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## Human Rights in a Contemporary Society and European Values: Critique of Eurocentrism

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# HUMAN RIGHTS IN A CONTEMPORARY SOCIETY AND EUROPEAN VALUES: CRITIQUE OF EUROCENTRISM

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## DISCLOSURE

Many papers delivered by the Forum’s participants have either “provocative” titles (by “provocative” I mean its original Latin sense *provocare* – to excite curiosity, to raise a question) or question marks. It is a good academic tradition to express doubts or to avoid being too categorical. Following this tradition I would like to touch upon some questions that remain unanswered to me after the long years of my academic career and my activities as a European judge.

## INTRODUCTION

In his recent publication “Human Rights: Universality in Danger”, the French researcher and former Secretary-General of the National Consultative Commission on Human Rights Gérard Fellous begins his study with the following words: “*Les droits de l’homme pourraient disparaître au XXI siècle s’ils perdaient leur universalité*” (Human rights could disappear in the XXI century if they lose their universality).<sup>1</sup> At the same time the well-known Greek scholar Petros Pararas, honourable Vice President of the State Council of Greece, publishes in the very prestigious *Revue trimestrielle des droits de l’homme* a kind of manifesto entitled “*L’impossible universalité des droits de l’homme*” (The impossible universality of human rights) where he defends the idea that only the “human rights of the occidental type” could be genuine while human rights in the non-occidental world (especially in Muslim countries) have rather restricted significance.<sup>2</sup>

This denial of the universal values of human rights is not a new phenomenon. Suffice it to remind ourselves that during the adoption of the Universal Declaration of Human Rights of 1948 (UDHR) some countries, especially the Soviet bloc and Saudi Arabia, abstained from voting because they questioned the universal character of

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1 Fellous, G. (2010), *Les droits de l’homme: une universalité menacée*, Paris: La Documentation Française, p. 11.

2 Pararas, P. (2011), ‘L’impossible universalité des droits de l’homme’, *Revue trimestrielle des droits de l’homme*, no. 85, pp. 3–22.

some rights proclaimed by the Declaration. Since then at least three approaches to the questioning of the universal character of human rights have been developed.

Firstly, a demonstrative denouncement of the universal values of human rights as a product of Western philosophy. One can identify this in, for example, the famous expression “the West and the Rest” by the Singaporean Deputy Minister for Foreign Affairs M. Kishore Mahbubani during the UN Vienna Conference on Human Rights (1993)<sup>3</sup> where many representatives of the third world demonstrated their scepticism about “occidental values” expressed by the UDHR.

Secondly, one finds an instance of “American exceptionalism” in the interpretation of the global nature of the international mechanism of the protection of human rights: acceptance of the universalisation of American human rights values, but negation of the jurisdiction of international courts. The real distinction between the American way of law<sup>4</sup> and that of Europe impedes the universal judicial protection of human rights because of such competition between the models of jurisdiction. The resistance of Americans to the extension of the international judiciary is not only of a juridical but also, and perhaps first of all, of a political nature.

Thirdly, an emphasis on the Eurocentric conception of human rights as it is done by Mr. Pararas cited above calls into question a worldwide application of universal standards of human rights protection and opens the way for the justification of so-called cultural relativism. Robert Badinter replied to this tendency of “occidental cultural imperialism”: “*Nous admettons le caractère universel des droits de l'homme parce qu'il exprime l'unité fondamentale de l'espèce humaine: nous sommes tous des hommes*”<sup>5</sup>

So, the question is how to reconcile the universality of human rights with the legal and cultural pluralism of the modern world. What could be the specific role of “Old Europe”, the indisputable main source of ideas of human rights, when facing the challenges of the 21<sup>st</sup> century, challenges that endanger the application of international standards of human rights? To put it succinctly: how can “Old Europe” continue to be a recognised leader without being oppressively dominant?

## **IS THE UNIVERSAL DECLARATION STILL UNIVERSAL?**

The idea that certain basic rights should be universal is the achievement of thousands of years of human moral development. I agree with the qualification by William J. Talbott of universal moral norms as a kind of moral imperialism<sup>6</sup>, the only kind of

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3 Mahbubani, K. (1993), ‘The dangers of decadence. What the Rest can reach the West’, *Foreign Affairs*, Sept.–Oct., pp. 10–14.

4 See: Lewkowicz, G. (2008), ‘Droits de l’homme, droits du citoyen: les présupposés de la jurisprudence américaine et européenne’, in Allard et al. (2008), *Juger les droits de l’homme: Europe et Etats-Unis face à face*, Brussels: Bruylant, pp. 1–43.

5 Badinter, R. (1989), ‘L’universalité des droits de l’homme dans un monde pluraliste. Un résumé des faits et des idées’, *Revue universelle des droits de l’homme*, vol. 1, p. 2.

6 Talbott, W.J. (2005), *Which Rights Should Be Universal?*, Oxford: University Press, pp. 19–21.

imperialism that could be accepted. However, he notes that “Many people are reluctant even to entertain the possibility of universal moral claims, because they feel it is morally objectionable for anyone to extend their own moral judgments to different cultures or moral traditions. To do so smacks of moral imperialism. There are many historical examples of moral imperialism.”<sup>7</sup>

The Universal Declaration of Human Rights proclaimed some basic rights as infallible moral authority. Let me reproduce the wording of its Preamble:

“...Whereas Member States have pledged themselves to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms,  
Whereas a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge,  
Now, Therefore the General Assembly proclaims this UNIVERSAL DECLARATION OF HUMAN RIGHTS as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, 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, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.”

