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HUMAN RIGHTS AND CULTURAL RELATIVISM

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Abstract

This thesis focuses on the universal doctrine of human rights and to the challenges advanced by the advocates of cultural relativism. It analyzes the Islamic law in the light of the international standards of justice and the "reforms" proposed by liberal Muslims, often persecuted in their countries. The thesis then addresses to the so-called "Asian values" and explains how these values might be manipulated so as to justify repressive policies in non-democratic states.

Introduction

I - An Introduction to Human Rights

My thesis on Human Rights and Cultural Relativism addresses to the universal discourse on human rights, to its philosophical roots and international legal recognition, as well as to the challenges advanced under the guise of cultural relativism. The first chapter *An Introduction to Human Rights* provides a brief history of the modern human rights doctrine. It illustrates the core-documents of this system, first of all the UN Declaration of 1948 but also the International Covenants and the following Conventions further elaborating human rights. This chapter allows ample room to the analysis of the principles protected by the Declaration, which range from legal personality and individual security to the right to join trade unions or freely express its own beliefs (Paragraph 1.2: *The Universal Declaration on Human Rights*). They can be classified as the following: 1) civil; 2) political; 3) economic, 4) social and cultural rights. The first group comprises freedom of movement and residence within the state, noninterference in family life, protection of correspondence, and equal right to marriage. The second kind refers to a general right to take part in the government of the country, through the guarantee of basic liberties e.g. freedom of thought, assembly and religion. Finally, the third category consists of an assurance to have equal pay for equal work, reasonable limitation of the working hours, adequate food, education, housing and medical care. In one word, a decent standard of living for everybody. The inclusion of the last set of rights has at times been regarded as a political accommodation necessary to secure the favor of the URSS. Since most members of the Human Rights Commission shared the Soviet view, there was no chance that economic and social rights would be excluded from the agenda. In the light of their ideological victory after WW2, Western states played a predominant role in the drafting of the Declaration. In any case, senior representatives also came from China, Chile, Lebanon etc. and represented a number of ethical or political perspectives. The board tended to adopt a universal approach in defining global principles, which needed to be suited for a culturally plural world so as to present a connection between people's broader philosophy of life and their commitment to human rights.[1] It was largely agreed that the content of the Declaration could neither discriminate

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[1] Joshua Cohen, "Minimalism about Human rights: The Most we Can Hope For?", *Symposium: Toward International Consensus,* The Journal of Political Philosophy, Volume 12, Number 2, 2004, p. 200

among faiths nor accept harmful evaluations of secularism. Indeed, the possibility to be myself requires me to allow others to be themselves too, on their own terms. This principle of reciprocity, or Golden Rule, was valued as the ultimate cross-cultural basis of universal rights.[2] Chapter one moves on to mention the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, drafted in order to accord legal effects to the still nonbinding provisions of the Declaration (Paragraph 1.3: *The Covenants and Other Human Rights Documents*). After a time-consuming debate, the Covenants were approved in 1966 and eventually ratified 10 years later. As a consequence of their entry into force, the UDHR of 1948 was expanded in scope and detail. The International Bill of Human Rights was born, thanks to the acknowledgment that our shared humanity encompasses a duty for everyone to respect the dignity of others.[3] While the idea of human decency has ancient roots, individual freedoms and equality have been legally secured at the international level only in the modern age. They arise from the historical experiences of crisis and injustice, indifferently committed by Western or Eastern states, religious or non-religious communities, capitalist systems or bureaucratic governments. Without denial, freedom without equality benefits the strong at the expense of the weak, while equality devoid of freedom tends to transform society into a prison. If fraternity is lacking, the vocation to the common good could be hampered. In particular, the need to guarantee human rights to all appeared after the war, when the massacre of over six million Jews, gypsies, homosexuals, and people with disabilities shocked the worldwide community. Political leaders wanted to prevent a future regime, or anyone else, from depriving innocents of their life and liberties. Internationally warrantable criteria shall justify interference within countries ruled by unfair state laws or oppressive customary practices, responsible of avoidable offences. As a defense of human dignity and self-worth upon the boundaries of national sovereignty, human rights can truly be defined as the universal voice of the powerless against the authority of the despotic family structures, the government or the Church. The chapter concludes by displaying the political action to counterweight and even end human rights abuses (Paragraph 1.5: *Paradigms of political action: how to ensure human rights enjoyment*). First of all, there is accountability before the International Court of Justice so as to allow global monitoring of human rights enforcement. Secondly, a policy of inducement makes official institutions a purveyor of benefits – e.g. diplomatic

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[2] Abdullahi Ahmed An-Na`im, *Islam and the Secular State*, Harvard university Press (2010), p. 4, 24

[3] Saw Swee-Hock, Danny Quah, *The Politics of Knowledge,* Institute of Southeast Asian Studies (2009), p.48

incentives or preferential treatment in economic relations - rewarding states for compliance. Thirdly, assistance shall be provided if particular economic and social circumstances, such as undeveloped judiciary or lack of resources, occur. To continue, domestic contestation refers to the pressure put on domestic governments by foreign forces for bringing about changes in public or private behavior, while external adaptation limits the influence of outside agents if the latter are an obstacle to the internal compliance with human rights standards. Lastly, foreign powers may resort to coercive methods in order to stop abuses and mistreatment of citizens.

II - Human Rights and Cultural Relativism

The second chapter *Human Rights and Cultural Relativism* begins with the acknowledgement that no spiritual or cultural tradition refutes the inestimable human decency. The early contributions of Islam, Christianity, Buddhism, Confucianism and the rest of the world's major faiths can prove it. [4] All of them address interactions among people with kindheartedness and justice. This is outstanding if considered that religions were historically born in pre-modern, male-dominated communities shaped by huge discriminations, social unfairness and deep hierarchies. Leaving aside the religious field, the equal dignity of individuals is also highly considered by nonbelievers as a moral inner law of which everybody is endowed (Paragraph 2.1: *The Human Dignity Beyond the Religious and Secular Debate*). Anyway the following paragraph, *Universal Human Rights for Different Moral Codes,* informs about the existence of dissimilar spiritual and ethical theories, each with competing formulations, related to the stage of development of a society, to its productive forces, to the content of its political culture and many other factors. As a consequence of this intercultural moral diversity, the contemporary human rights doctrine is clearly not neutral among the world ethical codes. International principles, in particular those referring to the rights of women and children – e.g. female legal equality or free choice of partner; etc. – can be alien to some existing traditions, as these are understood by many of their members. If there is a conflict between human rights and gendered norms found in some social patterns, it is unlikely that women's universal rights may be embedded in domestic laws and policies. The evidence shows that people who grew up in a regime that emphasizes their inferiority might be prevented from

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[4] Rushworth M. Kidder, *How Good People Make Tough Choices: Resolving the Dilemmas of Ethical Living*, Harper, New York, 2003, p.159.

thinking and acting freely by a more or less latent coercion. In similar cases, the role of human rights activists is to encourage a critical view so as to make people aware of their agency and decision-making power, and then to enable them to genuinely choose for themselves. The chapter continues with the debate about the historical process which led to the formulation of modern values, mainly developed within the Western civilization as a secularized form of what were originally Christian precepts. Charles Beitz, author of *The Idea of Human Rights,* considers for instance that basic rights to social security, to political asylum, to take part in the government of the country, or to free elementary education could not exist a-priori, without the established social conventions or institutionalized patterns of reciprocity from which contemporary principles arise (Charles R. Beitz, *The Idea of Human Rights,* Princeton University Press (2011), pp. 58-60, 71-75). One of the last paragraphs , *Cultural Legitimacy of Human Rights Standards,* returns on the issue of the intercultural moral diversity and warns that everyone shall build moral duties in a language rooted in his or her tradition. The human rights doctrine shall not be conceived as merely reflecting the socio-political beliefs prevalent in Western Europe and America.[5] Compliance with global norms cannot be effective if they are perceived as extraneous to people's own social customs and practices.[6] On the contrary, such norms must be "conquered" from within each community. In order to have legitimacy, their violations shall be denounced and condemned also at the local level. The paragraph *Substantive Minimalism of Human Rights* presents a limited core of human rights as object of an intercultural agreement - "overlapping consensus" in the words of John Rawls[7] - which provides for a foundation for any but the most essential negative liberties. This "global ethics" comes from the human nature and a mutual vulnerability to suffering, a kind of universal reason, and some familiar themes among existing patterns of behavior. It suggests people what is undeniably wrong, regardless of their race, religion, nationality etc. [8] We cannot imagine any situations in which we or anyone we know would desire to be enslaved, victimized

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[5] Charles R. Beitz, *The Idea of Human Rights,* Princeton University Press (2011), in Preface p. XII, p. 37

[6] D. Melidoro, *Sharia and Human Rights: Hemeneutics and the Risks of State-centrism,*Global Policy Volume 4. Issue 4. November 2013, h t t p : / / w w w . a c a d e m i a . e d u

[7] John Rawls, *A Theory of Justice,* Harvard University Press, 1971, 1999, p.340

[8] Kofi Annan, "*We may have different religions, different languages, different colored skin, but we all belong to one human race. We all share the same basic values*". As quoted in *Simply Living: The Spirit of the Indigenous People* (1999) edited by Shirley A. Jones

without a valid reason, or arbitrarily detained. Such awareness is based on our capacity of feeling the sufferance inflicted to other human beings as if it was our own. Substantive minimalism protects against a restricted number of threats but does not recognize a wider list of civil and political values, and totally disregards social or economic standards. Otherwise, minimal human rights might be deprived of sufficient resources to be efficiently monitored and enforced, or external interferences may hamper domestic self-determination under the guise of a more demanding approach to universal principles. [9] But the inference that nothing of the liberal tradition can be applied to foreign communities implicitly condemns the latter to a long-lasting underdevelopment. Next paragraph, *From Overlapping Consensus to Progressive Convergence*, addresses to the general interests that fall outside this "overlapping consensus" and discusses new elaborations of cultural norms so as to include universal rights within a "progressive convergence" of worldviews. The global human rights practice evolves according to the circumstances of modern life; thereby this intercultural agreement shall arise from the best available elaboration of the current cultures through an enlightened adaptive reinterpretation. [10]

III - Islam and Human Rights

The third and fourth chapters are mostly about the study of the Islamic teachings in the light of the universal understanding of human rights. Chapter three, *Islam and Human Rights,* begins with a brief history of Islam, its origins in the seventh century and evolution after the hegira from Mecca to Medina, until the systematization of the moral and legal precepts in *Shari'a* as a wide-ranging way of life(*al-Islam nizam kamil wa shamil*). Shari'a refers to a variety of everyday matters, such as private property, the laws governing family relations, and the sharing of inheritance among relatives. Constitutional or criminal issues are also included in the Islamic jurisprudence, and so the behavior to adopt during wartime and diplomacy. The sources of Shari'a are primarily rooted in the literal readings – and interpretations - of the Holy Qur'an and the *Sunna* of the Prophet, as well as in some old customary practices of the pre-Muslim Arabic

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[9] Joshua Cohen, "Minimalism about Human rights: The Most we Can Hope For?", *Symposium: Toward International Consensus,* The Journal of Political Philosophy, Volume 12, Number 2, 2004, p. 192-193

[10] Charles R. Beitz, *The Idea of Human Rights,* Princeton University Press (2011), p.88

societies (Paragraph 3.2: *Systematization of the Islamic Sources*). [11] This chapter lets the reader know about the progressive development of the spiritual mission of Prophet Mohammed. It ranged from proselyting tolerance and acceptance of diversities within the community into inciting to violence so as to secure the Islamic authority in Medina, in particular at the expense of Jews and nonbelievers. This is the reason why there are still open questions concerning how to understand the general – and possibly contradictory – Mohammed's message. The paragraph *The Shari'a Law and Human Rights: a View on Non-Muslims, Slaves and Women* highlights that Shari'a norms were defined with the purpose of consolidating the community (*Umma*) in a socio-cultural context profoundly different from that of nowadays , when people all over the world were alien to the idea of universal human rights. [12] On the one hand, the Shari'a law preached fairness and lightened the harsh consequences of dependence and discrimination between genders so as to counterweight injustices mainly against widows, orphans and non-free men. On the other, it has never struggled for the refusal of certain ancient practices, e.g. female seclusion and subjugation, the enslavement of prisoners of war, cruel and degrading lawful punishments against nonbelievers and people who thought on their feet. Each argument (criminal law, slavery and female status both before and after marriage) has been widely discussed in the following specific subparagraphs. The subparagraph *Women in Muslim Societies* identifies male guardianship as the current "Sword of Damocles" which at times makes wives suffer a persistent seclusion within the community. Nowadays, the female condition in some Muslim countries might be worse than as prescribed by the Islamic traditional sources. In the field of women's rights and also in many other aspects of social life, the so-called "fundamentalists" could easily impose their views, given the absence of a central authority of doctrinal interpretation and the ambiguity of the religious message as delivered through the Qur'an and the Sunna of the Prophet. Not only "fundamentalists" strike for enforcing their theories, but also some political leaders present themselves as the custodians of a true orthodoxy and of its inflexible austerity. The subparagraph cites the example of Saudi women, who are not even allowed to do simple things or take basic decisions, e.g. driving a car, going for a swim, and voting. Cases of domestic violence are not uncommon and, since judiciary guarantees available to women are poor, women are often deprived of their right to have a fair and impartial

