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# In Defense of Soft Universalism –a Modest, yet Presumptuous Position

## 1. HUMAN RIGHTS ARE NECESSARILY UNIVERSAL

The genius of the human rights concept is the idea of universality. Human rights are for all human beings in contradistinction to most other types of law that pertain to particular groups, often but not necessarily national groups. Thus, the rights prescribed by a national constitution pertain to citizens of that particular state and to some extent to persons who in one way or the other have a relation to that particular state (residents, visitors etc.). But constitutional rights do not pertain to everybody, to all human beings but only to a limited group. Constitutional rights are general in the sense that they pertain to all persons of the group without distinction as to birth, color etc., but they are not universal in the sense that they pertain to all human beings. While States have limited jurisdiction, human rights do not.

Conceived in this way, the 1948 Universal Declaration of Human Rights was the first genuine human rights declaration. The French Declaration of 1789 was only partly universal as it was meant as a declaration of the rights of man, but in fact limited to French citizens, hence its title: «Déclaration des droits de l'homme et du citoyen». In order to be included in the 1789 human rights protection one had to be French. In practice, there was an attempt to overcome the dichotomy between the particularity, being French, and the universality, being human with human rights, via the French conquest of most of continental Europe and Northern Africa, which could be seen as an attempt to bring civilization to the uncivilized in the form of general rights and modern law. However, the French troops were not mainly seen as the providers of general rights, but rather as foreign conquerors, or in other words, as troops representing one particular nation. Conceived in this way, the French Declaration was not truly universal, but depicted what could be labeled a local or particular universality, an abortive attempt of universality.

Genuine human rights must be for all human beings, otherwise they are not *human* rights but rather French rights, Danish rights etc. If rights are not for all,

they are neither universal nor human rights. [1] This necessary component of human rights does not say much as regards the content of human rights, nor does it imply that the Universal Declaration of Human Rights contains the only possible list of universal human rights. However, art. 2(1) of the Declaration has some naturalness to it:

> «Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.»

If rights are to be genuinely human rights, it does not make much sense to claim that the rights are only for Aryans, whites, males, speakers of Indo-European languages, Christians, liberals, French, high caste, rich, etc.

## 2. HUMAN BEINGS LIVE IN COMMUNITIES

Human beings are social beings, a species in which the individuals live in communities. This conception is by no means new, but it is corroborated and nuanced by anthropology and evolutionary psychology. Since the origin of the human species, we have lived in groups, in communities, similar to other species such as ants, wolves and lions and in contradistinction to sea turtles, tigers and polar bears. It is probably an evolutionary developed capability, a *strategy* for survival, not of course as a conscious policy by our forefathers, but as a means of survival. «The small strength and speed of man, his want of natural weapons, etc., are more than counterbalanced by his […] social qualities, which lead him to give and receive aid from his fellow-men», as Darwin put it. [2] This development is contingent in the sense that a species does not require social capabilities in order to survive –e.g. crocodiles are one of the longest existing species, more than 300 millions of years, without any particularly well developed community capacity, but with other talents. The fact that living in communities is a natural trait of human beings does not imply necessity, merely that this is the way this species has developed. Our biology is developed and organized in such a way that we are very apt at living in communities, we can communicate rather ingeniously, and we have a sense of reciprocity and a sense of the common good, by no means perfect, but it is conspicuous compared to, e.g., crocodiles. [3] This community capability, or to frame it stronger, this community necessity, does not imply that we cannot live as Robinson Crusoe for some time, but only that this is an exception and only possible because of the communally developed skills and talents. It does not imply,

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1 Jack Donnelly labels this «conceptual universalism». See «The Relative Universality of Human Rights», *Human Rights Quarterly* Vol. 29 (2007), pp. 281-306.

2 Charles Darwin: *The Descent of Man*, orig. 1871, here cited from Martin A. Nowak & Robert M. May: «The Arithmetics of Mutual Help», *Scientific American*, Issue 6 (1995), p. 76.