Certainly, the UDHR expressed a set of aspirations rather than a readily attainable reality. The Declaration to some extent crystallised centuries of struggle for rights, but at the same time initiated the process rather than represented its culmination. One of the legal consequences of the adoption of the Declaration was the implicit recognition of the international legal capacity of an individual, a real revolution in the theory and practice of international law, which is still hardly being digested by some scholars.<sup>8</sup>

Other conventions elaborated within the United Nations (for example, the Convention on the Political Rights of Women, 1953; International Convention on the Elimination of All Forms of Racial Discrimination, 1965; International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights, 1966; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984; Convention on the Rights of the Child, 1989; etc.) reinforce the universal application of standards provided by the UDHR, and the Vienna Declaration of 1993 reaffirmed – in spite of opposition from some governments – the universal validity of human rights:

“All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal

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7 Ibid., p. 20.

8 See my review on this issue in: Kovler, A. (2002), *Anthropology of Law*, Moscow: Norma, Ch. X. ‘International standards of human rights and the problem of the international legal capacity of an individual’ (in Russian).

manner, on the same footing, and with the same emphasis. 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.”<sup>9</sup>

The democratisation of regimes in Central and Eastern Europe, Latin America, and the abolition of apartheid in South Africa objectively contributed to this process of universalisation. A new generation of constitutions incorporates principles and norms of UDHR and UN conventions into its texts thus implementing them on the national level (a phenomenon of the internationalisation of modern constitutional law).

The worldwide spread of new information technologies is a powerful instrument for the dissemination of knowledge about human rights without boundaries. The effects of this instrument were recently demonstrated during the events in Tunisia, Egypt and other Arab countries disproving once again the notions of “democratic centre” and “democratic periphery”.

However, it could be unforgivably naïve to proclaim a triumphal procession of universal human rights standards all over the world. Even the most romantic advocates of human rights are careful on this issue: “The human rights framework, with its international bodies, international courts and international conventions, might be exasperating in its slowness to respond or its repeated inability to achieve its ultimate goals, but there is no better structure available for confronting these issues. Courts and governmental organisations, no matter how international in purview, will always be slowed down by considerations of geopolitics...”<sup>10</sup>

One of the main problems in the way of universalisation of standards of human rights is the problem – obviously coloured by “considerations of geopolitics” – of traditional values and human rights. The workshop on traditional values of human-kind held in Geneva on 4 October 2010 in accordance with Human Rights Council resolution 12/21 focused on the issue of how traditional values contributed to (or impeded) the promotion and protection of human rights in general.<sup>11</sup>

It is extremely significant that European Union countries had voted against the resolution that allowed for the organisation of this workshop because, as the Belgian speaker on behalf of the EU stated, the notion of “traditional values” had a negative connotation and was subject to broad interpretation. The absence of a universal definition of the non-legal concept of “traditional values” made it difficult to articulate them in the language of human rights. The European Union pointed out that, according to the Vienna Declaration, no tradition could justify violations of

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9 Quoted from: Council of Europe (2000), *Human Rights and International Law. Collected Texts. 2<sup>nd</sup> Edition*, Strasbourg: Council of Europe, p. 202.

10 Hunt, L. (2007), *Inventing human rights*, New York: W.W. Norton & Company, p. 213.

11 UNHCR (2010), ‘Report of the United Nations High Commissioner for Human Rights’, Human Rights Council, A/HRC/16/37.

or limitations upon human rights. According to the comments made by the International Commission of Jurists, the content of human rights must be determined not by reference to traditions or religions, but to international law as it was interpreted by legal authority and evolved over time.

These rigorous positions contrasted with another rigorous position: the representative of China stated that the concept of human rights should not be monopolised by a few countries, and that it was actually deeply rooted in the traditional value system of every country. According to China's position, the universality of human rights should be combined with countries' traditional values.

As to the Russian representative, she affirmed that the birth of both the Universal Declaration and the European Convention were attempts to give new impetus to values that were deeply rooted in tradition. She therefore advocated the restoration of the link between human rights and traditional moral values.

The notion of "values" was not completely absent from NGOs' approaches. ARC International proposed a compromise settlement: given the potential for abuse of an approach based on traditional values, it suggested that it would be more efficient in the future to refer to "universal values" or "values underpinning international human rights law".

I would like to conclude my analysis of these different positions by mentioning the position of Joseph Prabhu, Professor of California State University, who referred to Mahatma Gandhi's reply to the inquiries from UNESCO's study on the then prospective Universal Declaration. According to Gandhi, the universality of human rights might be conceived in many different ways. He therefore stressed that in order to avoid imposing a particular ethnocentric standard on the rest of the world, there was a need for engaging in intercultural dialogue. Through such a dialogue different ideas could correct and enhance each other.<sup>12</sup>

And the conclusive remarks of the independent expert Farid Shaheed seem to go in the same direction of a dialogue between cultures:

- "65. ... (a) All cultures shared a common set of values that belonged to humankind in its entirety, and those values had made an important contribution to the development of human rights norms and standards;
- (b) Such values were inscribed in the Universal Declaration of Human Rights that, having incorporated diverse, cultural and political traditions and perspectives and having been adopted by consensus, 'represents a common standard of achievement for all peoples and all nations';
- (c) Each and every person, regardless of any socio-economic, cultural and personal identity, belief system, political views, or physical location, is entitled to the rights and freedoms recognized in the Universal Declaration of Human Rights;

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12 Ibid., pp. 7-8.