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[11] Abdullahi A. An-Na'im, *Toward an Islamic Reformation: Civil Liberties, Human Rights and International Law,* Syracuse University Press 1990, chap. 2

[12] Abdullahi Ahmed An-Na`im, *Islam and the Secular State*, Harvard university Press (2010), p. 53

process. Eventually, honor killing is a plague of the Saudi society in particular, and of the Arab societies in general. [13] The last paragraph of the chapter, *The Cairo Declaration of Human Rights in Islam*, gives room to the Declaration adopted in 1990 by the Organization of the Islamic Conference. [14] As in the case of the 1981 Universal Islamic Declaration of Human Rights, the Charter of 1990 reaffirms fundamental rights by adopting a vague and unclear understanding of Shari'a which rejects the universal discourse of the UN 1948 Declaration. Shari'a norms are likely to be used as a tool to defend customary practices undermining human worth and dignity, regardless of the common standards of decency all people shall enjoy. [15]

IV - Islamic Modernist and Reformist Thought

Chapter four, *Islamic Modernist and Reformist Thought,* focuses on the current debate about liberal Islam and its support for a Muslim reformism. As the first paragraph *The Ethical Core of the Islamic Message in Mecca* reminds, the Shari'a law discloses several messages, from an original universal solidarity to political – and eventually harmful - commitments to Muslim supremacy in Medina. Contrarily to the exclusively religious bonds of the Medinan community, the Meccan verses endorse a moral responsibility of the individual, based on principles of pluralism, tolerance and compromise in the light of the eternal values of liberty and equality. [16] In any case, the cultural, economic and political background has transformed over the centuries, thereby social teachings advanced more than a thousand years ago – in Medina as well as in Mecca - are likely to be difficultly applied today (Paragraph 4.2: *Shari'a Law in the Modern Society*).[17] In the same way in which Islam of the origins could not neglect the circumstances where it was born, current social

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[13] United Nations Report of the Special Rapporteur, Ms. Asma Jahangir, on Civil and Political Rights, Including Questions of Disappearances and Summary Executions (New York: United Nations, Jan. 2000), p. 27

[14] The Declaration is published in English in: *Conscience and Liberty. International Journal of Religious Freedom,* Spring, 1991: 90-95

[15] LSE The London School of Economics and Political Science: MEC blog, Human Rights: The Universal Declaration vs The Cairo Declaration (2012)

[16] Qur, 2:256; 2:285; 3:64; 4:134; 5:5; 5:8; 5:48; 11:118; 29:46; 49:13; 60:8-9. All references are from Ahmed Ali, *Al-Qur'an: A Contemporary Translation*, Princeton: Princeton University Press, 2001.

[17] *Women's Rights in Islamic Shari'a: Between Interpretation, Culture and Politics* in Muslim World Journal of Human Rights. Volume 11, Issue 1, Pages 1–24, ISSN (Online) November 2014

customs and rules cannot disregard the human rights standards of modern times. Paragraph 4.2 suggests that a critical reading of the theological doctrine (jurisprudence, *fiqh*) in the framework of modernity offers significant prospects of development to ancient practices e.g. enslavement, polygamy, male guardianship or severe punishments. Demands for a reform of the penal code, of the family law and old-fashioned institutions might be supported by arguments which can be acceptable to more conservative believers. The paragraph *Muslim Reformism: the Shari'a Principles as Humanely Understood* warns that human rights criteria may be difficulty implemented at the domestic stage if principles like male guardianship of women (*qawama*), sovereignty of Muslims over non-Muslims (*dhimma*), and offensive *jihad* are preserved. It mentions a handful of Islamic modernists and liberals (the Egyptian scholar Ali Abdel Raziq; Ustadh Mahmoud Mohamed Taha and, most recently, Abdullahi Ahmed An-Na`im) which paved the way for a religious reform. They regard *Shari'a* as a set of humanely understood spiritual guidelines, not as a direct and immutable decree of God's will and guidance. [18] The content of Shari'a - but not its deep meaning - originates from the intrinsically imperfect nature of every human elaboration within a certain socio-historical environment. [19] Thereby, in recognition of their mortality and fallibility, individuals should do their best to live in a system open to reforms. Like Muslim modernists and liberals, also Islamic fundamentalists oppose to the conservative religious doctrine as traditionally implemented, although for totally different reasons, of course (Paragraph 4.5: *Opponents of Traditional Islam: Fundamentalists and Muslim* Modernists). Both Islamic fundamentalists and Muslim modernists strive for "reopening" of the gates of *ijtihad,* and thus to develop a kind of critical thinking which detaches itself from conventional religious teachings. The difference between them is clear. The former have a destructive objective: the establishment of a holy doctrine permitting the killing of every Muslim who voices for the suspension of the Shari'a, even if this does not find any support in the Qur'an. [20] The latter instead tend to use ijtihad to encourage a more progressive form of Islam, in particular in the field of women's rights and freedoms. They criticize the inability of theocratic governments to be impartial with regard to the ethical and civil matters rooted in the core of the universal discourse of human rights.

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[18]   Charles   Kurzman,   *Liberal   Islam: Prospects   and   Challenges*   in http://www.liberalinstitute.com/LiberalIslam.html

[19]   See   https://serdargunes.files.wordpress.com/2008/05/the-quran-in-its-historical-context-gabriel-said reynolds.pdf

[20] John L. Esposito, *Voices of Resurgent Islam,* Oxford University Press, 1983

V - Human Rights and "Asian Values"

The fifth and last chapter *Human Rights and "Asian Values"* moves to another region of the world, East Asia. Paragraph one and paragraph two, respectively, *The World Conference on Human Rights* and *The Bangkok Summit,* explain the challenges of East Asian leaders to the drafting of the Vienna Declaration, a position elaborated in the regional preparatory meeting of Bangkok few months earlier the UN World Conference on Human Rights. In the aftermath of the Cold War, politicians and scholars began to lively discuss about the universality of rights, and whether these are consistent with the values shared by East Asian peoples. [21] They questioned the applicability of human rights standards to socio-economic and political contexts having specific regional peculiarities.[22;23] At the UN Conference, Asian leaders – in particular the Singaporean Senior Minister Lee Kuan Yew and the Foreign Minister Wong Kan Seng, Malaysia's Prime Minister Dr Mahathir bin Mohamad, the Chinese and the Indonesian delegation - sponsored the so-called "Asian values", apparently characterized by an alleged set of rights which accord primacy to survival and to its subsequent eradication of poverty. [24] The emerging societies – they upheld – could justifiably postpone the implementation of civil and political freedoms so as to guarantee government stability in the framework of the economic progress. They endorsed that liberties embedded in democratic regimes mean little to those without food, clothing or shelter: for the poor, the satisfaction of basic needs has priority over the fulfillment of political or civil rights. Eventually, the Vienna Declaration valued development as "a universal and inalienable right" in Article 10, but declared that no one should appeal to a development-related cause to excuse systematic abuses and denials. To move on, the paragraph *What are the "Asian Values"?* illustrates the collective concern for social order and discipline, deference to authorities, and a mistrust of political liberalism typical of East Asian cultures, as defenders of cultural relativism

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[21] Alfred M. Boll, "International Review of the Red Cross" Article No. 841, *The Asian values debate and its relevance to international humanitarian law,* ICRC International Committee of the Red Cross, 31-03-2001

[22] Saw Swee-Hock, Danny Quah, *The Politics of Knowledge*, Institute of Southeast Asian Studies (2009), pp. 42-44

[23] "Debate over Rights: Rejecting Western Pressure, Asia Tables Its Own Definition", *Asiaweek,* 30 June 1993, p. 24

[24] Xiaoming Huang, *Politics in Pacific Asia: An Introduction*, Palgrave Macmillan (2009), p. 225

assert. Complaining against hierarchy and state interference is perceived as a sign of weakness; that is the reason why Asians are generally reluctant to join trade unions as well as to denounce underpayment or hard work: the primacy accorded to consensus and stability does not allow any room for a disruptive class-consciousness to develop. [25] The Confucian religion shapes most of the so-called "Asian values", in particular the denial of personal freedoms at the advantage of the harmony within the family and the larger community. In political terms, such attitude is likely to reinforce the domestic authority in the light of the "common good" and produces passive and compliant citizens. [26] Unluckily, it could happen that autocratic regimes tend to manipulate the notion of cultural relativism to reject universal human rights standards, while de-legitimizing external criticism (Paragraph 5.4 *Authoritarian regimes in East Asia*). High officials and their ministers may abuse of the rhetoric of "Asian values" as a convenient façade for fighting social change or forbidding civil and political dissent. Within the justificatory framework of these alleged "Asian values", reactionary practices might be approved, although such practices have no cultural explanation. Advocates of the universality of human rights maintained that this ambiguous understanding of "Asian values" is not a genuinely-held view of East Asian citizens, but an ideological paradigm promoted by few oppressive regimes to preserve their authority. [27] In some Asian countries, corruption, attacks to the judiciary power, control of the formally independent press, and repression of political debate occur everyday. Dissent is blamed as subversive, and so the other freedoms embedded in the liberal thought. Feudal customs are still alive, figured out in the practices of revoking rights, nepotism, favoritism, and bribery. Patriarchy is a plague for societies where women live under constant threat: for reasons related to customary laws and prejudices, women cannot claim equality or the same degree of liberty and social justice recognized to some extent to men. [28] With the awareness that cultural values can be deployed at the advantage of the strong, the world shall not ignore the arbitrary detention and painful tortures taking place in many Asian prisons. All people should be aware of having fundamental rights, and

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[25] Stanley C. Igwe, *How Africa Underdevelops Africa,* iUniverse (2012), chapter: "An Appraisal of Asian Traditional Values", p. 67

[26] Cristina Jayme Montiel, Noraini M. Noor, *Peace Psychology in Asia,* Springer Science & Business Media (2009), p. 310

[27] See http://therightsfuture.com/common-tracks/asian-values/

[28] Religious Diversity and Human Rights-Clashes and Convergences in Asian-European Dialogues,See: file:///C:/Users/USER/Downloads/Clashes%20and%20Convergences%20on%20HR,%202006.pdf

thus individual agency and decision-making power, simply as, and because they are, human beings. The paragraph *"The East Asian Economic Miracle"* proves that the record growth rates of certain East Asian countries do not imply that authoritarianisms are to be preferred to democratic regimes. Development is not explained by the domestic forms of government, but by the Asian integration into the world political economy, which led to the introduction of successful land reforms and state incentives for investments, exporting, or industrialization. [29] As it is clear, none of these policies call for an authoritarian form of government which denies civil liberties to its citizens. [30] Everywhere, especially in the age of knowledge and technology, progress shall not come at the price of subjugation of vulnerable categories. The final paragraph, *The Discourse on Universal Human Rights,* argues in favor of ethical universalism, which asserts that all human beings should enjoy the same degree of equality. There is no reason to see the doctrine of universal human rights as a tool that always advantages the Occident. A number of considerations challenge the alleged Western cultural dominance which is apparently explicated through human rights and international institutions. First of all, Europe had no reason to be proud of its civilization in 1948, after a catastrophic World War which profoundly weakened its imperial self-confidence. The right of self-determination – as stated in Article 29 UDHR, "everyone has duties to the community in which alone the free and full development of his personality is possible" - also applied to colonies until then belonging to European states. Thereby, the Article was established at the expense of Western countries that still owned colonies all over the world. In addition, human rights were the pillar of numerous battles in the 1960s, among others the one for full civil rights of black Americans, which culminated in the Civil Rights Act banning any kind of discrimination in public places. In this and similar cases, universal standards of justice have undermined the prevailing state policies, in the USA and abroad. Furthermore, independent human rights courts have weakened unfair and arbitrary sentences emanated by corrupt domestic courts of the Middle East, Africa, East Asia and even Europe or America. Finally, it should be considered that universal rights do not imply a universality of interests. Noam Chomsky, a radical and undeniably Western intellectual, maintained that the Occident, among all the United States, does not respect