3 Frans de Waal: *Primates and Philosophers. How Morality Evolved,* Princeton University Press, Princeton, NJ, 2006.

either, that we have no sense of individuality, on the contrary. Human beings have developed individuality precisely because of our community life. Polar bears do not need a particularly strong sense of individuality, whereas gregarious species may develop this capacity. Chimpanzees, elephants and maybe dolphins have the capacity to recognize *themselves* in a mirror, and human beings have developed this sense of the self to a very intricate level.

The community is a prerequisite for language, judgments, truth, norms, law and even rights. It appears to be obvious that language presupposes a community, but also our capacity of judging has a social element:

> «Zur Verständigung durch die Sprache gehört nicht nur eine Übereinstimmung in den den Definitionen, sondern (so seltsam dies klingen mag) eine Übereinstimmung in den Urteilen.» [4]

Please note that Wittgenstein is not talking of total agreement. It is, of course, possible to disagree, but the option of disagreeing presupposes agreements on some points. Similarly, Charles S. Peirce has pointed to the fact that *truth* requires a community, not in the sense that the community is the supreme arbiter of truth, but in the sense that *truth* only functions in a community. [5]

It is important to note that whereas living in communities is a natural condition for human beings, the particular community to which the individual belongs is not natural, even though it may be conceived as such by the participants. An individual is always thrown into a particular group, [6] the individual cannot choose in which culture s/he is born, which language s/he will have as her/his mother tongue, which norms s/he will be socialized into, etc. At a later stage the individual has a choice of her/his own, but then the individual already has internalized the norms of the first society to some extent. To put the point differently: Generally, human beings are living in communities, but different individuals may belong to different communities, including families, tribes, peoples, nations, etc.

Finally, it is important to note that human beings have the capacity to live in more than one community, and as a matter of fact will always live in at least two communities, the family, in whatever way the family is constituted, and the larger society.

As for human rights and the universality of human rights this indicates *firstly* that there must be a community relevant for human rights, and this is of course, mankind (see below on the emerging global community). *Secondly*, it is important

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4 Ludwig Wittgenstein: *Philosophische Untersuchungen*, Suhrkamp, Berlin, 1977 (orig. 1953), § 242, p. 139.

5 Charles Sanders Peirce: «Consequences of Four Incapacities», in Charles Hartshorne, Paul Weiss & Arthur Burks (eds.): *Collected Papers of Charles Sanders Peirce*, Harvard University Press, Cambridge, Ma., 1931-1958, vol. 5, § 311 (orig. 1893).

6 Martin Heidegger uses the term «*Geworfenheit*», in *Sein und Zeit*, Max Niemeyer Verlag, 1967 (orig. 1924), p. 175.

to distinguish suitable norms of the larger community from norms and law of a particular community, norms and laws that may be perceived of as natural by the participants (see below on the dangers of parochial universalism).

## 3. HUMAN COMMUNITIES ARE NORM GENERATING

Thus, human beings are highly social in contradistinction to species such as oysters and tigers, and in order to be able to interact, norms are necessary; everywhere where human beings interact, norms emerge or are used as a necessary means of communication and a necessary component of social life. By means of social norms human beings can get married (as opposed to just mating) and rent a flat for a home or get a loan to buy one themselves or whatever the norms regulate as for having a home.

Other social species, such as wolves and monkeys, also have norms, but human beings are probably the only ones being able to mould their own, to make deliberate and conscious decisions as to how their norms should look like. This capacity is not unlimited –as most legal positivists tend to believe– but the limits are unknown. Human beings cannot make *any* decision as regards their own norms, because neither human beings themselves nor the surrounding world are totally plastic. As Hart pointed out in his *The Concept of Law*, there seems to be a minimum content of natural law: Human beings have a certain nature, e.g. we can kill each other in opposition to giraffes that cannot, and consequently we have norms relating to this capacity. Apparently we cannot decide *not* to have norms regarding the killings of other human beings, although of course the norms may differ in content. Likewise we cannot avoid having norms regarding protection of property and protection of promises, even though, of course, the particular content of the norms may differ considerably. [7]

My point here is that human beings are a highly social species that cannot avoid having norms and that to a large –but not unlimited– degree can mould their norms. No norms is not an option, absolute pre-fixed norms are not the case (as natural rights theorists tend to claim), but neither are we able totally to mould our norms (as most legal positivists tend to claim).

