop fighting, these critics mistake cause for effect. Quite contrary, it was the non-recognition of Slovenia's and Croatia's independence, in particular after the failure of the so-called Brioni-moratorium by the end of September 1991, which fostered fully fledged war, because Milosevic and the Serb war parties in Croatia and BiH under his influence could hope in the beginning that the "realists" in international diplomacy would agree to the territorial separation of the Serb held territories as a means of conflict resolution. Seen from this perspective, the EC mediation efforts, the Opinions of the Badinter Commission and the UN SC-Resolutions between 1991 and 1993 contribute in a substantive way to the further development of the principle of self-determination of peoples and *uti possidetis* by making clear that they are no longer restricted to a "colonial context" and that the prohibition of use of force does not only apply to international borders, but also internal borderlines and thus invoke the *uti possidetis* principle and its functional logic insofar as any "territorial adjustments" by use of force shall never be recognized.

This is also affirmed by the logic of the General Framework Agreement for Peace concluded in Dayton/Ohio in December 1995 as can be seen from the political compromise entrenched in constitutional law by Article I, paragraphs 1 and 3 of Annex 4, "the" constitution of Bosnia-Herzegovina. Paragraph 1 declares that "… Bosnia and Herzegovina shall continue its legal existence under international law as a state, with its internal structure modified as provided herein…", whereas paragraph 3 established two new political units as "Entities" of BiH. Thus, the secession of Republika Srpkska in April 1992 and the war against the legitimate government of BiH until 1995 was not "rewarded" by international recognition of RS as an independent state. Only the "territorial adjustments" through creation of the Entity of RS and the so-called Inter-Entity boundary line follow more or less the military situation on the ground at the end of the hostilities, or – less euphemistically – the facts on the ground created by territorial occupation and ethnic cleansing.

Also SC-Resolution 1244 in 1999 did, initially, not reward the use of force by Serb authorities or the insurgent UÇK by referring to the right of territorial integrity of the Federal Republic of Yugoslavia and promising only "substantial autonomy" to Kosovo until a "final settlement" of the conflict could be reached. The unilateral declaration of independence by the Kosovo Assembly in February 2008 and the recognition of Kosovo as a new state, also by several EU member states, can – because of UNMIK-Administration since 1999, which cannot be called an illegitimate government not

[29] See Ratner (1998, 112–127) and Stokes (2009, 103–107).

[30] See Calic (1995).

"representative of the whole people" in the terminology of the Friendly Relations Declaration – hardly be justified[31] except for the illegal obstruction of UNMIK administration in Northern Kosovo by all Serb governments since 1999 in upholding parallel institutions and thereby trying to prepare the ground for a territorial separation of Kosovo as well as the exclusion of Kosovo Albanians from the right to vote and to participate in the referendum on the Serb constitution of 2006.[32]

In conclusion, the use of force in international relations[33] is combined with two legal-dogmatic problems, which go hand in hand in practice: unilateral and/or violent secession and humanitarian intervention by third parties. With regard to the legality of secession and humanitarian intervention there are two conflicting approaches: lawyers of public international law, methodically anchored in strict legal positivism, simply deny the legality with reference to the text of the principles and rules of the UN-Charter and their interpretation in light of the "original intent." Lawyers preferring a method of contextual/functional interpretation will also deny the legality, except for certain exceptions as "*ultima ratio*." It is then a matter of hotly disputed facts what will be recognized as "*ultima ratio*." It is beyond doubt for this approach that (attempted) genocide will be a situation which allows the use of force by external intervention. It is, however, less clear and disputed whether also ethnic cleansing allows the use of force and where the empirical and legal borderline between genocide and ethnic cleansing runs. The interpretation of genocide by international criminal courts is rather narrow and requires specific intent which can hardly ever be proven[34] so that scholarly literature vehemently argues to "criminalize" also ethnic cleansing as a separate criminal offence.[35]

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[31] This can be seen also from the Advisory Opinion of the International Court of Justice of 22 July 2010, "Accordance with international law of the unilateral declaration of independence in respect of Kosovo." The Court argues that there is "in general international law, no applicable prohibition of declaration of independence" (at paragraph 84), and comes to the conclusion that the unilateral declaration of independence by the "leaders of the Albanian people in Kosovo" does neither violate SC Res 1244 nor the legal system created by UNMIK regulations (at paragraphs 118/19). However, this conclusion is based on the rather "abstract" construction of an "Albanian leadership" being not "identical" with the members of the institutions of provisional self-government despite of the fact that the Albanian members of the Kosovo Assembly in the presence of the Kosovo President adopted the declaration of independence in a meeting of the Kosovo Assembly. This "construction" was necessary, after the Court had declared that SC 1244 and UNMIK regulations are still in force and the declaration of independence can be seen merely as an "attempt to determine finally the status of Kosovo" (at para. 114). If SC Res 1244 is still in force, as the Court argues, then a final "political status" of Kosovo is not yet achieved, hence Kosovo not yet a state which can be recognized! Hence, the juridical self-restraint of the Court, not to issue an opinion on the question of "statehood" of Kosovo, as it is claimed by the supporters of the declaration of independence, is based on the "political wisdom" that the legitimacy of the ICJ would not be sufficient to resolve this issue and – politically speaking – to keep the ball rolling.

[32] See Muharremi (2008) and Marko (2008a, 401–450).

[33] See Grey (2000), Gazzini (2005) and Hofmann (2003, 133–149).

[34] See Schabas (2000) and International Court of Justice, Bosnia and Herzegovina v. Serbia and Montenegro, Judgement of 26 February 2007.

[35] See Mulaj (2008, 163–170) and Hofmann (2003, 146, fn33).

It goes hand in hand with these developments that also a new doctrine is emerging in international law. After the illegal NATO intervention in Kosovo 1999, the Canadian Government established an independent International Commission on Intervention and State Sovereignty with the task to reconcile intervention for humanitarian purposes and sovereignty. This commission produced a report with the programmatic title "The Responsibility to Protect."[36] Hence, sovereignty does not only include a right of states to territorial integrity and non-intervention, but also a responsibility to protect its own population. If the state concerned is unable or unwilling or itself the perpetrator, it becomes the responsibility of the international community to act in its place. This new principle was then also adopted by the UN General Assembly at its World Summit in 2005. Under the heading "Responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity," paragraphs 138 and 139 again summarize the new obligations following from this doctrine through measures of prevention, reaction and rebuilding.[37] However, despite Corradettis's optimistic statement in the introduction to this volume that the responsibility to protect is "as a core mission of states, directed towards individuals, no matter of their citizenship and affiliation…", it remains to be seen how this new doctrine will be transformed into "hard" public international law. Against Talbott´s (2005) claim – based on a "minimal legitimacy account of human rights" and discussed in this volume by Reidy – that either nondemocratic or nonliberal states have "no principled claim… to be free from coercive democratization or liberalization," there is a "principled" counter-argument in legal discourse and mistrust against lawyers of public international law, in particular from the US, that the doctrine of responsibility must not serve as a legitimation for regime change through military intervention.[38]

### *14.2.2 From Minority Protection to Human Rights and Back: Swing of the Pendulum or Change of Paradigm?*

After WWII, there was a dramatic shift of the paradigm from the protection of the "special" rights of minorities as ethnic groups as this was the case under the League of Nations system to the notion that it is "essential" and appropriate to protect individuals and their "general" human rights as can be seen from the developments in the legal standard setting processes within the United Nations as well as the Council of Europe. The ethnic issue was not totally neglected, but it was expected that the protection of human rights in combination with the principle of non-discrimination on grounds such as, inter alia, "race, sex, language, religion, or national origin" would be much more functional instead of a special and group rights approach as

[36] See ICISS (2001).

[37] See UN GA, Resolution A/60/1 of 20 September 2005.

[38] See also Benhabib in this volume.

can be seen from Article 1.3 UN-Charter and Article 2 of the Universal Declaration. The same "philosophy" can be seen in the drafting process and text of the European Convention on Human Rights (ECHR) finally adopted in 1950. Again a proposal to insert a "specific" minority protection provision was dismissed so that Article 14 serves as "subsidiary" non-discrimination principle in the enjoyment of all the fundamental liberal and political rights established by the ECHR and all its Additional Protocols until the very day.

The only remnants of the minority protection approach on the global level could be seen in the fact that the UN Commission on Human Rights established the Subcommission on Prevention of Discrimination and Protection of Minorities at its first session in 1947 which also took the initial steps in drafting the crucial Article 27 of the ICCPR 1966, which was supposed to serve as a political compromise between the individual human rights and minority protection approach on the one hand and the French and German model of the nation-state on the other by stating: "In those States where ethnic, religious or linguistic *minorities* exist, *persons* belonging to such minorities shall not be denied the right, *in community* with the other *members* of their *group*, to enjoy their own culture, to profess and practice their own religion, or to use their own language" (Authors' Emphasis). It is thus no wonder that France upholds a reservation with regard to this provision until the very day arguing that "no minorities exist" in France with the effect that Article 27 shall not be applicable. Due to the experience with both totalitarian ideologies of Nazism and Bolshevism, for Western style democracies individual human rights and their effective protection against violation by public authorities through judicial enforcement remained the "essence" of liberalism and democratic governance until the end of the Cold War.