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[29] See http://archive.unu.edu/unupress/asian-values.html

[30] Amartya Sen, "Human rights and Asian values: what Kee Kuan Yew and Le Peng don't understand about Asia", The New Republic July 14, 1997 v217 n2-3 p33(8). See http://www.hmb.utoronto.ca/HMB303H/weekly_supp/week-02/Sen_Asian_Values.pdf

fundamental principles when it is not convenient to do so. [31] At first, human rights were juridically recognized in Western democracies, which at times fail to apply these international standards. They enforce the values embedded in the international human rights law in a partial and inconsistent way. It happens when they provide authoritarian governments with weapons to finance the repression of civilian dissent. They preach democracy and freedom for all while allying themselves with despotic states. The Occident blames China for failing to respect human rights, but it has never abstained from having economic relations with the Chinese government. In the case of Palestine, the West is not sufficiently ready to claim for the protection of local people. A similar view has been advocated by Donald Dworkin about the conduct of President W. Bush's administration during the war in Iraq. [32] In his *World Poverty and Human Rights,* [33] Pogge points out the double standard that Western countries apply to inequality when they move from national to global level. At the global level, they bear levels of injustice that they would not tolerate at the national level. This double standard clearly contrasts with the previously mentioned ethical universalism. In light of these reflections, how can non-Western states affirm that the human rights discourse is an instrument for reproducing the old legacy of colonialism? Human rights are far from being a mere imposition of an arbitrary intellectual imperialism. As the last paragraph concludes, since Western democracies may reject the universal language of human rights in order to make their interests, the assertion that human rights necessarily benefit the Occident is not reasonable.

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[31] Chomsky: *There's no western concern for atrocities and human rights abuses if there's a profit to be made from it*, CP MacLochlainn@CPMacL2008, South East, England, https://twitter.com/cpmacl2008/status

[32] Letsas, G, *Interview with Ronald Dworkin on the Legality of the Iraq War,* Lambrakis Press Company, Athens, Greece (2003).

[33] Thomas W. Pogge, *World Poverty and Human Right,* Second Edition, 2008

I - An Introduction to Human Rights

1.1 A Brief History of Human Rights

The recognition of the rights of liberty and equal participation arises from the historical experiences of crisis and injustice, indifferently committed by Western or Eastern societies, religious or non-religious communities, capitalist systems or bureaucratic states. Everywhere – it was admitted - freedom without equality is likely to become the advantage of the strong at the expense of the weak; equality without freedom is likely to transform society into a prison. Those two values without fraternity would weaken the vocation to the common good. According to William Schultz, former Executive Director of Amnesty International, "ignoring the fates of human rights victims almost anywhere invariably makes the world – our world – a more dangerous place."[34] While the philosophical roots of the idea of human dignity can be traced back to antiquity, human rights have received an international legal recognition only in the modern age. In particular, the international human rights doctrine originated in Europe and the US. Many of contemporary human rights documents have important historical precursors. Antecedents begin from the English Magna Carta (1215) and Bill of Rights (1689), get through to the European Treaty of Westphalia (1648) about a collective guarantee of religious toleration[35], the French Declaration on the Rights of Man and Citizen (1789) and the US Constitution and Bill of Rights (1791), until the Congress of Berlin (1878) adopting the principle of religious liberty in order to recognize new states.[36] It was especially the philosophy of the Enlightenment to prepare the intellectual ground for the acceptance of universal human rights. In this sense, human rights are rooted in the Western civilization, mainly in the form it has assumed since the French revolution: they are a secularized form of what were originally Christian values. The antislavery movement of the late nineteenth century finally reached its aim of abolishing slavery and slave trade, while the 1919 International Labor Organization (ILO), established at the Paris Peace Conference, established international standards for the elimination of forced labor and development of fair labor practices,

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[34] William F. Schulz, *In Our Own Best Interests: How Defending Human Rights Benefits Us All,* 2002

[35] Leo Gross, *The Peace Treaty of Westphalia, 1648-1948",* American Journal of International Law 42 (1948), pp. 21-22

[36] George A. Finch, *The International Rights of Man",* American Journal of International Law 35 (1941), pp. 662-665

including the duty to respect health and safety of workers. Freedoms of expression and association were also recognized.[37] On the other hand, the League of Nations, promoted by the victorious European allies, never achieved its goals of international stability and cooperation – indeed, in the 1930s, Japan invaded China and Manchuria, while Mussolini attacked Ethiopia. Concern about the protection of certain minority groups and nondiscrimination on ground of race and religion were not included in the 1919 Covenant of the League of Nations; moreover the United States refused to join the League. In any case, the protection of minority rights after World War I was granted in international treaties, particularly in those referring to civil, political and social rights of national minorities living in Central and Eastern Europe and the Balkans. Due to the failure of the League of Nations, "Leagues for the rights of man" spread everywhere in Europe. To take just few examples, the « Fédération Internationale des Droits de l'Homme » and the « *Académie Diplomatique Internationale »* were established in Paris during the 1920s. The latter drafted a declaration of human rights whose report became a source of the Declaration of the International Rights of Man published in 1929 by the Institute of International Law in New York.[38] The necessity to protect human rights emerged stronger after the experience of World War II. The extermination by Nazi Germany of over six million Jews, Sinti and Romani (gypsies), homosexuals, and people with disabilities horrified the world. Governments wanted to ensure that never again would anyone be unjustly denied life, freedom, food, shelter, and nationality. The idea that "all men are created equal" and "are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness" - as it was originally stated in the United States Declaration of Independence - became an unquestionable truth for most of the world countries. The lesson from the catastrophic war taught that human beings are more likely to defend themselves against unjust state law and oppressive customary practices when they are aware of having warrantable rights. People endanger their lives if they lack an autonomous agency, whose protection must be guaranteed by international human rights criteria. Human rights are based on two primary forces that motivate all human behavior: the will to live and the will to be free. As President Franklin Delano Roosevelt's pointed out in his 1941 State of the Union

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[37] Paul Gordon Lauren, *The Evolution of International Human Rights,* 2nd ed., University of Pennsylvania Press (2003), pp. 97-102

[38] Charles R. Beitz, *The Idea of Human Rights,* Princeton University Press (2011), p. 16

address, [39] the will to be free comprises the four essential freedoms that the Allies adopted as their basic war aims: freedom of speech and religion, freedom from fear and from want. There are several fundamental rights deriving from this core of freedoms: freedom of movement and action; freedom of the press and teaching; freedom of reunion and association, and other general civil, economic and political freedoms. In the same way, the 1941 Atlantic Charter promoted by Roosevelt and the British Prime Minister Churchill described a postwar world order in which all people would have enjoyed an array of rights, e.g. to self government, social security, and again freedom from want and fear. Governments committed themselves to establish the United Nations, with the primary goal of bolstering international peace and preventing conflicts. Human rights standards mainly developed under the auspices of the United Nations Charter of 1945, within the framework of a growing acceptance of the common aspirations of peoples. According to the Charter, one of the purposes of the United Nations is "to achieve international co-operation in solving international problems […] and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion"[40]. The Charter did not explicitly refer to a bill of rights and did not set the standards for fundamental freedoms, but it delegated a permanent commission responsible to the newly constituted UN Economic and Social Council to identify the content of the human rights system. The premise was the following: there are universal principles of human rights that shall be respected by all countries of the world. The core of this system is the International Bill of Human Rights, comprising the Universal Declaration of Human Rights (1948), the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights (both 1966). Since its ratification in 1976, the Bill has become a fundamental element of international law. It was intended to give legal effects to nonbinding provisions of the UDHR adopted by the UN General Assembly. In addition, the United Nations approved more than twenty principal treaties further elaborating human rights. Among others, there is the Convention Relating to the Status of Refugee (1951), the Convention on the Elimination of All Forms of Discrimination against Women (1979), and the Convention on the Rights of the Child (1989). Antonio Cassese, the first president of the International Tribunal for the former Yugoslavia and one of the most outstanding figures in

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[39] FRANKLIN D. ROOSEVELT, 1941 STATE OF THE UNION ADDRESS ("THE FOUR FREEDOMS"), 6 January 1941

[40] Charter of the United Nations, Chapter I: Purposes and Principles, Article 1.3. http://www.un.org/en/documents/charter/chapter1

the history of international law who analyzed human behavior at its worst, taught us that one need not be a blind optimist to go in search of direction and progress through law.[41] All these international documents made a noble contribution to the furtherance of basic rights, which have been propelled rights onto the global stage and into the global conscience. It was agreed that human rights are possessed by people simply as, and because they are, human beings[42]. To borrow from Voltairine de Cleyre, "A right, in the abstract, is a fact; it is not a thing to be given, established, or conferred; it is. Of the exercise of a right power may deprive me; of the right itself, never"[43]. Everyone, by virtue of his or her humanity, is entitled to certain fundamental rights.

1.2 The Universal Declaration on Human Rights

The Commission on Human Rights guided by Eleanor Roosevelt drafted a document spelling out the meaning of interdependent and indivisible rights proclaimed in the UN Charter. On the 10 of December 1948, the Universal Declaration of Human Rights - which did not have the legal force of a treaty and lacked provisions for implementation - was unanimously voted and adopted by the 56 members of the United Nations, while 8 countries chose to abstain. Rights included in the UDHR are roughly listed according to the nature of the interests they are meant to protect. They range from legal personality, freedom of expression and association, personal security, to participation in political and cultural life. The inclusion of economic and social rights, such as right to work, to health and education, has sometimes been thought to be a political accommodation required to secure the support of the Soviet bloc. The US Department of State was initially resistant, but given that most members of the Human Rights Commission shared the Soviet view, there was no chance that economic and social rights would not be part of the Declaration.[44] René Cassin, President of the French Council of State, distinguished human rights enshrined in the Declaration in four categories: [45]

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[41] Antonio Cassese, *International Law,* Oxford University Press, 2005

[42] Moira Rayner, *History of human rights*, http://www.universalrights.net/main/histof.htm

[43] Voltairine de Cleyre, in "The Economic Tendency of Freethought" (1890), p.171

[44] Charles R. Beitz, *The Idea of Human Rights,* Princeton University Press (2011), p. 23

[45] Mary Ann Glendon , *World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights*, Paperback (2011), p. 174

1. Rights to liberty and personal security - life; prohibition of slavery; torture and inhuman or degrading punishment; legal personality including equality before the law, no arbitrary arrest, presumption of innocence;

2. Rights in civil society - non interference in family life and protection of correspondence; equal right to marriage; freedom of movement and residence within the state;

3. Rights in the polity - freedom of thought, conscience and religion; freedom of assembly and association; a general right to take part in the government of the country;

4. Economic, social and cultural rights - sufficient standard of living referring to adequate food, education, housing and medical care; equal pay for equal work; right to join the trade unions and reasonable limitation of working hours.