This point has bearings on the conception of human rights: As an emerging global community is a fact (see further below), emerging global norms will inevitably follow. The content of the norms, however, does not follow, and one could imagine all sorts of norms, including norms allowing some groups taking other groups as slaves, a prevailing practice during the 16th, 17th and 18th centuries.

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7 H. L. A. Hart: *The Concept of Law*, Clarendon Press, Oxford, 1961. I have some queries about Hart's more detailed elaboration of this «minimum content of natural law». Presently, it suffices to point to the facts *that* human beings can mould their laws and *that* the nature, including the nature of the species may set some limits, although the limits are not easily discoverable.

Human rights are, seen in this perspective, an attempt to more consciously frame the norms of the emerging community of mankind.

## 4. HUMAN BEINGS HAVE RIGHTS HANDLING CAPACITY

Studies in primate behavior suggest that primates such as chimpanzees and bonobos engage a concept of *right* in their social life, in contradistinction to other animals including monkeys such as baboons and macaques. When a favorite food item is introduced among monkeys, the strongest member of the group will appropriate whatever it wants, leaving room for the second when it is satisfied. For monkeys right equals might. Chimpanzees and bonobos, however, react differently. The finder is conceived as the rightful owner, and the others, including the alpha strong male, must ask for permission to get a share. The ones interested in the food must beg or ask for food and often food will be exchanged, maybe for a counter payment (among the bonobos often a sexual favor), maybe because of a previous favor or maybe for other reasons. The important fact here is that for chimpanzees and bonobos, right does *not* equal might. These apes have developed a more complex social life, enabling them to work together in a much more sophisticated way than other animals. [8]

My point here, of course, is that human beings, being closer to chimpanzees than any other non human species, have a capacity for engaging *rights* in their social life and that this capacity enables us to create far more complex social relations including the possibility to buy washing machines and having third parties such as courts to deal with frictions and conflicts, unavoidable in a close society such as human societies.

I am *not* arguing that human rights are a natural feature of human beings. What I argue here is that human beings have a capacity of engaging the concept of right –an apparently evolutionary developed capacity enabling us to have highly complex social interaction– and that universal human rights are an attempt to use our rights managing capacity in order to create a better life, just as our technical capacities have enabled us to create refrigerators, bicycles, wheel chairs, etc. in order to improve our lives in other aspects of life.

As for the content of human rights, this point does not pinpoint exactly which rights ought to be part of a universal human rights regime, and it does not imply that the rights as listed in the Universal Declaration and subsequent conventions and treaties are the only possible human rights, let alone the best rights. However, it does point to the interesting fact that the notion of «right» is not a purely cultural phenomenon, in contradistinction to the claim that «right» is of Western origin (whatever Western may mean). Rather, the handling of rights

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8 Frans de Waal: *Primates and Philosophers*…, cit.; Henrik Høgh-Olesen: «Offerets grundform – deling og socialitet hos mennesket og de øvrige primater [The Primary Form of Offering. Sharing and Sociality among Human Beings and Other Primates]», *Forum for Antropologisk Psykologi* [Institute of Psychology, Aarhus University] No. 14 (2004), pp. 6-36.

seems to be a human capacity, which then, of course, can be employed differently and in fact has been employed in many different, culturally developed ways.