At the European level, however, the breakdown of communist regimes in Central, Eastern and Southeastern Europe in 1989 brought again a swing of the pendulum back to the minority protection paradigm as can be seen from various international documents such as the chapters on national minorities of the Document of the Copenhagen Meeting of the Conference on the Human Dimension and the Charter of Paris of the CSCE, both adopted in 1990, as well as the Council of Europe's Framework Convention for the Protection of National Minorities (FCNM) and the European Charter for Regional and Minority Languages, both of which entered into legally binding force in 1998.[39] In some way, history seemed to repeat itself after 1989, but there are new developments which justify to speak about a change of the paradigm.

First, the chapter on national minorities of the Copenhagen Meeting sets the tone by referring in the preamble to "…cultural diversity and the resolution of questions relating to national minorities" by "respect for the rights of persons belonging to national minorities as part of the universally recognized human rights" as "an essential factor for peace, justice, stability and democracy…" Hence, no longer is "adaptation," i.e. assimilation into an ethnically homogeneous or indifferent nation-state, the underlying premise of minority protection, but cultural diversity as such is

[39] All the documents quoted in the following are reprinted in Benoît-Rohmer (1996).

recognized as a basic value. Moreover, human and minority rights are no longer opposite approaches, but minority rights are seen as part of an all-embracing human rights regime. Also human and minority rights do not only form an essential element of liberal democracy, but also a necessary pre-condition for peace and stability. And finally, the provisions require states to take affirmative action measures[40] to protect and to promote the (different) "ethnic, cultural, linguistic and religious identity" of minorities, i.e. the groups as such, and not only to abstain from discrimination. Following this declaration, the CSCE member states established a High Commissioner on National Minorities (HCNM) as "early warning" and conflict prevention mechanism at their Helsinki meeting in 1992. Within the Council of Europe, the Parliamentary Assembly took the lead and adopted Recommendation 1201 on an additional protocol on the rights of minorities to the ECHR, which included even a definition of the term "national minority" in Article 1 and could have brought also a judicial enforcement mechanism with the European Court of Human Rights (ECtHR).

However, a backlash followed suit. Due to political and ideological resistance of many unitary states within the Council of Europe, such an additional protocol was not adopted by the CoE Committee of Ministers. Instead, the European Charter for Regional and Minority Languages and the Framework Convention for the Protection of National Minorities were adopted as a "substitute." Critics argued from the very beginning that none of these instruments contained a definition of minorities and that the vague language and "program-type" provisions did not really impose binding obligations on states as contractual parties of these instruments. Moreover, the monitoring of state reports by the Committee of Ministers, albeit with the support of independent expert committees, was seen as a weak, ineffective political system in contrast to the supranational judicial enforcement mechanism of the ECtHR.[41] This criticism was understandable, since the French Conseil Constitutionnel, despite of the title "European Charter of Regional and Minority Languages" which had obviously been a political compromise again for those states who do not recognize minorities on their territory due to constitutional tradition and for alleged fear of secessionist claims, declared the ratification of the Language Charter unconstitutional as late as 1999.[42]

Against this early criticism, an assessment of the activities of the HCNM and the monitoring mechanism of the FCNM after more than a decade must come to the conclusion that they have established a rather effective "pan-European"[43] minority protection regime. Up to 2010, only 4 of all the 47 CoE member states have not yet signed the FCNM: aside from the two statelets Andorra and Monaco, these are

[40] Cf. also Sadurski's approach for the justification of affirmative action measures in this volume against – what he calls – the philosophically implausible "per se theory of discrimination" developed in the jurisprudence of the US Supreme Court or the European Courts.

[41] See Benoît-Rohmer (1996, 40–44).

[42] See Benoît-Rohmer (1996, fn39).

[43] In order to take over the book title of Verstichel et al. (2008). Since the activities of the HCNM are not made public, it is much harder to assess them. But see Kemp (2001), Parzymies (2007) and Verstichel (2008, 45–61).

France and Turkey. Furthermore, Belgium, Greece, Iceland and Luxembourg have signed, but not ratified the Convention. The Language Charter is now signed by 33 states, but ratified only by 25 states. The Advisory Committee (AC) of the FCNM, the expert body on behalf of the CoM, has adopted 85 country-specific opinions until the end of 2010, thereby evaluating the state reports and preparing recommendations for the Council of Ministers, and 2 "thematic commentaries" on education and on effective participation in cultural, social and economic life and in public affairs. The Committee of Experts under the Language Charter has adopted 56 country-specific opinions.[44] Both expert committees have succeeded in making these international treaties effective instruments in gathering relevant information on the factual situation and creating an atmosphere of dialogue with governments and minority organizations. The AC was also innovative by extending the personal scope of application of the FCNM against initial exclusive declarations on behalf of certain "autochthonous" minority groups only, so that several provisions are also applicable now to persons belonging to so-called new minorities stemming from recent immigration, even those without citizenship in the relevant state. Finally, all of the opinions of the expert committees and the conclusions and recommendations of the CoM offer a massive amount of text, which is already characterized as "soft jurisprudence,"[45] consisting of legally binding "minimum standards," "emerging standards" and "best practices" which were identified by the expert committees and the CoM in their monitoring activities. In conclusion, the vague terminology of the FCNM and the political monitoring mechanism can be seen as an advantage today, which has helped to overcome the political deadlocks in legal standard setting. In addition, the permanent dialogue between the organs of the CoE and governments and minority organizations and the political pressure following from the publication of all documents must be seen as a long term benefit which could also lead to a change of attitudes of majority populations in terms of the acceptance of cultural diversity.

However, despite this rather optimistic assessment of the development of minority protection in Europe over the last decade, in particular when compared with other regions of the world, there are some left overs. So far the EU has not incorporated a specific minority protection provision into its primary law due to strong resistance from the above mentioned states. Article 19 of the Treaty on the Functioning of the European Union and the corresponding EC-Directives[46] are still an expression of the anti-discrimination approach, only allowing for, but not requiring affirmative action measures by the EU member states. Further on, there is

[44] All reports and commentaries can be accessed at www.coe.int/minorities.

[45] See Lantschner (2010).

[46] Council Directive 2000/42/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L180, 22–6, Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L303, p 16 and Council Directive 2004/113/EC concerning equal treatment between men and women in access to and supply of goods and services, OJ L 373, 37. See also Meenan (2007).

more and more overlapping of international organizations or even within international organizations such as the CoE in dealing with minority issues such as the various expert committees under the FCNM, the Language Charter, but also the CoE Charter against Racism and Intolerance (ECRI), the OSCE, and the newly established EU Agency for Fundamental Rights. The enumeration of all these institutions demonstrates how important co-ordination, not to say a common strategy, would be in order to avoid duplication, double standards and even institutional competition. Finally, the burning banlieus in French cities as well as the electoral success of right wing populist or even extremist parties all over Europe prove the constantly pressing problem of integration of new minorities. The Thematic Commentary on Effective Participation of National Minorities speaks about "effective participation, full and effective equality and promotion of national minorities' identity and culture" as the "three corners of a triangle which together form the main foundations of the Framework Convention."[47] This observation can be generalized insofar as these fundamental values of the mentioned "triangle" also reflect a shift of the paradigm from "national minority" protection as means of conflict "resolution" in the context of state sovereignty and the European nation-state models to the "management" of ethnic diversity,[48] where "old" and new minorities can also serve as a bridge for peaceful cooperation based on the functional prerequisites of (internal) "autonomy," in order to preserve and promote cultural diversity, and "integration" in order to enhance social cohesion and to stabilize political unity within, between and beyond states.[49]

## 14.3 Human and Minority Rights in the Life Cycles of Ethnic Conflict

### *14.3.1 The Pre-conflict Phase: Human and Minority Rights Problems and Causes of Ethnic Conflict*

Against all forms of primordial theories it follows from epistemological analysis as well as from a careful comparative analysis of empirical case studies of ethnic conflict around the globe[50] that cultural diversity as one of the possible "structural" causes need not automatically lead to tensions or even violent conflict. In addition to political, socio-economic or perceptual underlying causes, there must be internal

[47] At § 13, available at www.coe.int/minorities.

[48] See Marko (2008b, 251–280, fn7).

[49] See the preambular provisions of the FCNM referring to "stability, security and peace in this continent," "cultural diversity…a factor, not of division, but of enrichment of each society" and the necessity of "transfrontier co-operation between regional and local authorities" in addition to co-operation between States.

[50] See instead of all Wolff (2007).

or external "proximate" causes which enable the outbreak of conflict: Internal causes are "bad leaders" or "predatory" elites who control their community for their own, individual political and/or economic interest, are ready to spoil legitimate government also by use of force, and are not willing to compromise. External causes are usually "bad" neighbors either by diffusion, when conflicts spill over, or by escalation through direct military intervention or (in-)direct support of insurgent parties and their militias.