Human rights refer to a plurality of interests and require various kinds and degrees of commitment of different agents. The implementation of these rights protects what Griffin calls human "personhood", that embeds three fundamental components referring to individual agency. First, the capacity to choose one's own path through life without been dominated by external agents; secondly, the opportunity to have the resource, e.g. a certain minimum education and information, to choose effectively; finally, the liberty to pursue what one sees as a worthwhile life.[46] In Griffin's theory autonomy, minimum provision and liberty are regarded as claim of every human being having the capacity of normative agency. Although provisions of the UDHR were not intended as legally binding, the Commission on Human Rights considered several possibilities to monitor human rights violations. Among others, there were mandated reporting, petitions or inquiry by special commissions and eventually by an international court of human rights authorized to reach final decisions. Governments had the primary responsibility to ensure the respect of rights within state borders: most of the more than 185 countries now in the United Nations incorporated these principles into their constitutions so as to allow citizens to seek compensation for violations through their domestic legal system. Furthermore, human rights achieved the status of customary international law. Given the historical context within which the present standards on human rights have been formulated, it was unavoidable that Western members played a predominant role in the drafting of the Declaration. In any case, senior representatives also came from China, URSS, Chile, Lebanon etc. Therefore, a plurality of religious,

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[46] James Griffin, *On Human Rights,* Oxford University Press (2008) p. 31

philosophical and political positions – Chinese, Marxist, Latin American, Islamic – were represented at the drafting. The committee tried to assume a universal approach in formulating human rights criteria, which needed to be suited for a culturally plural world characterized by a high degree of variation among the world's major societies. The recognition of a culturally plural world is specifically embedded in Article 22, which states that economic, social and cultural rights are to be realized "in accordance with the organization and resources of the state". In Article 21, the individual right to take part in the government of his country was drafted so as to be compatible with noncompetitive (one party) and competitive electoral systems. The attempt of the Declaration was to find a common ground to define a delimited range of moral universals within different viewpoints. For instance, the lack of reference to God was a sign of respect towards the atheistic Communists and competing religions; otherwise they would have been discriminated. The proposals to include references to God or nature were not rejected as false or outdated, but because a parochial theological or natural position would have been inappropriate in a declaration aspiring to broad international acceptability. Jacques Maritain - a member of the UNESCO Committee on the Theoretical Bases of Human Rights – reported that human rights as principles of action with common grounds of similarity were justified in different ways by different people.[47] The Declaration was presented in a way that allowed adherents of divergent perspectives to work out the relations between their broader philosophy of life and the account of human rights, giving them the opportunity to efficacy accept the human rights idea.[48] Eventually, rights articulated in the Declaration have become part of customary international law by virtue of their common acceptance in the international legal practice of states.[49] Under the umbrella of universal human rights, there is not a uniform, global mono-community. Otherwise, the principle of reciprocity on which universality is grounded would be violated. The Declaration recognized the moral equality of all people: certain values such as freedom of thought, religion, peaceful assembly etc. were put under an eternal ban. The abstract appeal to the idea of human dignity encourages multiculturalism, therefore a plurality of religious, philosophical and cultural

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[47] Jacques Maritain, "Introduction", in UNESCO, *Human Rights: Comments and Interpretations*, Allan Wingate (1949)

[48] Joshua Cohen, "Minimalism about Human rights: The Most we Can Hope For?", *Symposium: Toward International Consensus,* The Journal of Political Philosophy, Volume 12, Number 2, 2004, p. 200

[49] Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law,* Oxford: Clarendon Press (1989) ch. 2

interpretations of life which conform to the principles of freedom and equality. These principles produce general moral and ontological frameworks of convictions about what makes lives worth living. It follows that a justifiable conception of worldwide standards of freedom and justice should be based on the right of men to live in terms of their own traditions.[50] Consequently, the Declaration seems to abolish the hierarchy of civilizations and cultures.

1.3 The Covenants and Other Human Rights Documents

The UN Commission on Human Rights began to draft a binding international covenant even before the Declaration was completed and continued until 1954. Ideological conflicts - especially between Soviet communists and Western liberals - and continuous changes characterized the work of the Commission. The intervention of the UN General Assembly - moved by socialist and less developed countries - was essential to secure the inclusion of economic and social rights, already embedded in the Declaration, to which the United States and Great Britain continued to oppose. As a result of a political compromise, two documents were established: the International Covenant on Civil and Political Rights – with its optional Protocol allowing individuals to submit complains for review - and the International Covenant on Economic, Social and Cultural Rights. Both covenants were finally approved and adopted by the General Assembly in December 1966 and entered in force from 1976. The former mostly focused on such issues as the right to life, freedom of speech, religion, and voting, etc. while the latter was mainly about labor rights, food, free education, health, and shelter. The covenants expand in scope and detail the provisions of the Declaration. They have a common article (Art. 1) about the right of peoples to self-determination and to dispose of their natural resources and wealth, while there is no mention of the right to own property. The ICCPR is monitored by the UN Human Rights Committee - a separate body to the UN Human Rights Council – the ICESCR by the UN Committee on Economic, Social and Cultural Rights. The United States has signed both covenants but ratified only the ICCPR, and even that with many reservations to its full compliance. The solution of developing two distinct covenants was officially motivated by the following reason: although both categories of rights have equal importance, civil and political rights could be recognized rapidly whereas the implementation of economic and cultural rights required international assistance and cooperation in most of the cases. Under certain economic and social circumstances, it may not be possible to guarantee various rights

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[50] American Anthropological Association, Executive Board, "Statement on Human Rights", *American Anthropologist,* NS 49 pp. 542-543

immediately, at least not without sacrificing some other relevant aims of public policy. The indigenous features of poor societies, particularly the quality of their institutions, might not be able to provide the full implementation of anti-poverty rights. For instance, no agent or group of agents controls sufficient resources to satisfy the claims for an adequate standard of living. The articulation of a doctrine of human rights progressively developed in a series of international agreements in order to supply the norms of an increasingly elaborated global policy. The United Nations has adopted at least four more treaties that may also be regarded as part of the "core" of the universal human rights system. The first two are documents to prevent and prohibit specific abuses, with particular reference to punish ideas based on racial superiority: the Convention on the Elimination of all Forms of Racial Discrimination (1969) and the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punish (1987). The ICERD – one of few UN human rights instruments that the US has both signed and ratified – specifies the measures that States must undertake to eliminate racial discrimination. Members are committed to the promotion of understanding among all races, in the form of outlawing hate speech and criminalizing membership in racist organizations. A monitoring body, the Committee on the Elimination of Racial Discrimination, was included, as well as individual complaints mechanisms so as to effectively making the provisions enforceable against its parties. The UNCAT defines what torture is and how it should be criminalized, investigated and prosecuted. It sets out clear legal obligations for countries to take action against torture, degrading and inhuman treatment at home and abroad. Countries must prevent torture within their borders and are forbidden to forcibly send people to where they risk torture and more. The last two are documents to defend vulnerable populations: the Convention on the Elimination of All Forms of Discrimination against Women (1981) and the Convention on the Rights of the Child (1990). The CEDAW recognizes to women the same rights as men to vote and to participate in government, equal access to education, employment, health care and the courts. It also condemns injustice in law governing marriage and family relations, and protects women against the consequences of unfair social practices.[51] The purpose – as stated in Article 5 - is to eliminate "prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes." The Convention defines what constitute discrimination against women and provides the basis for realizing gender equality; at the same time it sets up an awareness-raising agenda for national action. The UNCRC deals with the child specific needs and requires that states act in the

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[51] Charles R. Beitz, *The Idea of Human Rights,* Princeton University Press (2011), p. 187

best interests of the child. Its content is very detailed: children's basic rights comprise the right to life, to their own name and identity, to be raised by their parents within a family or cultural grouping, and to have a relationship with both parents, even if they are separated. Children also have the right to privacy, to be defended from abuse or exploitation, and to have their opinions heard and acted upon when appropriate. Other relevant treaties include the Convention on the Prevention and Punishment of Genocide; the International Convention against Apartheid; the ILO Indigenous and Tribal Peoples Conventions. It is worth to cite the Helsinki Declaration of 1975, when the Soviet Union exchanged international recognition of the postwar boundaries in Eastern Europe for a commitment to respect human rights – whose importance was a matter of social controversy – in particular, freedom of religion and association, and political liberties. As a consequence, political dissent increased in the Eastern bloc and contributed to the eventual dissolution of the Soviet authority.[52] There are also regional documents whose purpose is to guarantee fundamental rights: among others, the African Charter on Human and People's Rights, the Arab Charter on Human Rights, the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union. It is not unlikely that regional regimes are nested within the larger framework of the international human rights practice.

1.3 Human Rights as Individual Rights

Human rights always address to the individual. The emphasis on individualism is a lesson from the historical experience: The Nazi and Stalinist oppression were regarded as the disastrous heritage of the European collectivism. In some cases, individual rights require the recognition of group rights, whose ultimate purpose is to protect the individuals without whom the group would cease to exist. The individual rights to speak your own language and practice your own religion, for example, do not mean anything if the language or the religion have died out. The importance of these values cannot be explained without considering the individuals' group membership. At the same time, group rights - which are essential preconditions for the exercise of individual rights - shall not become a source of collective tyranny. They shall not be used to prevent individuals from learning a language or practicing a religion other than the language or religion of the group[53]. Otherwise on what basis might human rights be regarded as universal and grounded on the principle of reciprocity? Beitz points out that there is a long history of criticism of human rights as

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[52] Daniel C. Thomas, *The Helsinki Effect,* Princeton University Press (2001) ch. 5

[53] Michael Ignatieff, *The Rights Revolution,* Toronto: Anansi 2000, ch. 3

excessively individualistic. In particular, individual rights e.g. religious freedom or private property are accused of limiting forms of public actions and producing social disunity. However – Beitz underlines - human rights are not objectionably biased against the possibility of group rights, understood as rights that can be claimed by individuals in virtue of their interest in membership in various kinds of groups. [54] Under the global and inclusive framework of justice, there is no conflict between the values having a collective dimension - embedded in the idea of national sovereignty - and other rights more connected to the individual sphere. National sovereignty is deeply related to the principle of self-determination, recognized among all by the UN Charter[55], the ICCPR and the ICESCR[56]. Self-determination derives from the reciprocal right of peoples to affirm their identity and to achieve justice and peace, guaranteed by national sovereignty, without interference by any other state. Societies and states, just like individuals, are supposed to be objects of toleration, but only in case tolerating a state is the most effective way of protecting the liberty of its members. No government is allowed to manipulate the valid and essential principle of self-determination for its own interests. If it be so, the world community shall adopt mechanisms to ensure the respect of human rights of the people within the country, regardless of their race, sex, religion, sexual orientation or any other distinguishing feature. Authoritarian leaders accuse international institutions to be discretionary and unjust, to do Western interests, but this is a mere excuse to limit external interference when they know to be in the wrong. The principle of self-determination is still an individualistic value –intended as a value for the individuals who enjoy it - although its importance can only be explained within the framework of individuals' group membership. Thereby, a right can have a collective dimension without being non individualistic.

1.4 Paradigms of political action: how to ensure human rights enjoyment

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[54] Charles R. Beitz, *The Idea of Human Rights,* Princeton University Press (2011), p. 112-113

[55] Charter of the United Nations, Chapter 1, Article 1.2: The purposes of the United Nations are: "*To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace*"

[56] Article 1 in both the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) reads: "*All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.*"

A variety of paradigms of political action might be adopted in response to human rights offenses. These are: accountability; inducement; assistance; domestic contestation and engagement; external adaptation; compulsion.

1. Accountability

Accountability is a structured way to induce respect of human rights by threatening sanctions in the event of non compliance. It describes an account-giving relationship between individuals, e.g. "A is accountable to B when A is obliged to inform B about A's actions and decisions, to justify them, and to suffer punishment in the case of eventual misconduct".[57] Implicitly, the absence of proper accounting practices means an absence of accountability. For human rights enforcement to be effective, states are held accountable before the International Court of Justice; in the case of the European and the EU level, respectively before the European Court of Human Rights and the Court of Justice of the European Union. Some kind of role of supranational institutions has been contemplated since the reference - in the declaration and covenants - to global cooperation and provisions for international monitoring. Indeed, the disastrous experience of World War Two was regarded as an evidence of a structural deficiency in the system of states as it then existed: the world political structure concentrated power at dispersed locations not subject to higher order control. Early advocators of modern human rights doctrine believed that domestic misconduct could be reduced through the establishment of a set of common standards, supported and monitored by the global community and those acting as its agents. Unfortunately, accountability has not always been a useful instrument for the furtherance of human rights concern. The human rights system is known for the weakness of its institutional capacities for authoritative resolutions of disputes. As Beitz claimed, the treaty bodies lack sufficient resources to audit reports of states, which tend to be late and incomplete, and the sanctions available in the event of non compliance are generally limited to "naming and shaming", that is only a mere reporting of the violation.[58] Even if various mechanisms have evolved for human rights enforcement, many of the rights listed in the major international treaties continue to be disregarded. In his *History and illusion in Politics,* Raymond Geuss remembers that: "Perhaps if we repeat claims about natural rights long enough

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[57] Andreas Schedler, Larry Diamond, Marc F. Plattner, *The Self-Restraining State: Power and Accountability in New Democracies*, Lynne Rienner Publishers(1999), pp. 13–28

[58] Charles R. Beitz, *The Idea of Human Rights,* Princeton University Press (2011), p. 34

and loudly enough, and pass enough resolutions, people will stop doing various horrible things to each other. Indeed, perhaps they may, but perhaps not"[59] .