## 5. THE EMERGENCE OF A GLOBAL SOCIETY

One idea of the relativist position such as the one propounded by the American Anthropological Association in 1947 [9] is that law and rights necessarily are related to culture and that it is nonsense to engage the concept of rights as if it did not have connection to a specific human society. Rights are within a specific community and within a specific culture, not without. This is correct in the sense that human beings are not isolated individuals as noted above and that we are always born into a society with already existing laws and norms. But the statement is wrong, *firstly* because human beings have the capacity of criticizing and eventually changing traditions of the society. After all, the *witch hunt* of many European countries was abandoned because of internal criticism. *Secondly*, we are not forever doomed to live in the society in which we were born –quite obvious in the case of the United States of America which has to a very large extent been made up of people who left their own country, including parts of its culture, language, norms and laws, in order to enter into and create a new one. *Thirdly*, the relativist position does not take the emerging global culture, the emerging global community into consideration. Before 1492 it made little sense to talk about a global community, even though it was possible in the abstract. Large parts of human societies were cut off from each other and there was no global culture but a number of sometimes very isolated cultures. However, after 1492, the age of «discoveries» and the continuous improvements of transportation and communication technologies, there are no isolated cultures any more, all cultures are linked to other cultures and larger settings in various ways, and simultaneously a global culture is slowly emerging. We trade, invest and communicate across the globe and across the cultures as never before. Personally I became aware of this point when I in 1991 wanted to do some legal anthropology in Chiapas, Mexico. We visited some very remotely located people way out in the mountains, and they were linked to the global market –and as a consequence to global culture– by means of their producing an internationally traded commodity, coffee. They were in some sense isolated, but on the other hand deeply dependent on global norms, trade norms, custom rates, finance regulations etc.

Thus the relativists presume, rightly, that law is connected to culture, but, wrongly, that cultures exist as isolated phenomena and that they exist as unchangeable givens. Presently cultures exist in interaction with other cultures, human beings can rather easily belong to or participate in more than one culture, in more than one normative setting, and human beings can criticize parts of their own or of other cultures by ways of comparison or by other criteria.

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9 «Statement of Human Rights», *American Anthropologist* Vol. 49, No. 4 (1947), pp. 539-543.

Conceived this way human rights and human rights law are an attempt more consciously to frame the necessarily common norms that would emerge anyway, but now, by way of human rights, can be framed in a more beneficial way, at least to some extent.

## 6. HUMAN RIGHTS LAW AS TRAFFIC LAW

Cars are smart. They are decentralized means of transportation, highly practical in bringing people where they want to go and bringing goods from producers to consumers. But cars are also dangerous. They go fast, and they frequently run into people, killing them or maiming them seriously. They may also collectively create problems in terms of their emissions of carbon dioxides and the waste created when discharged. So what we can do is to try to curtail the use of cars, to improve their environmental standards etc. In short, we may try to get the best out of them and avoid the worst.

States are also smart. They can organize human life in such a specialized way that we have schools, hospitals, supermarkets, judges, etc., all of which –maybe to a varying degree– make our lives better than it could be without the state. When human beings were living in small bands of people hunting game and gathering fruits, life was much harder, the child mortality rate was much higher, and so was the mortality rate of birth giving mothers, and the average life span was conspicuously shorter. (I am not arguing that we are necessarily more happy. I am merely pointing to the fact that living within a state structure has in most cases resulted in longer lives, lower child mortality rates, etc.).

But, like cars, states are also dangerous. Once we have a police with a good organization, with guns and cells, they are dangerous. They may beat you, maim you or even kill you. But they are also very practical, a necessary part of the state. So we have to curtail their use of power, to improve their skills of preventing crimes and detecting crimes, to prevent their abuse of power. The same goes for armies. They are smart in the sense that they can protect us from violent and destructive attacks, but they are also dangerous, as their mere presence may entice others to make attacks and they may even be dangerous for ourselves when the military somehow uses their means of power to serve their own interest.

Just as we can try to regulate the use of cars, we can try to regulate the use of police, of armies and other humanly created institutions. And one way of regulating is by means of human rights as the problems relate to all humans, not only a specific group, and as particular states are evidently insufficient to deal with those kinds of problems.

Seen in this way, human rights are not a pre-existing set of rights that we only have to discover. Rather, human rights, when made into law, are an attempt to cope with existing and emerging problems. As Oliver Wendell Holmes put it:

«The life of the law has not been logic, it has been experience», [10] and the same goes for human rights law. It is not a question of logic or deduction from eternal principles, but a question of coping with reality, taking experience into consideration, experience which includes European slave trade, Nazi *Endlösung*, Soviet *Gulag*, some states' unwillingness or incapacity to provide the citizens with basic requirements such as housing, schools etc.