As can be seen from various claims made in ethnic conflicts, there are basically three types of grievances and ensuing claims:

First, there is economic neglect for groups or territories in a disadvantaged position or even outright exclusion from the access to and use of economic resources. The ensuing claim is thus to end discrimination and to create equal opportunities through effective participation, in particular in public services and administration. Roma communities all over Europe are the most vulnerable group since they are trapped in a vicious circle of poverty, discrimination through exclusion from education and thereby access to equal opportunities in the labor markets, ending up in the re-enforcement of poverty.

Second, there is "benign neglect"[51] or outright suppression of the public expression of "different" cultural identities of communities by violation of their right to speak their language or practice their religion in public. In many cases this goes hand in hand with political domination by the majority nation so that claims are made requiring to "take the rights" of ethnic communities "seriously" through legal recognition as a "distinct society" and the creation of the conditions for "effective participation" or "co-governance."[52]

Third, in case of an identification of identity and territory, when two or more communities make a claim to the identical strip of territory based on arguments of "historic" rights, present demographic realities, or past or present injustice in terms of economic deprivation and/or political oppression, this usually ends up in political self-determination claims. More often than not, such territorial disputes are perceived also as a threat to the physical existence of the group. It goes without saying that this type of conflict is the most dangerous one for ending up in a spiral of violence.

Why do leaders then choose war over peace and how do fears and threats translate into violence? The general hypothesis of the constructivist-instrumentalist approach goes that "ethnic entrepreneurs" in a "fear-producing environment," such

[51] Benhabib in the same vein speaks about "liberal indifference" in this volume.

[52] It is thus very important to distinguish minorities from 'co-nations' according to their self-perception and ensuing claims. Due to their different perception of facts, co-nations will never be satisfied even with the best minority protection instruments. For the term co-nation see Malloy (2005) and for empirical evidence for the necessary distinction between minorities and co-nations Marko and Lantschner (2008, 361–2). See also Benhabib's powerful argument for a human right to democracy requiring "robust forms of self-government through representative or more participatory forms of institutions."

as government breakdown, shifts in political power balances between groups and/or changes in control over economic resources and accompanying shifts in the balance of rival external patrons, (mis-)use the "feeling" that only my own group can protect me against the "others" in order to trigger a political process of ethno-national mobilization. Hence in a situation of regime change or weak or failed states, they create or make recourse to the "we-feeling" of "their" group and transform economic, political or cultural tensions into an ethnic conflict over identity and/or territory, in short they create a political or even physical "security dilemma."[53] Hence, the creation of We-they antagonisms and enemy stereotyping through political or religious leaders, intellectuals and in the media must serve as an "early warning" indicator that such perceived or already real security dilemmas are engineered. Political and legal disputes over the "justification" of claims and counter-claims concerning basic human and minority rights such as freedom of expression and association and more special identity rights with regard to the use of the minority languages and scripts for names, topographical indications, and/or as "second," additional, but equal official language in education, administration and before courts are the next serious indicator that the process of ethno-mobilization by transforming competing rights and interests into ethnically perceived, antagonistic identity conflicts is in full swing. At this stage, mutual accusations, who firstly "started" the conflict, cannot rationally be tackled any longer: Was it the ethnically homogenizing and polarizing "nation-building" process by the majority population or the "radical" claim of the minority group by insisting on the implementation of their human and minority rights and/or "unjustified" claim for additional rights? The more one group challenges the *status quo* and the less another is prepared to allow changes, the more likely is it that conflict will rapidly escalate into violence. Finally, recourse to "extra-constitutional" means such as "illegal" referenda on establishing territorial autonomies or the abolition of existing autonomy regimes and the formation of para-military formations[54] already require the question whether it is high time for external mediation, arbitration or even intervention.

### *14.3.2 Conflict and Conflict Settlement*

It goes without saying that ethnic conflicts over territory and identity, when they indeed have become "primordial" so that the physical existence of members of groups, because of their group characteristics, is endangered, may lead to gross violations of human and minority rights, in the worst case to ethnic cleansing and genocide.[55] Mass killings, raping, torture in detention camps, and expulsion from

[53] See, above all, Mulaj (2008, fn35).

[54] See for all these elements of the process of ethno-mobilization ending up in a spiral of violence in the wars in the Balkans in the 1990ies Ingrao and Emmert (2009).

[55] See Bell-Fialkoff (1996) and for the need to distinguish conceptually and legally ethnic cleansing from genocide, Calic (2009, 120) and Mulaj (2008, 128–131 and 163, fn35).

the territory are part of the agenda of ethnic entrepreneurs in pursuing their ethno-nationalist policies.[56] The central question is then, how to stop violence? Through external mediation, sanctions or, in the final analysis, military intervention? The legal-dogmatic problem of "humanitarian intervention" and the use of force by external actors in "civil" wars have been discussed above. What concerns here is the perspective of conflict management and resolution.

As we have experienced in the wars in Croatia and BiH in the 1990s, mediation in the framework of the UN- and EU-led Yugoslavia conference became a total failure. First, the UN arms embargo proved totally counter-productive and hindered the legitimate Croat and BiH governments to effectively defend themselves from the very beginning. Economic sanctions against FRY and the restriction of freedom of movement also for ordinary people enabled Milosevic to blame the entire world to be biased against Serbia and to close the ranks against any moderates as "traitors." The Vance/Owen and Owen/Stoltenberg peace plans seemed to legitimize the ethno-nationalist policies in giving in to claims to create separate, but ethnically homogenous entities. In particular the Owen/Stoltenberg plan even triggered the war between Croat and BiH government forces when the annexed maps became public.[57] Only with strong US leadership and after the genocide committed in Srebrenica,[58] military intervention by NATO on the basis of a UN Security Council mandate could stop the war in 1995 and force the warring parties to the negotiation table in the military base in Dayton/Ohio. In conclusion, the international community, being ill-prepared, ill-equipped and due to a lack of political will did always "too little, too late" in order to prevent the outbreak of violence or to stop violence.

But even after a successful military intervention, the question raises, how is it possible to negotiate for a sustainable peace and not only a cease-fire? In other words, what encourages ethnic entrepreneurs to give up their rational choice for a politics of violence and how is it possible to deal with the legacy of violent conflict not only in terms of security guarantees and institutional arrangements, but also concerning the damages for the political culture, i.e. the mix of fear, hate, and ensuing distrust[59] and thus lack of societal solidarity and loyalty vis-à-vis state institutions following violent conflict? In short, how is it possible after peace-making to reconcile the needs of peace-keeping *and* for justice in an endeavor for long-term peace-building which prevents the possibility of a conflict cycle?

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[56] See in particular the Rapport of the Special UN Rapporteur, the former Polish Prime Minister Mazowiecki, E/CN;4/1992/S-1/10, stating already on 27 October 1992 at § 6: "… the principle objective of the military conflict in Bosnia-Herzegovina is the establishment of ethnically homogenous regions. Ethnic cleansing does not appear to be a consequence of the war but rather its goal."

[57] See Mulaj (2008, 97–101, fn35), Wachtel and Bennet (2009, 12–47) and Stokes (2009, in particular 97–107).

[58] As this is now determined by the International Court of Justice, Bosnia and Herzegovina v. Serbia and Montenegro, Judgment of 26 February 2007.

[59] See in particular Kaufman (2001).

Wolff's comparative study enumerates three conditions to make a conflict settlement possible[60]:

- the government and ethnic group(s) in conflict must be willing to accommodate to the key interests of the respective opponent;
- political leaders must be "realists" and willing and able to take the risk of compromise;
- the international mediators must give strong incentives and put strong pressure on the parties in conflict.

This list is, of course, no panacea for eternal peace and harmony. Why should "radical" claims for secession or partition be given up since there is no military solution possible for self-determination conflicts in terms of long-term peace? Why should there be a "rational" interest in stability, if a "frozen conflict" based on permanent international crisis-management allows predatory elites to enrich themselves and their clientele through state controlled "privatization" and organized crime, which might even be supported by an external strong patron? Moreover, an ethic of self-restraint of political leaders and tolerance of the people as a pre-condition for peace-building is exactly the problem after violent conflict. Exactly the absence of tolerance and mutual trust is the definitional essence of "severe ethnic divide". Insofar, also the theoretical battles between accomodationists and integrationists do not really help.[61]

Nevertheless, there are some general lessons to be learned from negotiations on the terms of peace-settlements and the effects of the structure of their provisions, based on the assumption that tolerance and trust must and can be created by institutional design and law-enforcement.[62]

First, to denounce one of the parties of ethnic conflict as "terrorists" as this was the case on the eve of the fully-fledged war between Serb authorities and the UÇK in Kosovo, simply pours oil into the flames. The same is true, on the other hand, if the "international community" shies away from simply calling ethnic cleansing and attempted genocide by state authorities or agents controlled by them what it is, namely an international crime. Hence, there is a dialectic of necessary impartiality and taking sides which can only be resolved, if the dichotomy between "realists" and "idealists" in international relations theory and diplomacy is overcome by a firm commitment to international legal standards and their implied value judgments. It goes without saying that this needs also more legal clarity through a better international criminal law regime as this was argued above.