2. Inducement

On the inducement side, official institutions are often viewed as purveyors of benefits rewarding states for compliance. These benefits include diplomatic incentives, preferential treatment in economic relations, the attachment of conditions to bilateral assistance and also manipulation of access to economic, social and cultural resources.[60] For instance, the UN Special Rapporteur on the Right to Food, Olivier De Schutte, supported the call by Alliance Sud for Switzerland to carry out human rights impact assessments before concluding trade and investments.[61] The European Union uses its economic and diplomatic instruments to foster the spread of norms on human rights. Indeed trade agreement, cooperation and association agreement, aid, diplomatic recognition, and eventual membership have been made conditional on respect for basic rights by the EU's partners. International financial institutions can include conditions bearing on rights compliance in development lending agreements or attach specific requirements to structural adjustment assistance.[62] However, the World Trade Organization has often been criticized for failing to address properly the human rights aspects of its activity. The probably most controversial issue is whether the WTO should allow the enforcement of rights through trade measures, given that trade-related human rights measures would be trade restrictions, such as embargo towards dictatorships.

3. Assistance

Under particular economic and social circumstances – e.g. insufficiently developed judiciary and lack of resources - it might not be possible for governments to protect certain fundamental rights. Foreign aid in order to strengthen the country's capacity is needed: it focuses on alleviating poverty in the long term. About 80-85% of development aid comes from government sources as official development assistance, while the remaining 15-20% comes from private organizations

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[59] Raymond Geuss, *History and illusion in Politics,* Cambridge University Press (2001) p. 144

[60] Evan Luard, *Human Rights and Foreign Policy,* Pergamon 1981, pp. 26-27

[61] http://www.alliancesud.ch/en/policy/trade/guidelines-for-human-rights-compliant-trade-policy

[62] Andrew Chapham, *Human Rights Obligations Of Non-State Actors*, Oxford University Press, pp. 137-159

such as "non-governmental organizations" (NGOs), foundations and other development charities.[63] Aid programs are promoted by various states, such as the United Kingdom with its Department for International Development, Japan with its international economic cooperation policy, and Sweden with its International Development Cooperation Agency. The electoral assistance given by the European Commission for Democracy through Law, an advisory body of the Council of Europe, is another example. The Commission was created after the fall of the Berlin Wall, at a time of urgent need for constitutional support in Central and Eastern Europe. Its primary task is to assist and advise individual countries in constitutional matters in order to improve the functioning of democratic institutions and the fulfillment of human rights standards.

4. Domestic contestation and engagement

Domestic actors might be encouraged by outside agents to put pressure on governments for changes in law and policy or to bring about changes in private behavior within the society. Outside agents provide resources for domestic political activities. They collect information about local conditions, translate human rights norms, facilitates local political alliances or partnerships with social movement groups.[64] Transnational activism modifies the claims of domestic actors and their prevailing strategies so as to encourage governmental changes. Various forms of international solidarity action have spread since the anti-slavery and workers' struggles or the women's movements. During the second half of the twentieth century, the number of transnational NGOs has enormously grown, as well as the measures in order to limit social systems and cultural practices blamable of violating human rights. For instance, the voluntary Sullivan Code required American corporations operating in apartheid-era South Africa to improve treatment of their workers. The global anti-apartheid movement brought together a powerful repertoire of "people's sanctions" such as boycott and disinvestment campaigns. Today various peoples – most obviously but by no means only the Palestinians – liken their situation to apartheid and appeal to the precedents set in the anti-apartheid struggle. Other campaigns – e.g. against human trafficking, work exploitation and oppressive cultural practices such as genital mutilation - have also proved formative in the diffusion of transnational activism. In Guatemala, the Commission for the Verification of Corporate Codes of Conduct (COVERCO) monitors conditions in factories producing

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[63] OECD, DAC1 Official and Private Flows. The calculation is Net Private Grants/ODA

[64] Sidney Tarrow, *The New Transnational Activism,* Cambridge University Press (2005), pp. 188-200

clothing under contract for major American brands, while in India, the Rugmark inspection team (today known as GoodWeave International) provides "social labels" for handknotted carpets made without child labor.

5. External adaptation

External adaptation aims at influencing the policy of other states and multinational actors when these agents constitute an obstacle for domestic compliance with human rights standards. For instance, the trade-related aspects of intellectual property rights (TRIPS) Agreement make the access to essential drugs difficult for many of those who need most. Property-rights patents may come at the expense of health and human lives. The costs of drugs is kept high by pharmaceutical companies, too. Hitherto, corporations have lobbied their governments to tacitly support dictatorships as they could control their own people and allow conditions like cheap labor, sweatshops, and so on. Corporations have also been accused of hiring local militaries to subdue workers protesting against oppressive work practices, just like the various controversies over oil and mineral companies in parts of Africa have highlighted.[65] There could be other external obstacles for human rights compliance at the national level. The trade policies of potential trading partners might prevent domestic firms from marketing their exports. Yet, the indigenous circumstances inherited from the legacy of colonial past may obstruct economic development and impair the implementation of anti-poverty rights.

6. Compulsion

In order to stop human rights infringements, outside agents occasionally resort to coercive means, from economic sanctions to armed interventions, going through giving assistance to a dissenting group. States are responsible for satisfying certain conditions in the treatment of their citizens. Failure to do so justifies remedial action by the world community to aid those who are involuntarily victims of deprivation. Paternalistic interference is admissible under special circumstances, when its purposes are seen as ones that those affected would accept if they were in a position to decide on their own. There should be good reason to believe that agents who are threatened by actions or omissions of the government are unable to choose for themselves and

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[65] http://www.globalissues.org/article/51/corporations-and-human-rights

would authorize the interference in order to prevent harm or secure their benefits[66]. Interference in defense of values not actually shared within a society's culture is objectionable, as stated by the Executive Board of the American Anthropological Association when submitting the "Statement on Human Rights" to the UN Commission.[67] The Charter of the United Nations only contemplates two cases for the admissibility of a war: 1) necessary measure to maintain or restore world peace and security, 2) legitimate defense because preventive war without clear proof that an attack is imminent raises serious moral and juridical questions. In all other circumstances, there is a general prohibition to resort to violence for solving international disputes. If outside agents seek to bring about a change in the offending law and policy, the force of the challenge will depend on how the idea of collective self-determination is understood and how the details of the practice, its demandingness and scope, are filled in. Not every kind of regimes can be recognized as genuinely self-determinating. A judgment about intervention would take into account the following factors: the urgency, the nature and the importance of the threatened interest; the likelihood that the threat protected against will actually occur, its source and explanation; the feasibility of implementing the protection in typical circumstances. It must also consider the nature of the historical relationships between beneficiaries and eligible contributors, and the likely cost of making the protection effective, as well as the likelihood of harm to both beneficiaries and third parties. In short, the admissibility of intervention is based on the "just war theory" (*jus bellum iustum*). This is an ethical-political doctrine whose purpose is to ensure that war is morally justifiable through a series of criteria, gathered in the morality of going to war (*jus ad bellum*) and in the moral conduct within war (*jus in bello*).[68] The origins of the traditional "just war theory" mainly derive from the Medieval religious thought, with important antecedents in the Ancient Greek philosophy of Plato and Aristotle. The Christian theologian Saint Augustine was one of the first to assert that God has given the sword to government for good reason, although it should not resort immediately to violence (Romans 13:4).[69] Nine hundred years later, the theologian Thomas

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[66] Charles R. Beitz, *The Idea of Human Rights,* Princeton University Press (2011), pp. 84-85

[67] Executive Board of the American Anthropological Association, "Statement on Human Rights", American Antropologist, NS 49 (1947) pp. 539-543

[68] Charles Guthrie, Michael Quinlan, "III : The Structure of the Tradition ", *Just War: The Just War Tradition: Ethics in Modern Warfare,* Bloomsbury Publishing, pp. 11-15

[69] http://biblehub.com/romans/13-4.htm

Aquinas used the authority of Augustine's arguments to enlist the criteria for a war to be considered just. First, the necessity is established by the state; secondly, good and just purpose motivate the war rather than self-gain; thirdly, peace is a central motive even in the midst of violence.[70] These days, commonly accepted ethical criteria for waging a war are:

a) Just cause – as affirmed in 1993 at the US Catholic Conference: "Force may be used only to correct a grave, public evil, i.e. aggression or massive violation of the basic human rights of whole populations"; [71]

b) Comparative justice – the claims and suffering of both sides must be considered;

c) Competent authority - duly constituted public authority within a political system that allows distinctions of justice are the ones allowed to declare war;

d) Right intention – the use of force is only permitted to correct a suffered wrong e.g. to keep or restore peace and to assist innocents;

e) Probability of success – prohibition of initiating a war for a futile cause or when disproportionate measures are required to achieve success: hopeless causes are unethical because they prolong sufferance;

f) Last resort – force to be used only after all non-violent viable alternatives have been seriously tried and exhausted or are clearly not practical: war cannot be a first choice;

g) Proportionality – the war must prevent more evil and human suffering than it causes.

Commonly accepted ethical criteria for conducting a war are:

a) Distinction – attacks should be directed against enemy combatants and should spare the wounded and sick, people who do not belong to the armed forces and enemy combatants who surrender;

b) Proportionality between the means employed and the aim sought to be realized;

c) Military necessity –attacks' purpose must be the military defeat of the enemy, while limiting unnecessary death and destruction;

d) Fair treatment of prisoners of war – prisoners shall not be subjected to torture, degrading treatment and discrimination based on race, nationality, religion or political opinion;

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[70] http://plato.stanford.edu/entries/aquinas/

[71] http://www.patheos.com/blogs/geneveith/2013/09/lets-apply-just-war-theory/

e) No means malum in se - armed forces do not have an unlimited choice of methods of warfare: women must be protected from rape and children under the age of eighteen must not be permitted to take part in hostilities.

Yet, prospects for success depend on many factors, such as the political or social circumstances of the society intervened in, and the military capabilities of the foreign actors.

1.6 How and Why Human Rights have become Part of Social Expectations?

Thanks to international instruments, individuals can claim their rights to resist to unjust laws and orders. In his *The Evolution of International Human Rights,* [72] Paul Gordon Lauren states that the way governments treat their people is a matter of global concern because the goal of human rights addresses to all peoples and all countries. There are standards to respect for domestic institutions whose denial provides reasons for action for external agents. Human rights defense overcomes the boundaries of state sovereignty: there are freedoms above those prescribed within the framework of the national law. Human Rights legitimize the claims of women and children against the injustice they suffer in patriarchal and tribal societies, such as arranged marriages, domestic slavery and genital mutilation. Authoritarian governments tend to refuse the idea of universal rights. As Ignatieff asserts, "It would be a hopeless task to attempt to persuade these holders of power of the universal validity of rights doctrines, since if these doctrines prevailed they would necessarily abridge and constrain their exercise of authority."[73]. In a world of unequal power, dominant groups or classes tend to maintain manipulated interpretations of cultural norms that support their own interest. These interpretations are unilaterally proclaimed to be the only valid view for the society. In the same way, fundamentalists reject human rights, the equal dignity and moral worth of people: the sacralization of violence is inherent to these movements which live for fighting. On the contrary, dominated groups or classes may be in favour of alternative explanations that are helpful for the achievement of justice[74]. In the absence

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[72] Paul Gordon Lauren, *The Evolution of International Human Rights,* Philadelphia: University of Pennsylvania Press, 1999

[73] Michael Ignatieff, *Human Rights as Politics and Idolatry,* Princeton University Press (2011), p. 68

[74] Deng, Abdullahi An-Na'im, Yash Ghai and Upendra Baxi, *Human Rights, Southern Voices, Cambridge University Press 2009, p.80*

of freedom of speech and belief, the demand of the dominated groups difficulty rises. Beitz borrows from Scanlon's writings[75] a general form of schema for justifying claims about the content of the human rights doctrine. This is based on three parts:

1. from the perspective of the beneficiaries, the satisfaction of an interest is reasonably considered a political priority

2. the interest's guarantee by means of legal or policy instruments is advantageous

3. the state's failure to provide the protection is a suitable object of international concern