- (d) All human rights are universal, indivisible, interrelated, interdependent and mutually reinforcing and must be treated in a fair and equal manner and on the same footing;
  - (e) Under international law, all States, regardless of their political, economic and cultural systems, have the obligation to promote and protect all human rights and fundamental freedoms for all.
66. Even if there was agreement on the universality of human rights, discussions on traditional values tended to focus on how the universality of rights was translated into reality. All human thinking and reasoning was rooted in people's cultural perspectives and understandings, including the traditions of elaborating the contents of human rights. Therefore, to breathe life into international human rights standards, there must be ownership of these norms and standards among all communities of the world. This implied an acceptance and assimilation of concepts through local lexicons. Equally, however, the continuing development of universal human rights standards was only possible if this was informed by the cultural diversity of the world's peoples. The interplay between universal standards and understanding and diverse localized realities raised a series of questions that had to be considered. To what extent were cultural notions and value systems in accordance with international human rights? Did international human rights reflect the cultural diversity of the world's people? And if not, how were we to achieve harmony and a common understanding and therefore, make human rights a living reality? To what extent was it possible to distinguish between traditional values and traditional practices, which are the external, visible manifestations of such values? Was there a common understanding of what, in practical terms, constituted 'traditional values'? Who was or should be responsible for defining the parameters and contents of 'traditional values'?
67. It was essential to unpack the terms 'tradition' and 'traditional', because of the emotive quality and resonance tradition had with cultural identity and the sense of self. Communities had divergent traditions that reflected different values within themselves, by reflecting the views of the majority and/or power-holders on the one hand, and those of the more marginalized, including minorities, on the other. Traditions constantly changed and evolved over time in response to changing realities and as a consequence of interactions and interchanges with other communities. Cultural notions and value systems drew upon both continuity with the past and a projected, imagined future."<sup>13</sup>

I think that the EU representatives were wrong when they voted against the organisation of the Geneva workshop. What is important to emphasise is that international actors in the human rights field must be able to view the field from cross-cultural perspectives as stressed in the opening speech of the UN High Commissioner for Human Rights by making reference to her own experiences of cultural diversity as a South African woman of Asian descent.<sup>14</sup>

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<sup>13</sup> Ibid., p. 15.

<sup>14</sup> Ibid.



## **THE EUROPEAN CONVENTION ON HUMAN RIGHTS: A NEW BIBLE OF HUMAN RIGHTS FOR THE GLOBALISED WORLD?**

The Universal Declaration outlined a set of moral obligations for the international community, but it had no mechanism for enforcement: "If it had included a mechanism for enforcement, it would never have passed"<sup>15</sup> observes Lynn Hunt. But as Hersch Lauterpacht correctly has pointed out, "the fact that the Universal Declaration of Human Rights is not a legal instrument expressive of legally binding obligations is not in itself a measure of its importance."<sup>16</sup> The universal rights and freedoms proclaimed by the UDHR are supplemented on the regional level by the European machinery of international supervision and enforcement.

The European Convention on Human Rights (ECHR) is often considered in international human rights law as a model of effectiveness while others prefer a sceptical view of the ideas of the old retired Europe...

I agree with my colleague, Judge Bostian Zupančič, for whom a problem of the universality of human rights is an artificial problem: "To suggest that human rights are inherently universal...is a thoroughly misleading idea. The concern, this we should make clear at the outset, is not whether human rights should not become universal. Of course, they should! The question is how!"<sup>17</sup> I also share his assertion that only because the founding fathers of the European Convention have wisely and practically created the so-called Strasbourg machinery it is now realistic to speak of "human rights". Without the implementation and enforcement system the international legal and political talk of "the universality of human rights would be so much empty ideological bravado", he said.

It is appropriate to ask this question: is the ECHR for the simple reason of its relative effectiveness a core instrument of the international system of human rights protection? Let's remind ourselves that the founders of the European system were rather prudent when they drafted the final phrase of the ECHR Preamble:

"...the governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration..."

Thus, the founding fathers limited its application to the European countries having a common heritage of political and legal traditions. The test of applicability of the principles and norms of the European Convention in respect of other systems of values

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15 Hunt, L. (2007), *op. cit.*, pp. 204–205.

16 Lauterpacht, H. (1950), *International Law and Human Rights*, London: Stevens & Sons, p. 417.

17 Zupančič, B. (2007), 'On universality of human rights', *Human Rights. Practice of the UCHR* (review published in Moscow), no. 6, p. 76. He is much more severe in his explanations: "...it becomes clear that the question 'are human rights universal?' is to perpetuate a shallow myth. This attempted myth testifies to a typically American, but enormous Western-centric, blind spot. This self-centred blindness is the origin of the problems epitomised by Huntington's 'clash of civilisations'"

is much more delicate. During the first forty years of their activities the Commission and the Court tried to avoid this kind of appreciation, emphasising nevertheless that the Convention is a “living instrument”.

Unfortunately, during the last ten years the European Court on some occasions overstepped the limits of self-restraint when it came to an appraisal of “non-European” systems of values. On the one side, the Court recognised the specific character of Romas’ way of life and the necessity of its protection (see first of all: *Chapman v. United Kingdom*, [G.C.] Judgment of 18 January 2001, ECHR 2001-I; *Connors v. United Kingdom*, Judgment of 27 May 2004; see also recent judgment *Oršuš v. Croatia*, [G.C.], Judgment of 16 March 2010). On the other side, in some cases the Court manifested a certain hostility in respect of Islamic values and institutions openly abandoning the path of exclusively legal analysis. The judgment of the Grand Chamber “*Refah Partisi (The Welfare Party) and others v. Turkey*” (no. 41340/98 [G.C.] Judgment of 13 February 2003; ECHR 2003-II) is an extremely significant example of this approach.