Human rights are thus an attempt by human beings to improve certain important norms in order to improve the lives of human beings. The attempt is definitely not perfect as it is only a human enterprise, and it is (or ought to be) open for future improvements. But it is an impressive attempt. The Universal Declaration of Human Rights contains most, if not all, necessary basic rights for individuals, it has few less convincing rights (such as the right to holiday with pay, art. 24, a right that incorrectly presupposes that all humans are wage laborers) and it strikes a fair balance between individual rights and the necessary protection of the group (bearing in mind that the protection of individuals will often contribute to the common good rather than threaten it). [11]

## 7. THE DANGER OF PAROCHIAL UNIVERSALISM

The claim for universality is inherently dangerous because human beings seem to have a built-in propensity for unwarranted generalizations, especially taking one's own culture, law, language etc. as the prototype, not realizing the particularity of one's own affiliation. Thus, to the Greeks non-Greeks were «barbarians» because they spoke incomprehensible languages which sounded just like «blabla», the mistake, of course, being that *any* language may sound as «blabla», the Greeks not realizing that they themselves spoke just one particular version of «blabla». In many Bantu languages, the word similar to human beings is «*antu*», a word only used in reference to blacks, whereas white people are «*asungu*». And in 1789 the French thought it universal to be French.

It is therefore essential that rights –or any other human phenomenon– which claim to be of universal application are scrutinized carefully in order to establish what is truly universal and what is rather contingent particularities, and –more importantly– in order to be able to make norms and regulations that are truly of general interest and application and not merely needs and interests of particular cultures and societies.

This necessary cautiousness is even more needed as human beings apparently also have a propensity to guise particular interests as general benefits,

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10 Oliver Wendell Holmes: *The Common Law*, Little, Brown & Co., 1881 (here cited from *http://biotech.law.lsu.edu/books/holmes/claw03.htm* Louisiana State University website with an upload of the text).

11 See Sten Schaumburg-Müller, «The Uneasy Balance Between Individual Rights and the Necessity of Communities», in Stephanie Lagoutte, Hans-Otto Sano & Peter Scharff Smith (eds.), *Human Rights in Turmoil*, Martinus Nijhoff Publishers, Leiden, 2007, pp. 71-96.

thus risking creating double standards. Colonialism, an inseparable part of the history of the emerging global society, was not primarily an enterprise consisting in bringing civilization to the uncivilized, but much more an enterprise of securing own material interests. Not surprisingly, there is scepticism towards human rights as yet another invention, created to serve particular rather than universal interests.

It is therefore paramount that proponents of human rights acknowledge this inherent danger, and it is paramount that we find ways to include all relevant experience in the deliberations.

I therefore contend that in order better to be able to mould necessary global norms such as universal human rights we need to be soft universalists, *universalists* as we are dealing with all human beings without distinctions, and *soft* as we have to realize that what we conceive of as universal may in fact be mere particularities, the difficult task of course being to find out and to agree on which norms are truly universal and which are not, a difficult enterprise as human beings are prone to defend their own interests, if possible disguised as general interests.

## 8. «SOFT UNIVERSALISM» –SOFT ON WHAT?

«Soft universalism» is soft in at least three ways. *Firstly*, it is soft in regard to the necessity of pluralism, of non-universalism. Human beings are different, and there are often different ways of doing things. Sometimes it may be a matter of doing it one way or the other (as with languages, it is not more correct to speak English than to speak Icelandic, only sometimes it may be more practical), which implies that universal solutions to a variety of issues may not be available. Often times, of course, some solutions are better than others, and yet there may not be one single right answer, but better and worse answers. The right to democracy as stipulated in art. 21(1) of the Universal Declaration, [12] may be implemented in various ways of voting, some of them may arguably be better than others, but obviously no final single way of carrying through elections has been agreed upon or may be agreed upon. This does not equal *anything goes*, but it does imply that there may be more than one good answer to fulfil this particular human rights obligation. «Soft universalism» is in this way not the second best, but the only possible option as we cannot reach the ideal. Rather, «soft universalism» is to be preferred exactly because it contains the option of pluralism.