In other words, the importance of interests recognized by human rights from the standpoint of a reasonable beneficiary shall be intelligible to reasonable people who might be called upon to defend them. Secondly, the benefit from assuring a certain interest depends on its vulnerability to certain predictable threats and on the desirability to protect against these threats by means of constitutional provision, law or policy. The final assumption is that human rights address to all peoples in all countries of the world: they overcome the boundaries of state sovereignty. A proper subset of external eligible subjects – in virtue of their location, capabilities and resources – is in a position to carry out political actions in order to remediate to the state's failure, when these political actions satisfy general standards of political morality and have reasonable prospects of success.[76]

1.7 Human Rights' Awareness: The Case of Genital Mutilation

Those who exclusively benefit from the norms of their cultural traditions may argue that if individuals accept to have a subordinate place within their society, as established by the religious or cultural group to which they belong, human rights objections on the ground of equality will be irrelevant, even intrusive. This is the case, for instance, in which tribal women do not oppose to female genital mutilation. Under some circumstances, interference to prevent a girl from consenting to some forms of genital cutting might be paternalistic. Indeed, the question whether the customary practice is harmful for the girl cannot be exclusively settled from a Western perspective. According to Renteln, the fact that many women perpetuate the custom of female genital cutting is an evidence. The presumption of universality cannot alter the reality that this

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[75] T. M. Scanlon, "Rights, Goals and Fairness", in *The Difficulty of Tolerance: Essays in Political Philosophy,* Cambridge University Press (2003), p. 35

[76] Charles R. Beitz, *The Idea of Human Rights,* Princeton University Press (2011), pp. 137-140

practice is accepted as moral by members of the culture.[77] On the basis of evidence available to any reasonable person, a question naturally arises: is genital mutilation the real preference of women? Or is it a choice depending on their cultural context, given that if women fail to submit to the ritual they will no longer have a place in the community? That being the case, genital mutilation is nothing but the price of tribal and family belonging. When individuals are denied an adequate range of choices, they do not choose according to a reasonable version of what could or should be preferred. In these situations, individuals sacrifice their preferences for complaining with the constraining norms of their culture. The distinction between choice and preference is relevant. The choices of people might not represent their true preferences. People who grew up in a regime that emphasizes their inferiority may systematically choose below their interests and desires. Indeed, more or less latent coercion prevents individuals to think, believe and act as they would do if their cultural tradition genuinely respected human rights. The role of activists is to encourage a critical view of specific cultures when the latter limit the free and responsible development of individual's personality. Activists make individuals aware of their fundamental rights, and thus of their agency and decision-making power, so as to enable them to genuinely choose for themselves. In this way, there is room for external and internal criticism of those cultures which deny rights of their members. Eventually, choice and preference tend to converge as much as possible.

1.8 Human Rights and Social Justice

Quoting the The Burmese politician Aung San Suu Kyi:

"Within a system which denies the existence of basic human rights, fear tends to be the order of the day. Fear of imprisonment, fear of torture, fear of death, fear of losing friends, family, property or means of livelihood, fear of poverty, fear of isolation, fear of failure. [...] Yet even under the most crushing state machinery courage rises up again and again, for fear is not the natural state of civilized man".[78]

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[77] Alison Dundes Renteln, *International human rights: universalism versus relativism,* Sage Publications (1990), p.58

[78] Aung San Suu Kyi, *Freedom from Fear*, Acceptance message for the 1990 Sakharov Prize for Freedom of Thought (July 1991).

According to Pogge, the human rights doctrine justifies claims against institutions accused of producing massive avoidable human rights deficits. Claims are also addressed against those who support these institutions and shared practices of which the claimant is a part.[79] As a form of protection of human dignity, human rights can truly be regarded as the universal language of the powerless, a language through which individuals defend their agency against the domestic authority of the despotic family structures, the states, the Church. In short, the human rights discourse is the common language people speak in order to criticize national politics. *As stated in the Preamble of the UDHR: "*Recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice, and peace in the world". Human rights represent a public normative practice of comprehensive scope for people with differing ethical traditions and values. To this extent, they are a doctrine construed to play a certain role in the global political life and are regarded as deeply related to a conception of social justice [80:] the paradigm of international justice and its moral commitment to implement human rights were born to reduce the amount of unmerited cruelty and pain all over the world. However, it should be always remembered that a theory of human rights is not a theory of ideal global justice. The latter refers to an hypothetical political constitution of the world within which the purpose of a practice of human rights may have a place, while the former takes certain basic facts about the world's political structure as fixed and considers the current practice of human rights within this structure.[81] Human rights and social justice provide for different degree of implementation of rights. To borrow from Rawls and Cohen, human rights constitute only a proper subset of the rights of social justice.[82;83] For instance, the respect of human rights requires to have a standard of living adequate for a decent life, while the content of social justice is more complex and is about an interest in not feeling ashamed or humiliated by one's material situation considered in relation to those of others. External action to promote social justice may fall outside the range of suitable objects for international concern as intended by the human rights doctrine.

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[79] Thomas Pogge, *World Poverty and Human Rights,* Cambridge: Polity, 2002, pp. 44-48

[80] Andrew Chaplam, *Human Rights: A Very Short Introduction,* Oxford University Press (2007) p. 162

[81] Charles R. Beitz, *The Idea of Human Rights,* Princeton University Press (2011), p. 128

[82] Rawls, *The Law of Peoples*, Harvard University Press (1999), p. 81

[83] Joshua Cohen, "Minimalism about Human Rights, *Journal of Political Phylosophy* 12 (2004), p. 210-213

As an example, international assistance in order to strengthen domestic economy and to eliminate the worst form of poverty is different from encouraging an income distribution that satisfies some more ambitious standard of distributive justice. A final consideration must be taken into account. In the view of their advocates, modern human rights are intended as universal, while social justice is deeply related to the economic, social and cultural context to which it is expected to be enforced. Specific aspects of social justice varies across communities in a way that responds to differences in levels of national institutions, laws and policies[84]. Under the universal framework of human rights, social justice does not imply an homogeneous view, applicable to all societies, about the domestic implementation of values such as liberty and equality, freedom and security, private property and distributive justice, etc. For instance, the so-called untouchables in India, who have been the victims of the Hindu caste system for centuries, claim for favorable treatment even at the expense of other citizens[85]. Is favorable treatment for the Untouchables a violation of the principle of non-discrimination, or is it a means to stop the continual harassment against Untouchables, thereby to implement full equality among members of the Indian society? There are no comprehensively valid principles to solve the tensions between global justice and a kind of special protection, particularly towards certain religious or cultural groups. The practical realization of social justice is contingent to economic and social circumstances. Other similar questions in liberal-democratic contexts are the following: given the historical gender discrimination women suffered, should women be granted special spaces, quotas and roles exclusively reserved to them at the expense of men? The reason to consider women to be a subject suitable for a differentiated treatment might be the historical fact that injustice against women has been such a pervasive feature of most human societies that special measures are needed to eliminate it. Is this favorable treatment for women pro or against the anti-discrimination principle embedded in the notion of universal human rights? Even more crucially, will special privileges be an advantage for women or will they further emphasize a new kind of female discrimination by producing double-edged weapons in the hands of conservative forces? The principle of non-discrimination embedded in Article 2 of the UDHR does not prohibit any kind of differentiated treatment on the ground of race, gender or religion. In effect, this principle is

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[84] Charles R. Beitz, *The Idea of Human Rights,* Princeton University Press (2011), pp. 142-143

[85] Neera Chandhoke, S K Agrawal, *Protecting the Unprotected: A Comparative Study of Social Protection Policies in South Asia,* Routledge India, 2012

conceived as against standards or predictable threats: the contingent structure of social and political life can produce circumstances in which certain important interests of women are subject to gender specific forms of abuse. Women's interests are vulnerable to threats not also typically faced by men.[86] The differentiated treatment should always be judged in the light of its purpose. As V. Van Dyke states in *Human Rights, Ethnicity and Discrimination,* if the purpose of the treatment is to impair the equal enjoyment of rights, then the treatment is discriminatory.[87] This is the case of apartheid, the system of racial segregation enforced in South Africa until the mid 1990s. Its ideological justification, grounded on the need to separate different races for their mutual benefit, can obviously be perceived as unfounded on the basis of evidence available to any reasonable person. On the contrary, a treatment whose purpose is to reinforce, instead of impairing, the equal enjoyment of human rights shall be accepted. In the case of ethnic minorities, might they be protected with special rights in order to compensate for the potential disadvantage minorities have in terms of public decisions? Someone claims that differentiated citizenship rights satisfy the sense of justice and fairness[88], while others reject special rights to particular categories in the name of universal human rights[89]. The assimilationist idea assumes that social equality means treating everyone according to the same principles, while the politics of difference argues that equality may sometimes require different treatment for oppressed and disadvantaged groups. Social justice - in this case the question of whether the value of effective political participation in a society's affair requires special provisions for the representation of minority groups - is not alien to the cultural, economic and political features of the basic structure of the community.

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[86] Charles R. Beitz, *The Idea of Human Rights,* Princeton University Press (2011), p. 189

[87] V. Van Dyke, *Human Rights, Ethnicity and Discrimination,* Greenwood Press, Westport (Conn.) 1985, p.194

[88] Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights*, Oxford Political Theory, 2000

[89] Susan Moller Okin, *Justice, Gender, and the Family,* Basic Books 2008

II - Human Rights and Cultural Relativism

2.1 The Human Dignity Beyond the Religious and Secular Debate

In a speech on 5 October 1995[90], the former Pope John Paul II referred to the Universal Declaration as "one of the highest expressions of the human conscience of our time". The leader of the Catholic Church recognized that "every culture is an effort to ponder the mystery of the world and in particular of the human person: it is a way of giving expression to the transcendent dimension of human life"; therefore "the quest for freedom cannot be suppressed. It arises from a recognition of the inestimable dignity and value of the human person". No religious or cultural tradition is alien to this inestimable dignity and value of the human person. The claim "Do to others what you would like them to do to you. Try not to do things to others that you would not like them to do to you" is an ethical code whose moral force can be appreciated by all reasonable people. Rushworth Kidder agreed that the idea of individual decency can be found in the early contributions of Buddhism, Confucianism, Hinduism, , Taoism, Judaism, Zoroastrianism, and the rest of the world's major religions[91]. Despite their apparent differences, all religions share certain fundamental values: they honor the dignity of human life, and consequently refer to the issue of the human responsibility toward others, especially toward those who suffer[92]. In his *The Evolution of International Human Rights,* Paul Gordon Lauren remembers that, according to the principle of Buddhism established by Siddharta Gautama, "only when we learn to empathize and feel the suffering of others do we become truly an fully human ourselves". Around 2500 years ago, Siddharta Gautama "explicitly attacked the entrenched and rigid caste system of his day by opening his order to both men and women, stressing the unique value of all individuals as physical

[90] The fiftieth General Assembly of the United Nations Organization, *Address of His Holiness John Paul II,* UN headquarters 1995

[91] Rushworth M. Kidder, *How Good People Make Tough Choices: Resolving the Dilemmas of Ethical Living*, Harper, New York, 2003, p.159.