Any attempt to exclude "radicals" and their positions from the framework for negotiation and to accommodate only the interests of moderate parties in the settlement agreement is bound to fail. As can be seen from case studies on Northern

[60] Wolff (2007, 152, fn50).

[61] See recently McGarry et al. (2008, 41–88).

[62] See the case study on South Tyrol with the, insofar, programmatic title by Woelk et al. (2008).

Ireland[63] and Bosnia-Herzegovina,[64] the former will always try to spoil the peace-building process by going on with ethno-national mobilization and recourse to illegal means or even violence. Post-conflict reconstruction efforts will then more resemble permanent crisis management than stable peace-building.

As the peace-plans submitted by the international community in the Bosnian war have demonstrated, there is first a principal choice to be made how to combine ethnic and territorial claims to sustain settlement. Wolff argues that there are only a few options:

- If none of the parties is willing to give up its self-determination claims on the disputed territory, but to share control, a "condominium-style" arrangement is the most likely outcome. If this concerns the entire state, this will lead to federal or regional arrangements with strong power-sharing arrangements at the central level combined with weak powers for central institutions. The Dayton Agreement is almost an ideal-typical example for this type.
- If territorial self-determination claims are given up and parties are willing to compromise on their ethnic claims, this allows again for federal or regional arrangements or the establishment of territorial autonomy, however with much stronger powers also for the central institutions to counter still existing centrifugal forces. Moreover, such territorial arrangements then go hand in hand with advanced and effective human and minority rights mechanisms.
- Finally, if there are no territorial claims involved, human and minority rights mechanisms which guarantee the groups that they are able to preserve their identity and offer them equal opportunities in the socio-economic sphere as well as effective participation in political decision-making are best to defuse tensions and to provide for sustainable integration.

Wolff also argues that the "velvet divorce" of the Czech Republic and Slovakia, the dissolution of the Soviet Union and the Israel-Palestinian conflict demonstrate that separation and independent statehood are (potentially) viable solutions provided that it is consensual and well managed. There are, of course, the general moral and legal implications with this view that partition after violent conflict would reward and legitimize ethnic entrepreneurs' politics of violence in the end and, at least in the European context, forced population transfer is prohibited by Article 3 of Protocol Nr. 4 ECHR. However, it is also contestable that partition is a viable solution in terms of political stability. First, also new states created by partition are not automatically homogenous so that "new" minorities are created which will be, in the logic of ethno-nationalism as basis for territorial partition, be dominated and suppressed, thereby creating new conflicts. Hence, partition makes sense in the ethno-nationalist logic only, if it goes hand in hand with population transfer, which has been termed the "Lausanne principle" after the international agreement concluded between Greece and Turkey in 1923. However, studies on the partition between India and Pakistan,

[63] See McGarry and O'Leary (2008, 369–408).

[64] See Marko (forthcoming).

Cyprus etc. reveal that population transfer is never voluntary, but always forced and does not lead, neither in the short nor long run, to the acclaimed security for peoples in their new country and regional stability between states.[65]

All post-conflict activities for one political unity have to address the "4 R's": recognition, restitution, remembrance and reconciliation and thereby to address old and new root and proximate causes in order to prevent a relapse into a conflict cycle. Hence, in order to be able to reconcile peace and justice from the very beginning, any interim settlement agreement must reflect a 'creative ambiguity' along the following lines:

- The content of a settlement agreement must contain rules on immediate security guarantees and a new institutional framework where conflicting interests can be accommodated so that the incentives for non-violence and compromise outweigh benefits expected from a further politics of violence.
- At the same time, it is necessary to entrench and enforce rules on human and minority rights protection and transitional justice, in case of previous ethnic cleansing in particular through the right to return to the home of origin and the restitution of property in conjunction with an obligation of authorities to take affirmative action to reverse the effects of ethnic cleansing.
- Moreover, rules are needed to stop ongoing ethno-mobilization by the respective agents in government, political parties, media, and education in order to break the danger of "intergenerational vengeance" and a conflict cycle.
- As far as procedure and time-lines are concerned, the rules should enable flexibility for the re-negotiation of institutional arrangements in order to be able to "temper" the saliency of ethnicity for the entire political system in progressing from corporate to liber powersharing and, finally, to integration under an impartial internal umpire as the case law of the Constitutional Court of Bosnia-Herzegovina can demonstrate.[66]

Finally, the IC must be ready for a long-term commitment. Any public exit strategy with the announcement of deadlines will only invite the warring parties to compromise on the surface, but to spoil in reality any implementation of the settlement in the expectation that they have only to wait and see the withdrawal of the international military and/or civilian presence.

### *14.3.3 The Post-conflict Phase: Reconstruction and Reconciliation*

In the immediate aftermath of conflict, reconstruction efforts by implementation of the peace settlement must have priority. However, as can particularly be seen from the "democratization" efforts of the OSCE in Bosnia and Herzegovina, early and

[65] See Kumar (1999) and Clark (2007).

[66] See Marko (forthcoming).

repeated elections every second year, which have been free, but not fair, legitimize only the "radical" ethno-nationalist parties and their leaders, thereby enabling them, on the basis of the corporate power-sharing arrangements of the Dayton constitution, to form a cartel of power and to hinder or even block reforms to overcome the institutional weaknesses and to strengthen rule of law. The general lesson for reconstruction is that effectiveness of institutions and rule of law must be given priority over democratization. Moreover, as the riots in Kosovo in March 2004 against Serb and Roma communities demonstrated, the vigilance with regard to security issues cannot be given up so that an international military presence with a robust and extended mandate including police tasks and civil-military cooperation will be necessary also for long-term peace-building.

The second important task is economic reconstruction in order to get rid of aid-dependency and to trigger sustainable economic development. More often than not does economic aid not reach the people who are in need immediately after conflict, because the control over economic aid and its distribution by the warring parties becomes a proximate cause for ongoing conflict. Moreover, what happens when partition and a politics of divide and rule are not effectively tackled, can be observed again in Bosnia-Herzegovina where the power to legislate in economic affairs rests almost exclusively with the Entities so that it was so far impossible to create a common economic legal system as precondition for a functioning common market even within the country, let alone to integrate into the European Union.

As far as reconciliation is concerned, the climate of revenge, fear and hatred must be overcome to create the preconditions for mutual trust and co-operation not only on the elite level, but also in the minds and attitudes of people. However, as we can see in particular in the Balkans, instruments of transitional justice such as international and national criminal courts in order to sanction individual guilt for genocide, crimes against humanity and war crimes as well as truth commissions face the problem that victims and perpetrators proclaim a different "truth" with regard to past events.[67] Knowledge of facts and events, even if established by independent courts, does not necessarily translate into moral or political acknowledgement as can be seen from the association of war veterans in Republika Srpska which denies until the very day that the massacre of Muslim men and boys in Srebrenica ever happened. As long as there is either "my truth" against "your truth", as one of the ICTY indictees' stated in defense,[68] there will be ongoing and "competing narratives of resentment and blame."[69] The same phenomenon can be observed in education. A moratorium in history teaching for ten years as it was foreseen in the Erdut Agreement in 1995 for the peaceful reintegration of Eastern Slavonia into Croatia will not help to overcome the We-they dichotomy which has been characterized as an important indicator for ethno-mobilization in the pre-conflict phase. Hence, as

[67] See in particular Marko-Stöckl (2010, 327–352).

[68] Simo Drljaca stated towards the judges: "You have your facts. We have our facts. You have a complete right to choose between the two versions."

[69] I borrow this phrase from Sabrina Ramet (2007, 26–70).

long as ethno-national stereotypes, myths of victimhood and hate can be spread by family, friends, media and also in public education, the vicious circle of "intergenerational vengeance" cannot be broken up. The new approach of "positive history"[70] and "multiperspectivity" for history textbooks are first steps in order to de-construct the We-they dichotomy and to prepare the ground for the insight that it is necessary to find a consensus on the past, not in terms of collective guilt, but as collective responsibility for reconciliation and a peaceful living together in the future.

Moreover, one of the lessons to be learned from international territorial administration in Bosnia-Herzegovina and Kosovo is the fact that a mandate simply to coordinate the civilian efforts of implementation is bound to fail due to institutional jealousy and competition of international organizations and donor states. Piecemeal engineering based on the Anglo-Saxon philosophy of pragmatism will contribute to day-to-day crisis management at best, but not to sustainable peace-building. Hence, it is necessary to take the "complexity" of the interrelationship of institutional design, politics, economics, and culture seriously and to develop a long-term strategy for two important theoretical as well as practical problems as can again be observed from Bosnia-Herzegovina and Kosovo: When is it possible to renegotiate the (interim peace) settlement and its institutional design of corporate power-sharing in order to democratize the entire political system without opening the box of Pandora for a new round of conflict? And when is an exit possible for ending international territorial administration?