*Secondly*, «soft universalism» is soft even as regards the core of the universal. We do not know for dead sure what is universal. Rather, universal human rights are suggestions, made in order to improve human conditions (cf. above the comparison with traffic law), and there is no way that we can foresee future knowledge and future experience which may one way or the other change

12 «Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.»

the content of the universal. Philosophers like John Locke have definitely contributed to the progress of human rights even though we now know that he got some basics wrong, such as the idea of the pre-societal individual and the pre-fixed rights. Likewise, future science may provide knowledge relevant for the content of human rights, and future experience may require the international bill of rights to be amended. (One may argue that this is the case as regards environment and climate change). To put it another way: Human knowledge and human endeavor are fallible, [13] and we have no reason to believe that at this particular moment in history we have managed to find an eternal, unchangeable truth.

*Thirdly*, «soft universalism» is soft as there is no solid foundation, no hard ground. «We do not have or need a firm foundation: we are on swampy grounds, but that is what keeps us moving», as Peirce put it. [14] Human rights do not have a firm foundation, and attempts to establish the firm ground are futile and potentially undermining the very universality that it claims to support. Foundation is an obsession among certain types of philosophy, [15] and it leads astray as it is focusing on insolvable *Letztbegründungsfragen* rather than more practical philosophical, moral and legal problems of the day. Besides –and this may be the most important point– agreeing on a foundation will be much more difficult than agreeing on the more practical side (which is difficult indeed). In fact, there is no agreement as to the foundation of human rights. Various contenders will forward different and irreconcilable suggestions: reason, human nature, European civilization, Christian faith, Muslim faith, [16] etc., whereas to a large extent there is agreement on the basic human rights as forwarded in the Universal Declaration and many of the succeeding conventions. As a matter of fact, the Universal Declaration does *not* elicit any foundation in contradistinction to earlier more local versions such as the US Declaration of Independence of 1776 and the French 1789 Declaration, and the present argument claims that this is no shortcoming; on the contrary it is a strength.

«Soft universalism», however, is *not* soft on relativism. It is true that human beings differ and hold differing views, and it is true that different human societies have somewhat differing traditions, values, laws, morals, etc. These differences are what leads to the «soft universalism» which claims –*contra* the relativists– that human beings are also alike, we share the same biological traits, we can communicate if we make an effort, we can learn and even appreciate other

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13 This is a basic tenet of pragmatism as presented by Charles Sanders Peirce, John Dewey and others.

14 Hilary Putnam cites Charles S. Peirce in *The Collapse of the Fact/Value Dichotomy and Other Essays*, Harvard University Press, Cambridge, Ma., 2002, p. 102.

15 «Ethical theory […] has been singularly hypnotized by the notion that its business is to discover some final end or good or some ultimate and supreme law» (John Dewey: *Reconstruction in Philosophy*, Beacon Press, enlarged ed., 1948, [1st edition 1920] p. 161).

16 Cf. The Arab Charter of Human Rights, in force 15 March 2008. The introductory words of the preamble goes: «Based on the faith of the Arab nation in the dignity of the human person whom God has exalted …»

cultures, *mores,* traditions etc., and we are, whether we like it or not, presently living in a world interconnected in all sorts of ways, trade, finance, pollution, climate etc. Therefore we need universal, common norms, common laws, as in any other case of communicating and interacting, and human rights constitute a part of these shared norms. (Another ingredient and at least as important are international trade norms). [17]

## 9. SOFT UNIVERSALISM IN PREVAILING HUMAN RIGHTS LAW

«Soft universalism» is pretty much in line with prevailing international human rights law. [18] Please note that I am not claiming that «soft universalism» is the only possible position, let alone the position expressed by prevailing law. All I am contending is that «soft universalism» coheres with prevailing law. The Vienna Declaration p. 5 states:

> «While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.» [19]

And this is not, as I see it, a bowing of principles but rather better principles than hard universalism. Admittedly, the wording as to the *softness* and on what points the significance of particularities should be taken into consideration is not clear (see also below regarding unsolved problems). But the idea of accommodating pluralism within human rights is indispensable.