[92] Kofi Annan, *"These values:* compassion*;* solidarity*;* respect *for each other - already exist in all our great religions […] We can use these values – and the frameworks and tools we have based on them - to bridge divides and make people feel more secure and confident of the future"*, World Civilisations: "Bridging the World's Divides". Lecture given at the British Museum London.

and spiritual beings […]"[93]. Human beings have worth regardless of their social or political position: this was accepted as an ethical principle already in the 6th century BC. Confucianism was founded by Kong Qiu at approximately the same time as the emergence of Buddhism. Reflections on human nature and moral judgment are similar, since every individual has the responsibility to overcome his egotism in order to recognize the equal worth of others. The Confucian principle "Do not impose on others what you yourself do not desire" [94] is regarded as a rejection of despotic governments who oppress their people. An Hindu maxim states: "One should never do that to another which one regards as injurious to one's own self"[95]. People are prevented from causing pain to any living being at any time through the actions of one's mind, speech or body. Every life is sacred and the value of tolerance is a prerogative in the Indian culture.[96] Paul Gordon Lauren continues: "the tenets of Islam, founded five hundred years after the lifetime of Jesus and revealed through the writings of Muhammed, also address responsibilities towards others […]. The scripture of the Qur'an speaks to social justice, the sanctity of life, personal safety, mercy, compassion, and respect for all human beings". Differently from Confucianism and Buddhism etc., Islam regards individuals not in the first instance as members of groups or a community, but as ultimate locus of responsibility and accountability.[97] Finally, human rights are an integral part of Judaism and Christianity, whose doctrines enhance the individual autonomous moral judgment. People are created in the divine image as members of the same human family. Thereby, brotherly love is a fundamental principle. By virtue of mutual recognition of people as human beings endowed with ethical codes, human rights have a moral universal validity in the Christian-Jewish culture. The many and various religious traditions attempt to address human relationships with compassion and justice. All of them had systems of justice as well as ways of tending to the health and welfare of their members. This becomes particularly remarkable if considered that religions historically emerged from pre-modern, male-dominated societies characterized by enormous

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[93] Paul Gordon Lauren, *The Evolution of International Human Rights,* Philadelphia: University of Pennsylvania Press, 1999, p.7

[94] Do not unto another that you would not have him do unto you. Thou needest this law alone. It is the foundation of all the rest. (Confucius, 500 BCE)

[95] Brihaspati, Mahabharata (Anusasana Parva, Section CXIII, Verse 8)

[96] Amartya Sen, *The Argumentative Indian: Writings on Indian History, Culture and Identity,* Picador 20

[97] Joshua Cohen, "Minimalism about Human rights: The Most we Can Hope For?", *Symposium: Toward International Consensus,* The Journal of Political Philosophy, Volume 12, Number 2, 2004, p. 207

discriminations, hereditary systems of inequality and hierarchies headed by kings or emperors. From a secular point of view, the equal dignity of human beings is a moral law inherent to the individual nature as a matter of natural law. According to Greg M. Epstein, a Humanist chaplain at Harvard University, the ethical principles as derived from human dignity are a concept that essentially no religion misses entirely, "but not a single one of these versions […] requires a God".[98] As a consequence, believers find their commitment to human rights standards on their own religious basis; in the same way non-believers seek to affirm their commitment on secular philosophy. In view of our personal beliefs, human dignity may be God given or may be natural and innate. It might be simply asserted as a fundamental value in its own right – like in the preamble of the Declaration - without reference to human nature or divine gift. The divine reference was on the contrary embedded in the American Declaration of Independence[99] and in the French Declaration of the Rights of Man.[100] After all, it could not be different in the historical context of the eighteenth century. The object of the modern human rights discourse is to agree on a body of universal principles in spite of disagreeing on the justification of these principles.

2.2 Universal Human Rights for Different Moral Codes

Human rights set common standards of achievement for all peoples and all nations, on the basis that there is a common normative value that is able to legitimize universal human rights criteria. This is the basic principle that "one should treat others as one would like others to treat oneself"[101]; thereby "what you do not wish for yourself, do not do to others". This Golden Rule,

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[98] Esptein, Greg M., *Good Without God: What a Billion Nonreligious People Do Believe*. New York: HarperCollins 2010, p. 115.

[99] "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights […]" American Declaration of Independence, Preamble

[100] "The representatives of the French people […] have determined to set forth in a solemn declaration the natural, unalienable, and sacred rights of man", Declaration of the Rights of Man, Preamble

[101] ed. (1979). "golden rule". A Dictionary of Philosophy. London: Pan Books in association with The MacMillan Press. p. 134. This dictionary of philosophy contains the following exact quote under the entry for "golden rule": "The maxim 'Treat others how you wish to be treated'. Various expressions of this fundamental moral rule are to be found in tenets of most religions and creeds through the ages, testifying to its universal applicability."

called "principle of reciprocity", is an ethical code whose moral force can be appreciated by all individuals regardless of their culture, race, sex, religion, nationality, sexual orientation, or any other distinguishing feature. The Golden Rule as the corollary to the cardinal virtue of impartiality may be seen as the most essential basis for a universal discourse on human rights, according to which every individual has a right to just treatment, and a reciprocal responsibility to ensure justice for others[102]. The main problem here is that the universality implied in the principle of reciprocity clashes with the cultural tendency to limit the application of this principle – Golden Rule - to members of the same culture. Throughout much of history, people acquired rights and responsibilities exclusively through their membership in a group – a family, indigenous nation, religion, class, community, or state. Even if we may assume that all reasonable individuals have a core of morality – regardless of its origins - and that human reason is the basis for the recognition of the other as a human being, the same wider system of ethical norms does not apply to all societies at all times. The intercultural moral diversity shall not be underestimated because there are fundamentally different religious and ethical beliefs, each with competing formulations. The system of ethical norms is deeply related to the stage of development of a society and its productive forces, to the content of its religious tradition and political culture. In this respect, authors such as Charles Beitz maintains that human rights as stated in contemporary documents are not likely to be neutral among the world moral codes. It would be unreasonable that international doctrine, in particular those provisions referring to the rights of women and children – e.g. legal equality for women; ban on female genital cutting; free choice of partner; etc. - can always be compatible with all existing social moralities. As an empirical matter, these protections are lacking in some world's ethical traditions, as these are understood by many of their adherents. Furthermore, rights generating certain kinds of public duties might be excluded from societies where responsibilities are taken by families and local communities, and not by the state. This is the case of the right to a high standard of physical and mental health, when it implies that every domestic government, regardless of its understanding of distributive responsibilities, has a duty to ensure the accessibility of health care for all. Beitz also holds that human rights do not come from the natural law, having either religious or philosophical grounds, but are the expression of an historical process mainly developed in the Western civilization. Consider, for example, basic rights

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[102] Paden William E, Interpreting the Sacred: Ways of Viewing Religion, Beacon Press 2003, pp. 131-132

to social security, to political asylum, to take part in the government of the country, or to free elementary education. These rights cannot exist in a state of nature where there are no established social conventions or institutionalized patterns of reciprocity. It is unreasonable to assert that they were intended for the ancient Greeks, China in the Ch'in dynasty or Europe during the Middle Ages. Nobody regarded himself as having a reason to provide these rights or was able to say where the resource to satisfy them came from. On the contrary, such rights strongly depend on people's institutional membership and on particular social contingencies, e.g. a minimal legal system, an economy that includes some form of wage labor, a public institutional capacity to raise revenue and provide essential collective goods, and participation in global cultural and economic life. Roughly speaking, these are societies that have at least some of the defining features of modernization. [103] Thereby, the alleged universality of human rights – intended as a universal discourse that extends across historical, political and cultural borders – is difficult to reconcile with the content of national legal doctrines. Each historical tradition had its own frame of references and deduced the validity of its precepts and norms from its sources. As we have seen, rights embedded in contemporary conventions – e.g. fair pay, educational opportunity and medical care – developed in a modern or modernizing societies. With reference to political rights –fair trial and due process, participation in civil society, freedom of expression, right to vote and petition – the assumption is the existence of certain institutions typical of modern times. It is worth nothing that the human rights' origin in the Western liberal tradition does not mean that human rights cannot be promoted as useful for all human beings.

2.3 Is there a Human Right to Democratic Institutions?

The modern conception of human rights is based on the following liberal preconditions: all human beings have the same equal worth; this worth must be protected in a priority way; everyone, within these limits, have the possibility to choose for itself the life he or she prefers. Thereby, the human rights discourse is deeply linked to a liberal political conception of the individual and its society. The influence of the Western democratic model is obvious: in political life, it leads to the principles of representation and majority rule, the separation of powers and the independence of the judiciary. Roland Rich suggests that there is now a pattern of international action which both encourages the development of democratic movements and regimes and protects established

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[103] Charles R. Beitz, *The Idea of Human Rights,* Princeton University Press (2011), pp. 58-60, 71-75

democratic governments against internal threats.[104] Mill argues that democratic institutions are desirable in terms of the results they produce. Democracy is more likely than other forms of governments to enable people to protect their most important interests: the activity of political participation encourages the development of a responsible character among citizens.[105] In order to support that democratic institutions are to be preferred everywhere, Sen refers to a study about the causes of famines which shows that no independent democratic country with a reasonably free press has ever suffered a substantial famine. The casual connection between democracy and the nonoccurrence of famines is clear: the electoral mechanism creates incentive for democratic leaders "to try to prevent any threatening famine, and since famines are in fact easy to prevent…the approaching famines are firmly prevented […] A free press and the practice of democracy contribute greatly to bringing out information that can have an enormous impact on policies for famine prevention", such as information about the nature of unemployment or the early effects of droughts and floods.[106] A current question in international doctrine is whether or not there is a human rights not only to adequate food (Art. 25 UDHR) [107] but also to democratic institutions. The main difficulty arises in the attempt to generalize familiar views about the moral basis of democratic institutions to social settings that conflict with those presupposed by these views. Different social settings provides for different material conditions and degrees of economic development, as well as for different norms of political legitimacy. Therefore, the persuasiveness of an instrumental justification of democratic institutions is likely to depend on empirical contingencies regarding the society at which the justification is directed. [108] It is part of a conventional, commonsense worldview that freedom embedded in democratic regimes means little to those without shelter, clothing or food and that, for the poor, the fulfillment of basic needs has priority over political freedoms. At low levels of development - Professor Ross declares - there is no evidence that in poor societies democracy produces better social outcomes such as

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[104] Roland Rich, "Bringing Democracy into International Law", *Journal of Democracy* 12 (2001), pp. 20-34

[105] J. S. Mill, *Considerations on Representative Governments,* (1861), in *Essays on Politics and Society II* [*Collected Works of John Stuart Mill,* XIX]

[106] Amartya Sen, *Development as Freedom*, Knopf Doubleday Publishing Group (2011), pp. 180-181

[107] Article 25, *Universal Declaration of Human Rights,* "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services […]"

[108] Charles R. Beitz, *The Idea of Human Rights,* Princeton University Press (2011), pp. 175-176

longer, healthier and more productive lives.[109] In this view, a minimally welfare-oriented authoritarian regime is better than a democratic government respectful of the political rights of its citizens but unable to fulfill their basic material needs and to reduce poverty.[110] Human Rights embedded in the UDHR were not drafted as implying a fundamental right to democratic institutions, but as compatible with both noncompetitive and competitive electoral systems. The right to self determination, enshrined in the first article of both covenants, is implemented if three conditions are fulfilled:

1. accountability of political decision to a process in which everyone's interests are represented;
2. public decisions explained in terms of a conception of the common good that is widely shared within the society's political institutions;
3. rights of dissent for all.

Yet, a government needs not be democratic in order to satisfy these conditions: none of them directly assumes the establishment of democratic regimes. Nevertheless it does not follow from the proposition that there is no human right to democracy that the promotion and defense of democratic institutions should not be an important goal of international political action.[111] The development of a democratic culture is a product of a larger process of social and institutional change. It is worth nothing that this change will have to address not on democracy alone but on respect for the individual within a community, the entrenchment of a balance of powers, judicial review of executive decisions and enforceable minority rights guarantees.[112] Otherwise, democracy without constitutionalism would be simply ethnic majority tyranny.