These two problems are again intimately linked. Until the very day, intransigent, obstructionist and predatory political elites are in power in both Bosnia-Herzegovina and Kosovo, which hinder reforms to make institutions and public services more effective. But even if effectiveness could be achieved by robust international supervision, intervention, or substitution in the form of a quasi protectorate, they will – as election results prove despite former election-engineering by the OSCE – constantly be reelected despite their lack of "representativeness" and "accountability" due to their ongoing ethno-national rhetoric and election campaigns as defenders of the "vital national interest" of their respective community. Representativeness, however, cannot be decreed by international supervisory mechanisms, but needs a reform of the entire system of intermediary organizations, in particular of political parties based on the acceptance of both leaders and electorate. From a typological point of view, ethnically divided societies will have party systems composed of mono-ethnic, multi-ethnic and/or "civic" parties or a mix of these. Hence, with regard to the democratization of the political system, not only a more liberal institutional arrangement needs to be established by constitutional amendments, but also requires a transformation of the party system away from the domination by mono-ethnic parties. They – as a matter of electoral success – must be interested to uphold the ethnic divide. As can be observed from Bosnia-Herzegovina again, a first step of

[70] I.e. to identify also narratives of cooperation and tolerance that cut across ethnic lines, stressing the commonalities of peoples despite ethnic conflict and war. See in general MacDonald (2009, 391–424).

"pluralization" of the party system through inducing intra-ethnic party competition does – against Horowitz's assumptions – not automatically lead to a moderation of the party system nor a cross-cutting of the ethnic divide in election-campaigns or the voting behavior of the electorate. Previously moderate parties and their leaders, as the case of the Prime Minister of Republika Srpska, Milorad Dodik, proves, are radicals today insofar as he constantly threatens with a referendum on independence of RS since summer 2006, whereas the SDS of Radoslav Karadzic, the former radicals, today seems to be the moderate party. The same observation of a change of the position of parties between radical and moderate within the respective camp, without however a moderation of the party system as such, can also be observed in Macedonia. Hence, only the preponderance of "representative" and "responsive" multi-ethnic and civic parties allows achieving a moderation of the ethnic divide, which in itself allows then for cooperation on the elite level, desegregation of institutions and, hopefully, re-conciliation.

In conclusion, only when the party system is transformed so that governmental institutions are representative and accountable, i.e. no longer in terms of ethnonationalist legitimation for a politics of divide and rule, but for the economic prosperity and well-being of the "entire population without discrimination according to ethnic or national origin" in order to paraphrase the UN General Assembly's Friendly Relations Declaration, will the relapse into ethnic conflict become unlikely and endogenous cultural diversity management possible. This would be the perfect point in time to end international territorial administration and to hand over the exercise of sovereign power to the people and their leaders.

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# Chapter 15
# Human Rights in the Information Society: Utopias, Dystopias and Human Values

**Giovanni Sartor**

## 15.1 Introduction

Information and communication technologies (ICTs) are bringing about a pervasive economic, social, and anthropological transformation. They are changing productive processes, substituting the production of physical commodities by mean of other physical commodities with the production of information by means of information, i.e., new productive processes where information is both the rough stuff and the outcome (consider for instance, the creation of software, digital goods, and web services such as searching, mining, filtering, aggregating, hosting and organising data, etc.). ICTs involve new ways of organising economical activities: distances become largely irrelevant, flexible organisation is enabled by the adaptable informational infrastructures, the enhanced capacity to produce and communicate favours new forms of cooperation. They support the integration between industry and culture, production and socialisation, in the interlocked development of software and digital contents, though commercial firms, individual endeavours, or peer-based networks. ICTs drive the convergence between different technologies, pertaining to hardware, software, telecommunication, electronics, biotechnology, etc. Being based on knowledge, ICT provide the environment for producing new knowledge, in all other domains of culture, science and technology, including first of all ICTs themselves.

This emerging technological, economic and social framework (the so-called information society, or knowledge society, see for all Castells 2000), offers new huge opportunities for individual and social development, as well as serious risks. In the following sections I shall consider opportunities and risks, and then the role the human rights may play as guidelines for developing the information society.

G. Sartor (✉)
Faculty of Law, University of Bologna, Bologna, Italy
e-mail: giovanni.sartor@unibo.it

C. Corradetti (ed.), *Philosophical Dimensions of Human Rights: Some Contemporary Views*, DOI 10.1007/978-94-007-2376-4_15,

## 15.2 ICTs: Opportunities for Human Development

First of all, ICTs provide many new opportunities for economic development. They support a vast increase in productivity, in industrial production as well all in related administrative and commercial processes. As machines for processing matter have enabled a huge increase in productivity during the industrial revolution, so informational machines (the innumerable virtual machines realised by putting software on top of the hardware) enable a similar increase in information-processing productivity, an increase that also affects the computer-driven production of material objects. Moreover, the fusion of computing and telecommunication makes innovation and development be rapidly transmitted and distributed, transcending geographical barriers. While centuries were necessary for industrial technologies to spread outside of Europe, ICTs have conquered all continents in a few decades.

Second, ICTs can contribute to the efficiency of public organisations, reducing the administrative costs involved in delivering public services, and providing more information, transparency and accountability, so favouring equal access. Workflows can be redesigned and accelerated, mechanical activities can be automated, citizens' interactions with the administration can be facilitated, documents can be make publicly accessible, participation in administrative proceedings can be enhanced, and so can controls over the exercise of administrative and political functions.

Third, ICTs can contribute to deliver information, education and knowledge to everybody. There is the possibility of packaging information and education as digital goods that can distributed at zero marginal costs: once information goods are made available (and the cost for their creation has been sustained) providing them to additional on-line users is costless. This makes a significant difference as compared with traditional hardware-based media, where each new copy had production, transportation and commercialisation costs. Moreover, new technologies dramatically reduce costs involved in the production of intellectual goods (e.g., typesetting, recording, revising, modifying, processing data, etc.).

Fourth, ICTs deliver unprecedented opportunities for individual creativity. Not only individuals can communicate more easily, but ICTs also provide new creative tools for producing information goods. Now it is possible to engage in publishing, making movies, recording music, developing software at a much smaller cost, and with much greater effectiveness than ever before. An increasing section of humanity can contribute to the decentralised production of culture, creating contents that can be made accessible to everybody.

Fifth, ICTs enable the aggregation of individual efforts into social knowledge. In the so-called web 2.0 (O'Reilly and Battelle 2009) contents are mainly provided by the users, though platforms delivering and integrating their contributions. This happens in the simplest way though the non-organised "crowd-sourcing" in the content repositories available on the web (YouTube, Twitter, etc.), which constitute collective works by aggregating separate individual contributions. More self-conscious kinds of participation in a collaborative efforts are provided by open source projects for the production of software (Linux, Firefox, OpenOffice, Tex and Latex distributions, etc.), intellectual works (like Wikipedia), and peer-production

of artistic or scientific contents (Benkler 2006). Moreover, the results of individual actions can be aggregated into collective goods even without individual intentions, as it happens when individual choices are aggregated into outcomes relevant to others (blogs get clustered around relevant hubs, individual preferences are combined into reputation ratings, spam filtering systems aggregate user signals, links to web-pages are merged into relevance indexes, etc.).

Sixth, information technologies allow individuals to interact with their peers, regardless of physical distance. Here the focus is on the integration of computing and communication technologies which diminishes the cost of telecommunications, makes them ubiquitously available (though digital phones, Internet connections, etc.), and consequently facilitates the interaction between individual (from e-mail, to social network, to chats and voice over IP, etc.). This has expanded each one's chance to find and exchange opinions, and freely establish associative links having different degrees of intensity. In particular, it provides new opportunities for those belonging to minorities (in culture, ethnicity, attitudes, interests, etc.), enabling them to enter social networks where they can escape solitude and discrimination. In a way, ICTs realise the utopia of Nozick (1974), i.e., the idea of a polity resulting from a network of multiple freely formed associations, built by the unconstrained choices of the concerned individuals.

Seventh, ICTs (and in particular the Internet) have enabled the formation of a new public sphere, where individuals merge their opinions and build social knowledge in a variety of ways. Not only individuals can engage with one another, as they have always done in face-to-face interaction and debate. New ways of political communication have emerged, where one can post one's contribution to an unlimited number of hearers, or people can merge their cognitive efforts in a variety of discussion. In a way the Internet realises the utopia of Habermas (1999), namely, the idea of polity whose choices result from open uncoerced dialogues, under conditions of equality. Political dialogues can avail themselves of the evidence accessible through ICTs and of the insights obtainable by processing such data.