Besides, the idea of having global as well as regional (and national) regulation of human rights adds to the idea that human rights are not monolithic, but rather a type of multilayered law. Obviously, the idea of having global as well as regional and national regulation is not only a question of enforcement, but also a question of the relatively smaller entities being in a better position to assess exactly how the more general principles best are carried through. Having several actors, including several actors on the same level, obviously leads to some flexibility. With different actors, there is room for some variation in the implementation, interpretation and priorities, although of course the freedom is not unlimited.

Even the content of the human rights themselves points in the direction of «soft universalism». Human rights are not *one* value, but involve several values not always pointing in the same direction. The right to security may clash with some

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17 Thomas Cottier: «Multilayered Governance, Pluralism and Moral Conflict», *Indiana Journal of Global Legal Studies* Vol. 16, Issue 2 (2009), pp. 647-679.

18 Jack Donnelly speaks of «international legal universalism» in «The Relative Universality of Human Rights», cit. This universalism is –according to my judgment– also soft.

19 Vienna Declaration and Programme of Action, World Conference on Human Rights, Vienna, 14-25 June 1993, U.N. Doc. A/CONF.157/24 (Part I) at 20 (1993).

procedural and due process rights, freedom of speech may clash with the right to privacy, and the providing of health, schooling and minimum living standards involves making priorities, and no country or other entity is able to provide a full blown, impeccable human rights catalogue.

## 10. POSITIONING THE POSITION

«Soft universalism» is not liberal. It rejects the *Lockean* idea of pre-existing individuals with pre-set rights, although it does not reject the idea of endowing individuals with rights *vis-à-vis* strong communities such as states, as this seems to be beneficiary to the individuals as well as to the societies. It also rejects Kant's idea of a world republic of republics. [20] The ideal is not having the world structured into a universal frame, but rather to develop the abundance of existing frames and making all actors contribute to human rights protection and promotion.

In attempts to construct an area of agreement in a world of conflicting ideas and ideals, Rawls' notion of «overlapping consensus» [21] is often brought in, but I doubt whether it is appropriately applicable to the problem. If [22] «overlapping consensus» is to be understood as different comprehensive doctrines distinguishing religion, morals etc. from a smaller area of political basics, reserved for the overlapping consensus, I have my doubts. *Firstly*, the actual distinction between e.g. religion and politics is in itself part of a comprehensive doctrine. Thus, various forms of Christian Protestantism exactly make this distinction, and one can perceive the enlightenment as a continuation of the same story, only that religion is relegated into irrelevance. *Secondly*, I doubt whether it is possible to construct a totally overlapping consensus; rather I tend to think that there will be several overlapping consensuses with no core, some agreeing on some issues, others agreeing on others etc.

If, however, the idea of overlapping consensus is to be conceived in a more pragmatic way, taking into consideration that human beings, including human societies, are in fact able to cooperate on important issues even though they do not agree on central ideas, then the notion of overlapping consensus makes sense. But in that case we may not really need any elaborate theory of what constitutes the overlap.

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20 Immanuel Kant: *Zum ewigen Frieden*, US Library Association, 1932 (orig. 1795). Kant forwards the idea but finds it too idealistic and ambitious and ends up with a more moderate suggestion of a society of states built on hospitality as opposed to the then prevailing culture of conquest and colonisation.

21 John Rawls: *Political Liberalism*, Columbia University Press, New York, NY, 1993.

22 I am not thoroughly intimate with Rawls' ideas, and I may not get the details right.

I am also skeptical towards the idea of «the original position», [23] the constructed position behind the veil of ignorance, not knowing our own specific position in the world, but knowing almost everything else. Human beings are not in any original position, but in different factual positions. We all have a specific language (or a few languages) in which to express our ideas, we all have the traditions of our culture (or a few cultures) as important and to some extent hidden factors as regards our conception of the world and of our comprehensive doctrines etc. «The original position» is not much better than Locke's state of nature: It is a construct, containing some insights but not able to function as a convincing foundation of a philosophical or political system because it clashes with empirical facts. As with Rawls' other concepts, «the original position» may be understood in a less stringent way, as a way of expressing the human capability of putting oneself beyond one's immediate situation and one's immediate interests. Human beings in fact have this ability –even though it may be shaped by culture and personal experience– and this skill is a prerequisite for universal human rights. However, abstracting this skill form from other human skills and propensities does not constitute a convincing foundation of a philosophical or political system, either.