The case in question concerned the dissolution by a judgment of the national Constitutional Court of the political party that obtained 22% of the votes in the general elections and one year later – 35% of the votes in the local elections. According to an opinion poll, Refah would have received 38% of the votes in the next general elections and even 67% in the general elections five years after (§ 101 of the ECHR judgment). The programme of the party and the declaration of its leaders included among other points the proposal to set up a plurality of legal systems concerning personal status in some spheres of private life and to apply *sharia* to the internal or external relations of the Muslim community within the context of this plurality of legal systems.

Unlike other cases against Turkey concerning the dissolution of radical political parties (*United Communist Party of Turkey and Others v. Turkey*, Judgment of 30 January 1998, Reports of Judgments and Decisions 1998-I; *Socialist Party and Others v. Turkey*, Judgment of 25 May 1998, Reports 1998-III; *Freedom and Democracy Party (ÖZDEP) v. Turkey*, [G.C.] Judgment of 8 December 1999, ECHR 1999-VIII) where the Court found violations of article 11 of the Convention (Freedom of assembly and association), in the *Refah* case the unanimous conclusion was a non-violation of the same article. One of the reasons can be read in the text of the judgment: “The Court [...] considers that at the time of its dissolution Refah had the real potential to seize political power without being restricted by the compromises inherent in a coalition. If Refah had proposed a programme contrary to democratic principles, its monopoly of political power would have enabled it to establish the model of society envisaged in that programme” (§ 108) and “While it can be considered, in the present case, that Refah’s policies were dangerous for the rights and freedoms guaranteed by the Convention the real chances that Refah would implement its programme after gaining power made that danger more tangible and more immediate” (§ 110).

Why the programme proposed by Refah party was “contrary to democratic principles”, especially in the light of the Court’s general statement that “a political

party animated by the moral values imposed by a religion cannot be regarded as intrinsically inimical to the fundamental principles of democracy, as set forth in the Convention" (§ 100)? The main reasons are the following:

- "a plurality of legal systems, as proposed by Refah, cannot be considered to be compatible with the Convention system" (§ 119)
- "sharia is incompatible with the fundamental principles of democracy, as set forth in the Convention" (§ 123).

These two points can be interpreted as a message to the external world: every departure from the European system of values (absolute uniformity of a legal system, only tribunals established by State law, etc.) is automatically anti-democratic "as set forth in the Convention"... In my concurring opinion (I concurred with the main part of the Court's ruling that the applicant's activities and statements were in contradiction with the principle of secularism, a pillar of Turkish democracy as conceived by Atatürk and enshrined in the Constitution) I expressed my disagreement with the non-legal appreciations of the Court.

What bothered me about some of the Court's findings was that in places they were unadapted, especially as regards the extremely sensitive issues raised by religion and its values. I wrote that I would prefer an international court to avoid terms borrowed from politico-ideological discourse, such as "Islamic fundamentalism" (§ 99), "totalitarian movements" (§ 99), "threat to the democratic regime" (§ 107), whose connotations, in the context of the present case, might be too forceful.

I also regretted that the Court missed the opportunity to analyse in more detail the concept of plurality of legal systems, which is linked to that of legal pluralism and is well-established in ancient and modern legal theory and practice.<sup>18</sup> Not only legal anthropology but also modern constitutional law accepts that under certain conditions members of minorities of all kinds may have more than one type of personal status.<sup>19</sup> Admittedly, this pluralism that impinges mainly on an individual's private and family life is limited by the requirements of the general interest. It is of course more difficult in practice to find a compromise between the interests of the communities concerned and civil society as a whole than to reject the very idea of such a compromise from the outset.

This remark also (and even more) applies to the assessment to be made of *sharia*, the legal expression of a religion whose traditions go back more than a thousand years and which has its fixed points of reference and its excesses like any other complex system. In any case, legal analysis should not caricature polygamy (a form of family organisation which exists in societies other than Islamised peoples)

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18 See: Griffiths, J. (1986), 'What is legal pluralism?', *Journal of Legal Pluralism and Unofficial Law*, no. 24 and publications of the International Union of Anthropological and Ethnological Sciences. See also: Rawls, J. (1999), *The Laws of Peoples*, London: Harvard University Press.

19 Gannagé, P. (2001), *Le pluralisme des statuts personnels dans les Etats multicommunautaires. Droit libanais et droits proche-orientaux*, Brussels: Bruylant.

by reducing it to “discrimination based on the gender of the parties concerned” (§ 128 of the judgment).