Eight, ICT may favour moral progress: by overcoming barriers to communication, offering people new forms of collaboration; by reducing costs involved in engaging in creative activities, it may favour attitudes inspired to universalism, (reasonable) altruism, and participation, beyond what may be expected from a merely self-interest person (Benkler and Nissenbaum 2006). In fact, when costs are removed, or limited to a minimum, then performing a creative activity without expecting a direct monetary reward may become more attractive, even to those having only moderate moral (altruistic) motivation. Moreover, the idea of benefiting others though one's own work can become more appealing when the work to be done is rewarding in itself, there are little costs attached to it, and a universal audience can access it. Similarly, the idea of reciprocity can become more attractive (and free-riding on others less so) when reciprocation becomes easier, being included in a broader set of interactions. Altruism and reciprocation may indeed merge (as in the so-called indirect reciprocity), so that one may expect some reward from one's participation in a community, but this reward is not conditioned to one's contribution, and comes from people different from the those that have benefited from that contribution (as is the case for open source software, Wikipedia, etc.).

## 15.3 ICTs: Risks

The ICT opportunities I have been picturing need to be combined with the awareness of the risks related to use of information technologies. I shall summarise and emphasise these risks by linking them to some literary works, which gave fantastic reality to dystopian perspectives.

The first risk is *Orwell's nightmare*, i.e., the use of technology for surveillance, from the story in the novel *Nineteen Eighty-Four* (Orwell 2004), where surveillance, exercised through telescreens and microphones located in houses and streets provided control over every aspect of human life, so that people were forced not only to behave according to the expectations addressed to them but also to assume corresponding attitudes and beliefs. ICTs have made surveillance much easier than before, since costs and accuracy of surveillance have dropped enormously. This is brought about by the increased possibility of uploading information from life scenes, with or without human supervision, both in real and virtual scenarios (consider for instance street cameras, and the possibility of monitoring e-mail communication as well as any Internet-mediated activity). Information so uploaded can be stored in digital form and processed automatically, enabling those in power to detect any unwanted behaviour or attitudes. New forms of surveillance can be brought about by the combination of neuroscience and computing, such us the possibility of identifying states of mind on the basis of the electric activity of the brain.

The second risk is *Kafka's nightmare*, i.e., the use of technologies for cover control and judgement, from the novel *Trial* (Kafka 2007) where a man is prosecuted (and in the end executed) for a crime whose nature is never revealed to him (for the idea of a Kafka's nightmare, see Solove 2008). As the trial goes on, the man progressively loses his autonomy and self esteem, the very sense of his dignity. ICTs may contribute to this nightmare, since the information collected and stored can be used for assessing individual behaviour, according to any criteria, and make decisions on the concerned individuals (from minor one, such as those on giving a loan or an insurance policy, to those involving access to work or even to criminal prosecution or political repression).

The third risk is *Huxley's nightmare*, i.e., technologies for discrimination and exclusion, from the novel *Brave New Word* (Huxley 1994), which delineates a word where humans are divided into castes, produced by applying certain technologies to human foetuses (genetic was not yet knows, so that Huxley considered differentiation being produced by giving foetuses different substances, and putting them in different temperatures, etc.). Each caste would be specifically destined and confined to a particular occupation and kind of life. This dystopia raises two issues concerning ICTs. The first issue concerns the possibility that the emerging combination of ICTs and biotechnologies may be used in the future not for therapeutic purposes, nor even for enhancing human possibilities, but rather for limiting and constraining the very biological bases of human freedom and equal dignity. The second aspect, which has a more concrete bearing for the issues here addressed concerns the

possibility that the information stored in computer systems (e.g., genetic or health information) is used for distinguishing and discriminating individuals, by classifying them into stereotypes without regard for their individual features, or taking into invidious consideration certain features of them, subjecting them to unjust treatment with regard to employment and other social goods.

The fourth risk is *Bradbury's nightmare*, i.e., technologies causing ignorance and indifference, from the novel *Fahrenheit 451* (Bradbury 1996), which describes a world where books are forbidden, and people are only fed the information that the political power wants to provide them, in order to produce pleasurable emotions while preventing any critical thinking. One may argue that this is what is already happening in the television domain, at least to some extent and in some places. Advanced ICTs could enable malevolent political-economic powers to achieve such an outcome to a higher extent: advanced technologies for the identification of content could allow unwanted materials to be tracked and eliminated, and at the same time, people could be provided with whatever information was considered to be useful for distraction or indoctrination.

The fifth risk is *Capek's nightmare*, from the play *R. U. R* (*Rossum's Universal Robots, Capek* 2004), the first text where the word "robot" was used (from the Czech *robota*, meaning work, or *robtnik*, meaning servant). The play describes how artificial "men" are constructed, first with the intention of helping humans, but then with the purpose of substituting them. The widespread use of the robots makes human work redundant, and with work also the engagements and commitments that give meaning to human life are lost. In the end the robotic slaves will rebel and wipe out humanity. This idea can be traced back to the famous pages of Hegel's *Phenomenology of Mind* (Hegel 1931), where the Master, after delegating all work to the Slave, loses the ability to interact with nature and with his fellows, the capacity to act as the intermediary between his desires and their satisfaction. By becoming dependent on ICTs we may similarly lose our ability to think and act on our own, become completely passive, mere "desire machine," relying on machines for all productive and communicative initiatives. This idea can also be found in Asimov's Robot-Saga (see in particular Asimov 1985), where peoples who have decided to rely on robots progressively become so dependent on them that they will lose the ability to act on their own, as well as their initiative and interest in life.

I reserve the name of *Asimov's nightmare* for the sixth risk, i.e., technologies causing separation and loss of communication between humans, from the novel *Foundation and Earth* (Asimov 1996), where a planet (Solaria) is described whose culture rejects every physical contact. Its inhabitants (humans transformed though genetic engineering) engage in face-to-face contacts only with their robots, which whom they have developed a symbiotic interdependence. Their supreme moral ideal of individual autonomy requires refusing all contacts with other humans, and in the few instances where this is necessary, to use telecommunication tools (a similar future has been described more recently in Houellebecq 2006). This social arrangement corresponds indeed to some present trends: Internet surfing and the solitary access to digital contents, games and other interactive programs, can become a substitute of face-to-face human interaction (as in the case of the reclusive young

Japanese called hikikomori, who remain in their computer-connected rooms, rejecting any social contact). The separation dystopia may also take a group rather than individual-based perspective. In a flexible information infrastructure, individuals (at least those empowered to do that) may establish with whom to interact, what kind of information to access, in what social networks to participate. The possibility of engaging in social interaction transcending geographic limits may lead us to rejecting physical proximity as a source of social bonds. Thus, individuals may lose contact with their broader social environment, with the political and social problems in which their fellows are involved, and choose to avoid unanticipated encounters and unfamiliar topics or points of views. Sunstein (2001) has argued that democracy may be at risk under such conditions, and that an active (though not authoritarian) public intervention may be justified to promote a broader exposure to information and social interaction.

The seventh risk is *Nozick's nightmare*, i.e., technologies for illusion and artificial pleasure, from the story of the *Experience Machine*, contained in Nozick (1974), where "super duper neuropsychologists" have figured out a way to stimulate a person's brain to induce pleasurable experiences, which that person cannot distinguish from real ones (as in the Matrix movie or in the early science fiction tale *The Chamber of Life,* by Wertenbaker 1929). Thus virtual experience could become a substitute for real experience, providing easier and deeper satisfaction than real life, it could become an electronic drug susceptible of taking possession of human minds. Humans indeed may become indifferent to their natural and social environment (the landscape, the art, the architecture around them), to their relations with other people (e.g., friendships and even sexual relationships), substituting them with virtual experiences. The idea of a technology-induced exchange illusion for reality can also be found is various science fiction works, such as Philip Dick's novel *We Can Remember It for You Wholesale* (originally published in 1966, see Dick 2002b, to which the movie *Total Recall* is inspired).

The eighth risk is *Vonnegut's nightmare*, i.e., technologies causing class division and exclusion, from the novel *Player's piano* (Vonnegut 1952), which depicts a society where technology, by substituting most human labour, divides society in two separate classes. An upper, well-educated class includes those having the knowledge and skills for operating in the new technological environment, governing the machines and addressing the complex problems of a technological society, while the rest of the people (those whose work could be substituted by a computer or a robot) would be made redundant, deprived of meaningful life and forced into the army or in most menial jobs. In fact, there are many new work opportunities opened by ICT, but unless everybody is enabled to profit of them, through education and social organisation (unless the digital divide, broadly understood, is addressed) Vonnegut's dystopia remains a likely outcome.

The ninth risk is *Dick's nightmare*, i.e., ICT technologies for war and human destruction. From the many dystopias emerging from the work of Philip Dick the extreme one is probably provided by his short story *Second Variety* (see Dick 2002a, originally published in 1953, to which the movie *Screamers* is inspired), where intelligent killer-weapons developed for global warfare acquire the ability to

construct and perfection themselves, become more and more similar to humans, and end by wiping out humanity. The recent developments in intelligent weapons may be the beginning of a new arm race, based on ICTs: warfare (but not its impacts on innocent human lives) will be increasingly delegated to technological devices, of growing destructive power and precision, with outcomes engendering not only the lives of particular individuals and communities, but potentially the very future of humanity.