Finally, there is a whole range of objections to Rawls' *The Law of Peoples* [24] in which he purports to take his theory into the international realm: States are categorized in a haphazard way, there is a conflation of states and peoples; the idea that the internal affairs comes before the external situation between states and/or peoples is unfounded and not convincing. In Europe, one may reasonably argue, democracy and rights were developed *within* the state. However, other countries did not develop internal democracy and human rights, and Europe, besides developing these domestically, made sure it was not developed in many places of the world by way of colonialism. Also the *domestic analogy*, i.e. merely assuming that the same thing is going on at world level among states as on the state level among human beings, is questionable –which is in fact the same objection as to Kant's idea of a republic of republics.

Of course, Rawls is not the only liberalist, but it seems that there are basic assumptions in liberalism incompatible with the tenets of «soft universalism». This said, it should be noted that liberalism has played a role in promoting human rights and that liberalism still holds ideas important for human rights. The main point here is that liberalism does not equal human rights defense and that «soft universalism» is not merely another kind of liberalism.

Of course, «soft universalism» is not illiberal either, and it rejects the Heidegger/Huntington/AAA 1947 Statement's [25] implicit notion that human beings are forever doomed by their origin, forever tied to their specific indigenousness,

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23 From John Rawls: *A Theory of Justice*, The Belknap Press of Harvard University Press, Cambridge, Ma., 1971.

24 Harvard University Press, 1999.

25 Martin Heidegger: *Sein und Zeit*, cit.; Samuel Huntington: *The Clash of Civilizations and the Remaking of World Order*, Simon & Schuster, New York, NY, 1996.; «Statement of Human Rights», *American Anthropologist* Vol. 49, No. 4 (1947), pp. 539-543.

to their cultural *Heimat*. As with liberalism, the position (if it is allowable to categorize the three into one) has some important points and insights: Human beings are not only abstract, let alone rational beings, we are all without any choice whatsoever born into a culture with language, norms, laws etc., and clusters of countries or cultures can be grouped into larger «civilizations» that differ in terms of religions, values etc. However, human beings do have the capability to learn more than one language (albeit not all), get on in more than one culture, and even to leave the *Heimat* for possible greener pastures. In addition, we are biologically, i.e. by means of brain capacity, able to relate to our own situation, including criticizing and improving our own as well as other cultures, and we are able to get along with other people(s) without sharing comprehensive sets of values etc. Please note that I am by no means asserting that this is what actually happens, let alone something that will happen by necessity. But it is important to note that the clash of civilizations is not a necessity, either. The clash of civilizations is an option as well as the civilizations' cooperation.

## 11. WINDING UP – LEAVING PROBLEMS UNSOLVED

«Soft universalism» does not serve as a position from which answers to problems may easily be deduced, and definitely the present preliminary version needs further elaboration in order to be more practical as regards solving difficult questions in relation to human rights, such as how to handle incompatible conceptions and practices on the world level. At any rate, «soft universalism» is not a position that enables simple answers to complicated problems, it is rather a tool that may assist in avoiding at least some problems and some unacceptable answers. As Oliver Wendell Holmes put it: «General propositions do not decide concrete cases», [26] even though one may add that general propositions assist in reaching a solution by way of delimiting the problem, only it is important to be aware that they do not point out solutions in a singular fashion.

«Soft universalism» is to some extent also soft on answers. It does not solve the problem of humanitarian intervention –the question whether gross human rights violations should be dealt with by military force– and it does not solve the problem of how to deal with the present tension between freedom of speech and respect for religions. Even though «soft universalism» will not be able to provide precisely cut out answers, there is definitely room for further elaboration on the position in order to work out more suitable directions, frames and weights.

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26 *Lochner v New York* 198 US 45 (1905).