Unfortunately, the same recurrence of euro-centrism (if not euro-snobbery) is demonstrated some years later in another case “*Serife Yigit v. Turkey*”, [G.C.] Judgment of 2 November 2010, where the Court openly denounced religious (Islamic) marriage as “a marriage tradition which places women at a clear disadvantage, not to say in a situation of dependence and inferiority, compared to men” (§ 81 of the Judgment). In my concurring opinion I stated that “it would have been wiser to refrain from making any assessment of the complexity of the rules of Islamic marriage, rather than portraying it in a reductive and highly subjective manner in the short section entitled ‘History’ (see paragraphs 36–37), where what is left unsaid speaks more loudly than what is actually said. Hence, to state that ‘Islamic law ... recognises repudiation (*talâk*) as the sole means of dissolving a marriage’, such repudiation being ‘a unilateral act on the part of the husband’, and not to mention that the woman can also seek a divorce, for instance if her husband is unable to maintain the family, is to present only half the picture... The language of politicians and NGOs is not always appropriate for the texts adopted by an international judicial body.” I think that the Court “could easily have refrained from such a demonstration of ideological activism... I would like to see the European Court of Human Rights take a more anthropological approach in the positions it adopts, by ‘not just exploring difference, but exploring it differently’. Otherwise, the Court is in danger of becoming entrenched in ‘eurocentric’ attitudes”, I concluded.

One can ask: does the European Court by its case law aggravate the conflicts between fundamental rights? I must advocate that the European Court does not have this intention, but some “outbreaks” of legal activism could do so. In any case this problem is seriously discussed by the experts.<sup>20</sup> Generally speaking, the European system of human rights protection is faced with a genuine dilemma: how can equal and effective protection of human rights be secured taking into account (or not doing so) an increasing multicultural dimension of European societies with a growing proportion of a non-European population...? Some scholars conclude: “Appliquer les droits énoncés par la Convention ne consiste pas nécessairement à imposer des solutions uniformes et invariables, en ignorant les facteurs culturels”<sup>21</sup> After all, the problem is how to maintain the quasi-biblical strictness of the Convention’s principles and standards of the Court’s case law as a part of the heritage of the European civilisation and to avoid a euro-centric vision of the world.

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20 See: Meerschaut, K. and Gutwirth, S. (2011), ‘Legal pluralism and Islam in the scales of the European Court of Human Rights: the limits of categorical balancing’, in Brems, E. (ed.) (2011), *Conflicts between Fundamental Rights*, Antwerp and Oxford: Intersentia.; Rigaux, F. (2011), ‘Les effets d’une union conjugale n’ayant pas satisfait aux conditions de forme de la loi étatique’, *Revue trimestrielle des droits de l’homme*, no. 86, pp. 317–324.

21 Hoffmann, F. and Ringelheim, J. (2004), ‘Par-delà l’universalisme et le relativisme: la Cour européenne des droits de l’homme et les dilemmes de la diversité culturelle’, *Revue interdisciplinaire d’études juridiques*, no. 54, p.140.

Undoubtedly, Europe is the motherland of the universality of human rights; European civilisation was the first to raise the question of the universal nature of the human being. But the same search for the universal dimension of human rights is peculiar to other civilisations – Indian, Chinese, Islamic.<sup>22</sup> Non-European critics of demands for a “Western” version of human rights argue that they have developed alternative political ideas and practices to preserve the values of family, community, devotion to duty and to avoid the excesses of “the rights-obsessed West”: guns, drugs, violent crime, unbecoming behaviour in public. Singaporean Senior Minister Lee Kwan Yew said: “Let me be frank: if we did not have the good point of the West to guide us, we wouldn’t have got out of our backwardness. We would have a backward economy and a backward society. But we do not want all of the West.”<sup>23</sup> But more flexible arguments for an Asian third way, however, advocate a selective appropriation of “Western” values and practices to produce an Asian version of modernity. For example, Chandra Muzaffar recognises the European “mainstream human rights ideas”: “Mainstream human rights ideas...have contributed significantly to human civilisation in at least four ways. One, they have endowed the individual with certain basic rights such as the right to free speech, the right to a fair trial and so on. Two, they have strengthened the position of the ordinary citizen against the arbitrariness of power. Three, they have expanded the space and scope for individual participation in public decision-making. Four, they have forced the State and authority in general to be accountable to the public.”<sup>24</sup> But at the same time he calls “to move from Western human rights to universal human dignity” and argues that the best remedy to “the cross individualism and self-centredness” are religious traditions: “Religion integrates the individual with society in a much more harmonious way.”<sup>25</sup>

It is obvious that Europe was and remains a laboratory for the promotion of human rights in the world and a model of its implementation. But at the same time Europe no longer has a monopoly on human rights for the simple reason that thousands of people sacrifice their lives in the whole world for human dignity as they understand it. Thus, Europe’s role could be not to impose its own ideas on the “Rest”, but to translate the multidimensional universality of human rights into terms of international law.

## **RETHINKING A PHILOSOPHY OF HUMAN RIGHTS**

Some contemporary scholars recognise that contrary to what happened in the history of Western thought and for purely historical reasons, in international law the moral currency of the concept of human rights predated and overshadowed that of justice and democracy (democracy started to emerge as a value of international

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22 Donnelly, J. (2002), *Universal Human Rights in Theory and Practice*, Ithaca and London: Cornell University Press, Ch. 5 ‘Non-Western Conceptions of Human Rights’, pp. 71–88.