## 15.4 What Role for Politics, Law and Human Rights?

The opportunities and the dangers just described raise a fundamental issue: what range of action do we have, as individuals and as societies, when facing information technologies? Are they a destiny, which will be imposed upon as, following its inescapable internal logic, or rather do they constitute a very broad window of opportunities, where humanistic as well as non-humanistic choices are possible? I think that, when facing informational technologies we should avoid the risks of inventing another philosophy of history, falling back on what Karl Popper called the "poverty of historicism" (Popper 1959), i.e., the pretension of detecting a necessary and inescapable trend in the technology-driven social development. On the contrary, ICTs open the broadest range of possibilities for individual and social choices, most of which we cannot yet imagine, since we cannot image the outcomes emerging from the aggregation of infinite individual choices nor the creative responses of individual minds to the complexity of their social and technological environment. In fact many uses of the information technologies, opening new unpredictable opportunities for individual and social action were not anticipated by the very people building those technologies. For instance the inventors of computer did not imagine that each of us would have multiple computers at his or her disposal (in one's personal computer, in the mobile phone, in the car, in the kitchen, etc.), as the constructors of the Internet did not think about its many applications (e-mail, chats, web-browsing, electronic commerce, Wikipedia, cloud computing, social networks, etc.).

Uncertainty concerning technological and social development does not eliminate our responsibility for governing the technology-driven social development, profiting of opportunities and preventing at least the most serious dangers. It also does not exclude the attempt to anticipate change, prospecting future scenarios and advancing possible solutions, even though we should be cautious since our forecasts (and moral-political judgments based on them) may be mistaken, and even the obvious assessments may be contradicted by reality. What if only a few decades ago, somebody would have said that the future informational infrastructure of humanity would not be controlled by any political body and would be run by an weird mixture of associations, working groups, and companies? Who could have imagined the spread of mobile phone in African countries, the development of Internet centres in Brazilian favelas, the activity of bloggers during the Iranian protest or the Iraqi war?

While we need to respect and promote the so-called generativity of the Internet, namely, the fact in its open environment new ideas, technologies, ways of interacting emerge though accumulation of free individual initiatives (Zittrain 1994), some governance is needed. Addressing the issues of the information society requires the integration of different legal measures (concerning issues such as data protection, security, electronic commerce, electronic documents, etc.), as well as appropriate public policies (addressing economical, political, social, educational issues), combined with self-regulation by the involved social actors and groups of them. Here I shall focus on an aspect having a limited, but not unimportant scope, that is, *human rights*. Human rights are important since they provide us with a framework for articulating some basic normative structures for the governance of the information society, in the awareness of the human values at stake. It is true, authoritative formulations, doctrinal developments and social understanding of human rights cannot provide us with a complete regulatory framework: economical e technological consideration must be taken into account, while legal traditions, and political choices play a decisive role in many regards (even with regard to the very understanding of human rights and their balance). However, the human-rights discourse still play an important role: it identifies some basic fundamental needs and entitlements, it links our understanding of such needs and entitlements to successes and failures of human history, it enables us to provide a context for our analyses of the new issues emerging in the information society, linking such analyses to a rich background including legal cases as well as social, political and legal debates.

## 15.5 Specific Human Rights Involved

Even a superficial reading of the main human rights sources reveals that number of human rights are involved in the opportunities and risks of the information society. Here I shall only focus on the 1948 Universal Declaration of Human Rights, a few and I shall limit myself to some general considerations (for a detailed account of the connection between human rights and new technologies, see for instance Joergensen 2006; Klang and Murray 2005).

In article 1 of the Declaration ("All human beings are born free and equal in dignity and rights") we find two broadest (though most vague and controversial) rights, the right to freedom and the right to dignity. Freedom, broadly understood as the opportunity for self-determination, and dignity, broadly understood as the opportunity to enjoy the consideration and respect that each human deserves, identify the fundamental, though largely undetermined, references for assessing the opportunities and risks above considered. These two rights provide background justifications for more specific rights, having a high and specific relevance in the information society, as the right to freedom of expression and the right to privacy. Freedom and dignity provide the deepest rationales for such specific rights, even though these rationales are often controversial, multifaceted, and pulling into opposite directions

(e.g. by exercising the freedom to collect information and express facts and views about other people, one may violate their privacy, whose protection, in its turn, may be a conditions for the freedom of action of the concerned people).

The combination of freedom and dignity may provide a reference (though a very partial and undetermined one) for approaching issues that go beyond specific individual rights and which can only be addressed though collective action, such as the need to provide virtual resources that enable multiple activities and engagements as well as the integration between the virtual and physical reality, so favouring human flourishing and commitment, rather than isolation and escape in virtual illusions.

The ideas of liberty and dignity are coupled with the further right mentioned in art. 2, the right to non discrimination ("Everyone is entitled to all the rights and freedoms … without distinction of any kind …"). This is relevant with regard to the exclusion from access to the Internet, when some groups or kinds of persons are differentially affected. It impinges also on limitation of access to informational resources, when this can increase the underprivileged status of communities and peoples. Non-discrimination can also sometimes justify (though this is highly controversial, and differently appreciated in different legal and political cultures) some limitations to other rights such as in particular freedom of expression, when used to incite to hatred and discrimination against particular groups or communities.

Art. 3 of the Declaration grants the right to the "Security of person" ("Everyone has the right to life, liberty and security of person"), which may be understood as covering not only the body of a person, and not only his "embodied" mind (what one has stored inside one's head), but also one's "extended mind," that it the computer memory where one has stored one's thoughts and memories, and the tools one uses for developing one's cognitive efforts, alone or with others. This is an idea that has been developed by epistemologists, philosophers and experts in cognitive science, which have observed how human cognition (and memory) does not take place only inside one's head, but requires interacting with external tools (see Clark and Chalmers 1998). It is true, there is nothing new in this idea (consider for instance how detainees in prisons or concentration camps could be hit by the prohibition to read, or to take notes), but in the information age we tend to work in symbiosis which automatic tools, so that interference with them is going to deprive us of a part of our mind, not only in a figured sense. In fact I shudder if I imagine that my computer and my backups were destroyed. I would lose all my work, the thoughts and projects I have stored, the links to people I know, etc. Besides the idea of security also the idea of property could be relevant in this connection, and the protection of property provided by art. 17 ("Everyone has the right to own property alone as well as in association with others").

Art. 12 of the Declaration sets out a cluster of rights particularly significant with regard to information technologies, that it the right to privacy, to correspondence, honour and reputation ("No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation"). Here one aspect of the right privacy broadly understood is at issue, i.e., informational privacy, understood as one's right to have control over information concerning oneself (the right that that this information is processed

only when needed for legitimate purpose, that one can assess it and control its accuracy, and so on), the right underlying data protection legislation. It has also been argued that this right can be assimilated to the "habeas corpus," i.e., the right to one's bodily integrity and freedom, since one has not only a physical dimension, but also an informational dimension. This is our "information shadow," i.e., the aura of data which accompanies each one of us and is constitutive of our social personality (determining how others see ourselves). In the information society our information shadows have become larger, thicker and more connected, as an increasing amount of personal information can be automatically captured, stored, linked, and processed in multiple ways. Information privacy is related through a complex web with other human rights, sometimes being in conflict with them (e.g. with the right to access and impart information) and sometimes, on the contrary, providing the background for their exercise (again, right not to be discriminated, to hold opinion, etc.). The right to communication (to the respect of correspondence) needs obviously to apply also to electronic correspondence, which has now almost completely substituted the traditional exchange of messages through paper. The right to reputation is also highly relevant, considering that today one's reputation can be interfered by publishing information on line, and how this information is going to be on accessible for ever, even if false or inaccurate, or no longer corresponding to the identity of the person.

Art. 19 of the Declaration addresses the relation between humans and information contents, by granting freedom of opinion, expression and access to information ("Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers"). The Internet has indeed expanded unprecedentedly our ability to express and transmit opinions, by enabling everyone to reach a universal audience through web pages, blogs, discussion groups, and other ways of delivering one's communications and intellectual creations. Recently the so-called web 2.0 has emerged, a new socio-technological framework where everyone can, and often does, contribute to the creation of online contents, expressing one's opinion and making it accessible to a universal audience. This expanded liberty has often been countered oppressive regimes, which have restricted this liberty for purpose of political control. More generally, however, this liberty has clashed with the limitations provided by art. 29 of the declaration, i.e., "the just requirements of morality, public order and the general welfare in a democratic society," or rather with the different ways in which these limitations are understood in different societies and by different people (consider for instance how limitations concerning pornography, glorification of violence and terrorist propaganda have been invoked against particular contents posted online).

The exercise of right to "receive and impart information" (art. 19) is hugely facilitated by the Internet, which allows costless universal distribution of information, as well by computer technologies for producing digital contents. Similarly the right to participate in culture and science (art. 27: "Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits"), is supported by ICTs, which facilitate

access to existing intellectual and artistic contents, as well as the creation of new contents to an unprecedented level.