23 Quoted by Donnelly, J. (2002), *op. cit.*, p.116.

24 Muzaffar, Ch. (1994), *From Human Rights to Human Dignity*, Kuala Lumpur: JUST, p. 1.

25 *Ibid.*, pp. 10–11.

law in the early 1990s, essentially for securing peace, human rights and development). But it is also true that the rights enshrined in the Universal Declaration and in the European convention and later on, in the two UN Covenants, were the result of political bargaining primarily between Western states, a compromised mixture of Anglo-American liberal ideals, European socialist ideals and 20<sup>th</sup> century Cold War politics.<sup>26</sup>

During the last 50 years no radical changes were introduced to the general concept of human rights. What changed was the human rights instrumentalisation: initially conceived as a condition for the legitimacy of post-war states vis-à-vis other states and the international community, they assume now, after global political changes in the 1980–90s, more diverse normative roles, teaching a complete moral code for societies. This idea was, for example, predominant in the foreign policy of the Carter Administration as an expression of the “American mission”: “Americans have agreed since 1778 that the United States must be a beacon of human rights to an unregenerate world. The question has always been how America is to execute this mission.”<sup>27</sup> One can be sceptical, as I am, about some forms of this missionary work, but this tradition contributed to the contemporary revival of concern for human rights. It suffices to remind ourselves that the Covenant of the League of Nations, adopted in 1919, made no mention of human rights. The human rights problems were granted asylum in international humanitarian law and reappeared in the Universal Declaration and the contribution made by Americans and Europeans in its drafting was crucial.

It is quite paradoxical that the contemporary theory of human rights as it stands in the theory of international law practically does not take into account the challenges of growing globalisation, especially impressive developments in information technology or the emergence of an active international ecological movement. New features of that globalisation have an impact on various aspects of human rights. The problem now is the capacity of contemporary international law to give an adequate response to more and more complicated issues concerning the effective protection of human rights. As the British scholar T. Evans noted, “International human rights law not only cannot prevent most human rights violations; the legalistic approach to human rights may distract the attention of human rights scholars and activists from the political, social, economic and cultural causes of these violations.”<sup>28</sup>

The intellectual production of European lawyers is impressive, especially in the field of interpretation of the European convention and of the European Court’s case

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26 See: Letsas, G. (2007), *A Theory of Interpretation of the European Convention on Human Rights*, New York: Oxford University Press, pp. 17–21.

27 Schlesinger, A. (1979), ‘Human Rights and American Tradition’, *Foreign Affairs*, Summer, p. 505. Cited by Donnelly, J. (2002), *op. cit.*, p. 160, who comments: “...America has been seen as a beacon, the proverbial city on the hill, whose human rights mission was to set an example for a corrupt world... In its extreme forms this leads to neutralism and isolationism”.

28 Evans, T. (ed.) (1998), *Human Rights Fifty Years On: A Reappraisal*, Manchester: Manchester University Press, p. 17.

law, but the question put by T. Evans “Does the legalistic approach of human rights suffice?” is legitimate. It presupposes an interdisciplinary approach to the theory and practice of human rights.

The solutions proposed by some scholars are rather radical: “Law should be removed from its hegemonic role in human rights studies, and relocated correctly within this interdisciplinary approach”.<sup>29</sup> This approach is explained by the fact that when the United Nations declared in 1945 that one of its principal aims was the promotion of human rights, it was under the impact of the Nazi horrors, opposing the previous 150 years of mainstream social theory based on the moral and political philosophy of natural rights. The Universal Declaration, in order to achieve universal credibility in a culturally diverse world, said little about its theoretical foundations. This has left the historical conflict between natural rights and social science unresolved. “Human rights became a special subject for international lawyers, and social scientists ignored them”.<sup>30</sup> One “unfortunate” consequence of legal positivism has been the domination of human rights scholarship by lawyers. The main reason for finishing with this domination is to link politics to law: “A principal task of a political science of human rights. . . is to demystify the legal order of human rights, and reveal the way that it has been politically constructed, and the way in which the extent of implementation of human rights law is determined politically”.<sup>31</sup>

Leaving aside the radical character of this reasoning one thing is clear: recent scholarship (sociology; political science; social and legal anthropology) has shown that the conception of citizens’ and natural rights can be found in more diverse social contexts than the standard “legalistic” version allows. There is a strong European tradition in human rights theory inspired by H. Kelsen that human rights are most secure when protected by law, although there is a rival view inspired by Anglo-American social anthropology and political science, that they are better protected by political culture, civil society and democratic institutions. Personally, I share the view that getting the balance between law and politics right is not just a question of disciplinary rivalries, but of effective human rights policymaking.<sup>32</sup> This understanding of human rights requires an approach that is interdisciplinary. This is my firm conviction.

The interdisciplinary approach is necessary in practice when we deal with “new rights” or increasing controversy regarding the nature and scope of the rights embodied in the European Convention. Some examples:

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29 Freeman, M. (2000), ‘Is a Political Science of Human Rights Possible?’, *Paper prepared for the XVIII World Congress of International Political Science Association*. Quebec, 2000, p. 1.

30 Ibid., p. 5.

31 Ibid., p. 6. I invite the reader to appreciate another view: “Ces non-juristes que furent les inventeurs des droits de l’homme leur ont sacrifié la justice; sacrifié le droit . . . Je doute que ce fût un progrès. Je n’y vois qu’une perle due à l’ignorance.” Villey, M. (1990), *Le droit et les droits de l’homme*, Paris: PUF, p. 154.

32 See: Forsythe, D.P. (2000), *Human Rights in International Relations*, Cambridge: Cambridge University Press.

- does the right to life under Article 2 of the Convention include the right to terminate deliberately a life? (*Pretty v. U.K.*, Judgment of 29 April 2002; ECHR 2002-III);
- has a person born under X. a right to know his (her) biological mother's name? (*Odièvre v. France*; [G.C.] Judgment of 13 February 2003, ECHR 2003-III);
- has a couple of two men or two women the right to marry? (*Schalk and Kopf v. Austria*, Judgment of 24 June 2010);
- has a prisoner sentenced to life-imprisonment for a murder the right to vote? (*Hirst v. U.K.*, [G.C.] Judgment of 6 October 2005, ECHR 2005-IX).