By enabling the reproduction and the modification of existing content, ICTs interfere with the rights of authors and inventors (art. 27: "Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author"). In particular there is a tension between participation in culture and exclusive copyright, namely, the entitlement currently attributed to authors to authorise duplication and distribution of their works (though copyright is not mentioned in the Universal declaration, and many have observed that its current regulation fails to protect adequately the rights of authors). How to enable the widest access to digital contents (software, texts, music) and the widest opportunities for creation (also reusing and modifying contents produced by others) while recognising the rights of the authors (and the role of cultural industry) still is a very controversial issue. Many interesting initiatives, such as open source software, and creative common licences show that innovative ways are possible to promote access and enhance participatory aspects. It should be noted in this regard, that besides the tension between copyright and access to culture, there is a conflict that is intrinsic to copyright itself. This is related to the authors' exclusive right over the modified versions of their works, which may impede others from exercising their creativity in elaborating and developing preexisting work (Lessig 2008). Similar considerations also apply to the right to education (art. 26).

The Internet is also having an impact on political participation (art. 21: "Everyone has the right to take part in the government of his country, directly or through freely chosen representatives"), providing new form of political communication between citizens, with their representatives and with the administration, new opportunities for civic engagement and participation. Even though results in e-democracy are so far limited and often disappointing, there are solid hopes for an increased informed participation of citizens to political and social debates and to legislative and regulatory procedures. In fact, the Internet, coupled with various technologies for producing and delivering contents and for social networking enables everyone to communicate his or her view and interact with others. The political arena has been so enriched by discussion forums, blogs, and interactive debates and comments. Where political debate and communication are constrained by repressive Government, the Internet and various ICTs (such as web sites blogs, and social networks, encryption methods for secrete communications and hacking techniques for overcoming informational barriers and monitoring governmental activities) have enabled citizens to exercise at least partially their rights to know about Governmental behaviour, to comment, diffuse criticisms, and build political action. However, as it has often been observed, new technologies also allow more intense political control over the Internet for curbing oppositions and restricting communications (web sites can be closed, Internet traffic can be filtered, on-line behaviour can be monitored, etc.).

The Internet and ICTs produce various impacts on other rights and dimensions of them, such as the right to work (Art. 23): ICTs create new jobs, but make many traditional work activities redundant, undermining the lives of those practicing them;

they enhance human creativity and productivity, but also enable new forms of monitoring and control endangering workers' freedom. Similarly, ICTs facilitate cultural, technological and economic development, by enabling a costless world-wide distribution of knowledge and a borderless articulation of productive activities, but also create new dependencies from the owners of the relevant technologies and infrastructures (this dependencies, however, are alleviated for the broad availability of open source software and digital resources, and by the decreasing cost of development tools). Also with regard to the protection of minorities, ICTs may provide a significant contribution: by facilitation the production and distribution of knowledge, as well as the creation of social networks, they enable ethnic, cultural or social minorities to articulate their language and self-understanding. This is indeed happening in Internet domain, where rather than the feared cultural homogenisation, we are seeing an increasing diversity of linguistic and cultural expressions.

In the circumstances of the information societies, human rights may be in conflict. Here I shall only mention a few cases which show the difficult and controversial choices involved in adjudicating such conflicts.

The case Eldred v. Ashcroft, decided by the US Supreme Court in 2003, concerned the legislative extension of copyright from 50 to 70 years after the death of the author, i.e., a conflict between intellectual property (the rights of authors and cultural industry) and participation in culture. The Court decided in favour intellectual property (or in favour of the political autonomy of the legislator), arguing that "Beneath the facade of their inventive constitutional interpretation, petitioners forcefully urge that Congress pursued very bad policy … The wisdom of Congress's action, however, is not within our province to second guess."

In the Marper v. UK decision of the European Human Rights Court (2008), concerning genetic samples collected during police investigation (samples which provide data to be processed through ICTs), the conflict between information privacy and security was at issue. The Court decided in favour of privacy, by concluding that such samples could not be kept for an indefinite time, after the concerned person was acquitted.

The conflict between freedom of speech and non-discrimination has been at the core of various recent judicial decisions such as Warman v. Kulbashian decided in 2007 by the Canadian Human Rights Tribunal, concerning the diffusion of hate-contents through the Internet. In this case the conflict between freedom of speech v. non-discrimination was decided in favours of the latter, and the Tribunal ordered the accused to cease and desist from communicating or causing to be communicated through the Internet, any matter "that is likely to expose a person or persons to hatred or contempt by reason of the fact that the person or persons are identifiable on the basis of a prohibited ground of discrimination."

Finally, the Phorm case (Commission v. UK), now pending in front of the European Court of Justice concerns tracking and monitoring Internet users (without their explicit consent) in order to send individualised advertising. The EU Commission has referred the case to the EU judges considering that this conflict between citizen's and economic rights of advertisers should be decided in favour of the first, according to EU law.

## 15.6 ICTs and the Concepts of a Human Right

In the above section the connection between human rights and ICTs has been addressed in general "political" terms, without considering the strictly legal dimension of such rights, namely, the extent to which they provide justiciable constraints over public and private action. I believe that indeed a merely legalistic understanding of such rights would fail to grasp their relevance as moral and political guidelines for a humanistic information society, for realising the opportunities indicated in Sect. 15.2 while avoiding the risks mentioned in Sect. 15.3. On this point I will follow Sen (2004) who argues that human rights are primarily ethical demands, concerning human freedoms or opportunities which satisfy some "threshold conditions," with regard to their importance for the concerned individuals and their social influenceability. According to this author human rights may generate different kinds of obligations. Firstly such obligations may be only moral or also legal. Secondly they may have different degrees of stringency: in Kantian terms they may be imperfect duties, i.e., duties to consider the right in deliberation, or perfect duties, i.e., duty to perform certain actions or omissions (this distinction corresponds to Alexy's 2002 distinction between rules and principles or to the distinction between action-duties and goal-duties in Sartor 2010). By adopting Sen's idea of a human rights, we can understand how ICTs not only provide new ways of satisfying human rights or of interfering with them, but they also contribute to the very existence of certain human rights or at least to the identification of their content. ICTs themselves can sometimes transform a mere human opportunity into a moral human right, in two complementary ways: by endowing a certain human opportunity with importance and making it socially influenceable.

Let us consider, for instance, the right to have access to the Internet under fair conditions. It seems to me that this right indeed satisfies the condition for it to be at least a moral human right. Firstly, this right concerns a liberty or opportunity greatly important for each individual, i.e., participating in the network that unifies humanity and provides unique opportunities for information, communication, and participation. Obviously, the importance of this opportunity does not pre-exist the Internet, but it is constituted by the Internet itself: according to the so-called network effect, the value of a network for its participants increases (in an accelerated way) as the number of participants increases. When the Internet has reached billions of people, embracing a larger set of contents and providing for a broader set of opportunities to communicate and publish to everybody, being able to access the net has become greatly important for each human being, and being excluded from it appears to be an unacceptable discrimination. Secondly, the recent technological evolution has made the realisation of this right socially influenceable, with a moderate effort, in all parts of the world: now that the web has spread over the whole earth and the costs for cables, machinery and software have gone down, we really have the means for giving everybody the opportunity of enjoying Internet access. The moral obligation for the realisation of this right would fall upon the State whose citizens need access, but also other States, organisations, and individuals would have an obligation to contribute and support its realisation.

Let us now consider whether this right may be considered just a moral right or whether it is a legal right, and a legal right "de lege lata," that should already today influence institutional decision-making, rather than only a right "de lege ferenda," i.e., something we would like to make legal through future legal instruments. I think that in this regard one has to distinguish the negative dimension of this rights, namely its protection through an obligation not to impede Internet access, and its positive dimension, namely, its protection through the obligation to provide the means for access (to those who are unable to obtain them). With regard to negative dimension one could argue for the existence of a perfect and enforceable obligation: forcefully excluding somebody from the Internet would amount to depriving him or her the most effective way to participate in culture, and express opinion (and exercise other fundamental liberties, such as the liberty of association, political liberty, etc.). The issue has recently emerged not only when the use of the Internet for political criticism has been met with repression (as in China, and in some countries in Northern Africa and in the Middle East), but also when exclusion from the Internet has been imposed as a sanction against repeated copyright violation (as in French and British legislation).

With regard to the positive dimension of the right, ensuring the means for universal Internet access may be viewed as an imperfect obligation upon States, namely, as a goal that needs to be duly taken into account in political decision-making (alongside with other goals, in the opportunity space determined by the available resources). Failure to take it in consideration, giving it the importance it deserves, still involves an unacceptable human rights violation (though the discretion of the legislature in articulating and prioritising human rights should be duly considered).

Similar considerations on how ICTs contribute to constitute new human rights or new dimensions of them can be developed for other human rights but these will be left to future investigation.

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# Subject Index



C. Corradetti (ed.), *Philosophical Dimensions of Human Rights: Some Contemporary Views*, DOI 10.1007/978-94-007-2376-4,