The reply to these and some other questions cannot be found only in national legislation or in international conventions. A European judge must take into account many elements of a medical, cultural, social or psychological nature running the risk of making value judgments (as it often happens) or of "judicial activism"...

The problem of legal lacunas or the absence of a common understanding concerning new (or more precisely "old new") problems leads us to other ones: living instrument interpretation, margin of appreciation doctrine, subsidiarity of Strasbourg machinery and state sovereignty, etc., once more emphasising the interaction between the universality and the particularity of human rights. Here European thought could demonstrate its creative potential while in other parts of the world the dominant scholarly and activists' discourses about human rights have developed largely without obligatory references to the Western viewpoints.<sup>33</sup>

Further evolution of human rights discourse needs to go beyond the limits of its original Western oriented formulation and to consider different interlocutors, such as civil society organisations. (On this last issue it is worth remembering that Robert Badinter over 20 years ago proposed recognising a right of application on behalf of citizens to non-governmental organisations.<sup>34</sup>) As an example of new approaches I can mention the voices against new forms of tyranny, the tyranny of individual<sup>35</sup> and the tyranny of conformism<sup>36</sup>, both representing a real danger for *homo europeus*.

Another important problem not yet resolved by Europeans is an increasing likelihood of norm conflict, part of the phenomenon of fragmentation of international

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33 See: Twining, W. (2009), *Human Rights, Southern Voices*, Cambridge: Cambridge University Press.

34 Badinter, R. (1989), op. cit., p. 4.

35 Todorov, T. (2011), 'La tyrannie de l'individu', *Le Monde*, 28 mars. "On passe... d'un extrême à l'autre, du tout-Etat totalitaire au tout (individu) ultralibéral, d'un régime libéricide à un autre, d'esprit "sociocide", si l'on peut dire. Or, le principe démocratique veut que tous les pouvoirs soient limités: non seulement ceux des Etats, mais aussi ceux des individus, y compris lorsqu'ils revêtent les oripeaux de la liberté". See also his new book: Todorov, T. (2010), *Le siècle des totalitarismes*, Paris: Robert Laffont.

36 Rioutol, I. (2010), 'Effets de la nouvelle tyrannie du conformisme', *Le Figaro*, 23 April. "Comment concevoir progrès et innovations, ces caractéristiques de la société occidentale, dans ce climat anxigène ou tout est fait pour surprotéger, infantiliser, abrutir? Ce totalitarisme soft qui met des libres choix sous contrôle au nom de la sécurité est d'autant plus inopérant qu'il ne sait répondre aux réels problèmes qui fragilisent la société".



law,<sup>37</sup> for example between a European court (the European Court of Justice in the *Kadi* case) and UN bodies (Security Council in the said case)<sup>38</sup> or between a European court (European Court of Human Rights) and national constitutional courts jealous of their constitutional sovereignty.<sup>39</sup> These conflicts not only weaken the European machinery of implementation of human rights, but also give a negative image to the rest of the world.

One of the most important problems is, to my mind, the problem of compatibility between a European understanding of human rights as expressed by the UDHR and ECHR and a non-European vision, because until now human rights discourse was often perceived not as an instrument of liberation, but as an instrument of domination in the disguise of Western cultural and ideological imperialism, serving the purpose of destroying traditional values and traditional social structures.<sup>40</sup> The most sensitive issue remains the attitude towards Islam and its conception of human rights, especially in our days when the “wind of liberation” is crossing the Arab world.

The Islamic world now represents about one-fourth of the global population and in the near future this proportion will increase significantly. Shamil Sultanov, president of the Russia–Islamic World Centre for Strategic Studies, introduces the term “global Islamic subject”<sup>41</sup>, which, to my view, adequately reflects the role of the Islamic world in international politics. The revolutionary transformation of the national elites in leading Muslim countries has its basis in a “theology of liberation”. At the same time even a “moderated” fundamentalism opposes Islamic moral values to the “decreasing scale” of Western moral values, but this opposition can be analysed as a part of the search for civilisation’s self-determination of an Islamic community, just as Leopold Sengor’s “negritude” was part of a search for African identity.

The main contradiction between European and Islamic societies remains in the fact that European (especially Western) society is based now on an individualistic system of values while the Islamic society remains communitarian (*Umma*). Does this mean that the dialogue between them is possible? My answer is “yes” under the

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37 See: Milanović, M. (2009), ‘Norm Conflict in International Law: Whither Human Rights?’, *Duke Journal of Comparative and International Law*, vol. 20.

38 “As a legal order independent of the United Nations, governed by its own rules of law, the European Union must justify its actions by reference to its own powers and duties vis-à-vis individuals within that order” – ECJ (2005), *Case T-315/1 “Yassin Abdullah Kadi v. Council of the European Union and Commission of the European Communities”*, E.C.R. II-3649, § 59.

39 See among other publications: Szymczak, D. (2007), *La Convention Européenne des droits de l’homme et le juge constitutionnel national*, Brussels: Bruylant.; De Aranjó, Ch. (2009), *Justice constitutionnelle et justices européennes des droits de l’homme*, Brussels: Bruylant.

40 See: Droit, R.-P. (2008), *L’Occident expliqué à tout le monde*, Paris: Seuil. The author insists on the fact that each civilisation has its own concept of a human dignity and of elementary human rights. “To present the century of Enlightenment as a century discovering human rights is at least a lie” (pp. 83–84).

41 Султанов Ш. (2010), ‘Глобальный исламский субъект. Перспективы его формирования в условиях мирового системного кризиса’, *Политический журнал*, no. 2 (198).

condition that this dialogue is based on a better knowledge of the legal, cultural, social and psychological perceptions of human rights to be found in each.<sup>42</sup>

A great number of publications on the Islamic conception of human rights has been published in the last 10 years.<sup>43</sup> Non-Western conceptions of human rights are also studied by scholars<sup>44</sup>, so there is no *terra incognita* for a goodwill researcher. Without sacrificing the universal character of the elementary rights of a human being, Europe could accept a cultural contextualisation of human rights and even benefit from a “cross-fertilisation” of ideas.<sup>45</sup> I agree with the pragmatic approach of my Polish colleague, Wiktor Osiatynski, who asserts that “the cross-cultural consensus on human rights should...focus on very specific rights and not on theoretical or philosophical considerations. Moreover, a list of universal rights should be minimal to avoid both the inflation of rights and disputes about specific norms that could be challenged by individual cultures”.<sup>46</sup> W. Osiatynski attempts to formulate such “a minimal list of rights”, arguing that most authors agree that the following basic rights and freedoms are indispensable:

- the right to life;
- the right to recognition as a human being;
- the right to legal personhood (including the rights to citizenship);
- basic autonomy in personal matters;
- the right to physical integrity, including a ban on torture and the prohibition of cruel, unusual, and arbitrary punishment and executions; a ban on forced disappearance;
- freedom from involuntary human experimentation;
- freedom from slavery, the slave trade, and servitude;
- freedom from arbitrary detention;
- specific rights of people under custody and detention;
- the right to a fair trial and due process;
- freedom from imprisonment for debt;
- freedom from retroactive application of criminal punishment;
- freedom of thought, conscience, religion, and expression;
- equality before the law and freedom from discrimination;
- participation in government.”<sup>47</sup>

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42 It's quite remarkable that the Cairo Declaration on Human rights in Islam adopted by the Organisation of Islamic conference in Cairo on 5 August 1990 is not included in the official publication of the Council of Europe “Human Rights in International Law. Collected Texts” (cited above), unlike, for example, the African Charter on Human and Peoples Rights (1981) or American Convention on Human Rights (1969). See this document in: Baderin, M.A. (2003), *op.cit. infra*, pp. 237–242.

43 See among others: Baderin, M.A. (2003), *International Human Rights and Islamic Law*, New York: Oxford University Press.; Sachedina, A. (2009), *Islam and the Challenge of Human Rights*, New York: Oxford University Press.; Arkoun, M. (2010), *La question ethnique et juridique dans la pensée islamique*, Paris: Librairie J. Vrin.

44 See: Donnelly, J. (2002), *op. cit.*, pp. 261–286.

45 A term quoted from: Mading Deng, F. (2009), ‘Cultural constraints in the universality of human rights’, in Twining, W.(2009), *op. cit.*, p. 39.

46 Osiatynski, W. (2009), *Human Rights and their Limits*, New York: Oxford University Press, p. 176.

47 *Ibid.*, p. 177.

Most of these rights are proclaimed by the European Convention and implemented by the European Court as a core list of human rights. I do not exclude as an accomplished dream that one day the European Convention on Human Rights could be accepted as a model of universal implementation of the main universal rights through regional courts and that this process should exclude abuses by double standards and selective enforcement. The only condition for this implementation might be the enforcement of universal human rights by law and not by ideological or political postulates. Current international law has not yet completely accomplished its role in this way. But this ideologically and politically neutral enforcement must be based on consensus, on the condition that "the existence of consensus cannot be used to justify the erosion of fundamental rights".<sup>48</sup> Once again, only effective strengthening of the universal dimension of fundamental human rights could help to establish "human rights imperialism", mentioned at the beginning of this modest contribution.

To re-write the UDHR, taking into account the contemporary changing context of the implementation of "basic" rights on the regional level, is one of the proposals going in this direction.<sup>49</sup> The ideas of Antonio Cassese to rationalise the instruments (*degli strumenti* in Italian) of the protection of existing human rights are, to my mind, well-founded as he proposes: 1. focusing on the restricted number of essential human rights; 2. maintaining non-numerous, but effective mechanisms of control and guarantees of these rights; 3. reinforcing criminal responsibility for the most dangerous violations of human rights; 4. envisaging an international mechanism of an exceptional nature for armed interventions having as its purpose the ending of large-scale violations of human rights (mass murders, genocide, atrocities qualified as crimes against humanity).<sup>50</sup> As Zen wisdom says, there are many ways to one Truth...

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48 ECHR (2008), *Dialogue between Judges. The Role of Consensus in the System of European Court of Human Rights*, Strasbourg: ECHR, p. 21.

49 Yacoub, J. (2005), *Les droits de l'homme, sont-ils exportables? Géopolitique d'un universalisme*, Paris: Ellipses; Vers une réécriture de la Déclaration des droits de l'homme. pp. 187–190. The author explains his idea: "D'une construction intellectuelle occidentale au départ, les droits de l'homme sont devenus (...) une œuvre collective à l'arrivée. Cela induit, n'est-ce pas, un changement dans la méthode de présentation et d'enseignement des droits de l'homme. Dorénavant, la DUDH ne doit plus occuper la première place, autrement il faudrait la réécrire. (p. 188).

50 Cassese, A. (2005), *I diritti umani oggi*, Rome and Bari: Editori Laterza, pp. 214–215.

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