2.4 Ethnocentricity and Divergent Moral Arguments within the Same Culture

The impact of culture on human behavior shall not be underestimated because culture is deeply embedded in our self-identity. It is a primary force in socialization, since it provides both the

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[109] Michael Ross, "Is Democracy Good for the Poor?", *American Journal of Political Science* 50 (2006), pp. 860-874

[110] https://www.opendemocracy.net/democracy/article_1431.jsp

[111] Charles R. Beitz, *The Idea of Human Rights,* Princeton University Press (2011), p. 181-185

[112] Fareed Zakaria, "The Rise of Illiberal Democracy", *Foreign Affairs* (November/December 1997), pp. 22-43

individuals and the community with the values to be pursued in life, as well as the means for pursuing them[113]. Consequently, a kind of ethnocentricity is unavoidable. But a high degree of ethnocentricity has disastrous implications in community life because it breeds intolerance and hostility towards those who do not conform to a specific cultural model. History is full of shameful examples to illustrate the point. Kurds have had a long history of discrimination perpetrated against them by the Ottoman and then Turkish government. The same government had massacred between 1 and 1.5 million Armenians[114] during World War I. Persecution of Jews reached its most destructive form in the policies of Nazi Germany during the Holocaust. Currently, discriminatory policies towards ethnic minorities include the race-based discrimination of Indians and Chinese in Malaysia[115] and of Uighurs in China[116]. When applied to ethnocentricity, the Golden Rule implies that the appreciation of our own ethnocentricity leads us to respect the ethnocentricity of others. Enlightened ethnocentricity recognizes the right of others to be different, whether as members of another society or as individuals within the same society, given their equal moral value and dignity. Indeed culture is not a homogeneous, integral and coherent unity. A similar assumption would presume that cultures are morally univocal, but it is a matter of facts that single individuals can disagree about various elements of the ethical system they share. Different people may have different worldviews and there are ethical argument even within the same culture. In a democratic system respectful of fundamental rights, the same structure of beliefs might not be accepted by everybody. As an example, Ignatieff points out that in the American abortion debate "both sides agree that the inhuman use of human life should be prohibited and that human life is entitled to special legal and moral protection". The universal right to life embedded in Article 3 of the Declaration is not questioned. "Yet this is hardly common ground at all", Ignatieff goes on, "since the two sides disagree as to when human life commences and as to whether the claims of the mother or the unborn child should prevail"[117]. On the one hand, supporters argue that the

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[113] Thoko Kaime, The African Charter on the Rights and Welfare of the Child: *A Socio-legal Perspective,* PULP (2009), p. 33

[114] Samuel Totten, Paul Robert Bartrop, Steven L. Jacobs (eds.) *Dictionary of Genocide*. Greenwood Publishing, 2008, p. 19

[115] "Malaysia's lingering ethnic divide". March 4, 2008. BBC News

[116] "Uighurs in China Say Bias Is Growing". *The New York Times*. October 7, 2013

[117] Michael Ignatieff, Human Rights as Politics and Idolatry Princeton University Press (2011), p. 21

choice of abortion is a woman's right that should not be limited by religious or governmental authority. Relying on Article 12 of the Declaration, "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honor and reputation […]". Freedom of conscience is also one of the main cores of Article 18. On the other hand, opponents maintain that personhood begins at conception; therefore abortion is the immoral killing of an innocent human being. In a case such as this, there is not an overarching way of judging which side is right and which is wrong. Not always is there an easy relation between universal objectives and strategic means: the dispute is a clash between competing views that needs to be solved in the limited realm of political means. In addition, human rights – intended as urgent individual interests – are not necessarily desired by everyone. Given that interests of masses and elites are not shared, human rights violations have different effects on various classes and individuals belonging to the same culture. For instance - as Maffettone underlines - there is no doubt that slavery entails a serious violation, but it may not be affirmed that it disadvantages slaves and the owners of slaves in the same way. Similarly, an interpretation of Islam that prohibits girls to study does not penalize boys as well.[118] Therefore, not all people value the interest or care about its satisfaction in their own case.

2.5 Toleration at the Domestic and Global Level

According to the modern conception of human rights - and to the principle of toleration embedded in it - only if domestic governments tolerate certain kinds of differences among people, the latter can reasonably confront a broad range of options. Toleration can take a variety of forms within the society. In this paragraph, the focus will be about the liberal idea of toleration and the concept of toleration as developed in the Ottoman empire. From a liberal perspective, it is freedom of conscience and expression. Although differing in their beliefs about the good way of life and in their cultural practices, individuals regard one another as moral-political equals, with a certain distinct ethical-cultural identity that needs to be recognized and tolerated as something that is especially important for the person. In this case, the tolerating parties respect one another in a reciprocal sense. If we go back into the historical record, the millet system of the Ottoman Empire allowed religious communities to enjoy particular rights and autonomous jurisdiction

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[118] Sebastiano Maffettone in chapter I: *Human rights and Asian values,* p. 38, Human Rights and Asian Values di Eva Pföstl, Editrice Apes (2008)

under the official institutional system. Such communities could practice private religion in private life but were obliged to follow Islamic religion within society. So long as their being different remained within certain limits - in the "private" realm - and so long as the minority groups did not claim equal public and political status, they could be tolerated. The "terms of toleration" were hierarchical: the authority gave qualified permission to the minority to live according to their beliefs on condition that the minority accepted the dominant position of the authority or majority.[119] At the global level, the idea of toleration suggested by the advocates of human rights is the following: a commitment to toleration provides reasons to tolerate tolerant states, but not necessarily intolerant ones. Indeed, an intolerant state disposes a coercive apparatus with the capacity to harm those who are not tolerated and to prevent them from leaving the community: restrictions on exit might be among the ways intolerance is expressed.[120] Toleration is instead guaranteed to those governments which tolerate their own people and result from an ethically significant domestic process of self-determination, if the condition that a self-determining regime is tolerant is satisfied.

2.6 *The Law of Peoples*: Human Rights and Toleration from Rawls' perspective

In Rawls's view, human rights represent a common ground for public reason of liberal democratic and "decent" peoples, governed by the same Law of Peoples. A political conception of justice is built up from moral ideas available in the culture of both liberal democratic and decent regimes. In liberal societies, people are free and equal. Their basic needs are met and their fundamental interests are fully compatible with those of other democratic peoples. Differently from liberal societies, decent societies are organized hierarchically, but there are internal strategies of popular consultation in order to grant adult members to have their voices heard. Participation is not based on political equality and might provide for the representation of citizens as members of groups rather than as individuals. These groups participate in political life primarily as agencies of consultation, without exercising a real control over the selection of public officials or the enactment of the legislation.[121] Although the established religion may have various privileges – e.g. religious doctrine controls certain political matter and access to some political offices - it is essential for the society's being decent that no religion being persecuted and that it respects the

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[119] http://plato.stanford.edu/entries/toleration/

[120] Kok-Chor Tan, *Toleration, Diversity, and Global Justice,* Penn State Press (2010), pp.42-44

[121] Charles R. Beitz, *The Idea of Human Rights,* Princeton University Press (2011), p. 152

political and social order of other societies. A part from repudiating aggressive aims, decent societies must also oppose to slavery because a slave economy hampers social cooperation and violates human rights. Human Rights refer to a special class of urgent rights, such as liberty - but not equal liberty of conscience - and security of ethnic groups from genocide. Certain civil and political rights, e.g. freedom of expression, association and democratic participation, are excluded. A decent system must impose bona fide moral duties and obligations on all people inside it. Judges and other officials who administer the legal system regard the law as guided by a common good conception of justice, which may provide for the idea that people are cooperative members of their respective groups but not free and equal citizens. A differentiated treatment of women, for example, might be intrinsic to this idea of the common good. Toleration is the recognition of non-liberal, yet decent, societies as equal participating members in good standing of the Society of Peoples, having certain rights and obligations. So toleration also addresses to the domestic practices of decent societies, in spite of their shortfall from liberal standards of justice. Indeed, the interference to internal lives of decent peoples is likely to produce resentment or even a counterproductive reaction and conflict: a comparison of the potential costs and benefits would mainly argue against intervention, also because the opportunity cost of helping shall be calculated in help not provided elsewhere for more serious violations. By recognizing decent peoples as well-ordered peoples, liberal societies encourage their change towards becoming more liberal. Decent citizens may bring about a progressive improvement so as to determine their future in their own way, according to their specific religion, moral and political standards. On the other hand, there is no obligation to tolerate societies that are neither liberal nor decent. Less fortunate societies are those that "lack the political and cultural traditions, the human capital and know-how needed to be well-ordered".[122] They are classified as the following:

1. Outlaw states - aggressive and dangerous;
2. Societies burdened by unfavorable conditions – towards which liberal democratic governments have a duty of assistance;
3. Benevolent absolutism – denying members a meaningful role in *decision-making processes.*

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[122] John Rawls, *The Law of Peoples: With, The Idea of Public Reason Revisited,* Harvard University Press (2001), p. 106

Human rights are supposed to be matters of global concern in the sense that a society's failure to honor them provides reasons for international action to appropriately situated outside agents. The general duty of well-ordered societies is to assist other peoples living under unfavorable conditions, so that the latter progressively develop the basic conditions that might enable them to become members of well-ordered societies, either liberal or decent. In the light of respect for cultural differences and pluralism, Rawls endorses a narrow conception of human rights: a special class of urgent individual interests whose violation is equally condemned by both liberal democratic and decent societies. This special class includes: the right to life (to the means of subsistence and security); to liberty (to freedom from slavery or forced occupation, but not equal liberty of conscience); to property; and to equal treatment under the law (similar cases are to be treated similarly). Rawls does not consider freedom and equality of all humans; prohibition of discrimination; freedom of opinion and expression, of peaceful assembly and association; right to democratic processes, etc. The list of human rights excludes interests for which a failure to secure them would not provide any intelligible reason for the world community or its agents to do something. Adherence to this restricted catalog of human rights is sufficient to guarantee a society against reform-oriented intervention. Decent peoples may disallow democratic processes or may discriminate against any particular group, by requiring religious or gender qualifications for higher public office. Yet they are still members of the Society of well-ordered Peoples, whose affairs are regulated by the Law of Peoples. As Rawls observes, although decent hierarchical societies are not "as reasonable and just" as liberal societies, they are also "not fully unreasonable", either.[123] Rawls seems willing to tolerate economic and social unfairness at the global level, while refusing to tolerate it within individual nations. To borrow from his writings in *A Theory of Justice,* principles of justice – in the domestic case - are those which individuals would choose in case a "veil of ignorance" blinds them to all facts about themselves so they cannot tailor principles to their own advantage:

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[123] John Rawls, *The Law of Peoples: With, The Idea of Public Reason Revisited,* Harvard University Press (2001), p. 74-83

"They are the principles that rational and free persons concerned to further their own interests would accept in an initial position of equality as defining the fundamentals of the terms of their association".[124]

It emerges that all social primary goods - liberty and opportunity, income and wealth, and the bases of self-respect - are to be distributed equally unless an unequal distribution of any or all of these goods is to the advantage of the least favored. Internal inequality can be justified only by benefits for the least advantaged. At the national level, the occupants of the original position are individuals or families; at the global level, the occupants of the "second original position" are representatives of peoples viewed as unitary entities. Let us consider the case in which a decent nonliberal government faces an internal disagreement about domestic constitutional arrangements. An indigenous opposition movement – supported by other societies, nongovernmental agents or an agency of the world community - might be committed to reform domestic political structures in order to abolish discrimination based on religion or gender. In Rawls' view, the outside agents, recognizing the decent society as an equal participating member of the Society of Peoples, have no choice but to decline the help.[125] In this way, dissenters have no opportunity to avoid the restrictions their society imposes, such as the failure to ensure equal access to all careers and other differentiated treatments validated by customary norms. In his *Rawl's Law of Peoples: Rules for a Vanished Westphalian World*[126], Buchanan blames the Law of Peoples for betraying liberalism: it grants legitimacy to very inegalitarian regimes, including those that deprive women of important rights, such as the rights to education and to equal opportunity in employment. These rights are not part of Rawls's notion of basic Human Rights. Yet, the interests of dissident individuals or minorities might be disregarded given Rawls's assumption that the parties who choose the Law do not represent individuals but peoples, united by common sympathies and a shared sense of justice. Nonetheless, as we have seen, it is reasonable to consider populations of states as a collection of different groups, often with conflicting views concerning justice and the common good.

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[124] John Rawls, *A Theory of Justice,* Harvard University Press 1971, p 11

[125] Charles R. Beitz, *The Idea of Human Rights,* Princeton University Press (2011), p. 156

[126] Allen Buchanan, *Rawl's Law of Peoples: Rules for a Vanished Westphalian World*, The University of Chicago Press, Vol. 110, No. 4 (July 2000)

2.7 Cultural Legitimacy of Human Rights Standards

People might be uncertain about why they have human rights, what kinds of objects human rights involve, why certain standards but not others should count as human rights, and which is the significance of having human rights for political practice. People may disagree not only about the scope and content of the system of norms, but also regard the eligible means for their application and enforcement, as well as the distribution of responsibilities to support them. A philosophical commitment to modern human rights is a demanding commitment to frame public concern, such as equal participation in politics and equal treatment of men and women, but it can be potentially at odds with other and more familiar socio-political standards. For instance, there might be a conflict between the requirements of human rights doctrine and gendered norms found in the ethical patterns of some existing communities. There is no plausible argument that women's rights state a standard for law and policy equally acceptable from all major moral points of view. The non neutrality of women's rights generates doubt about whether these rights are suitable to serve as grounds of international political action.[127] As a consequence, basic rights shall be brought into some reasonable relationship with other values, particularly those associated with toleration, cultural identity and self government, with which they may conflict. Since human rights offences are supposed to provide reasons for action to external agents, their content should not exclusively depend on beliefs and norms of a single culture or way of life.[128] They must not be conceived as a single fundamental category of moral concern, in terms of principles prevalent in the countries of Western Europe and America. It seems unlikely that a person agree to a global norm if compliance with it is incompatible with widely accepted codes of conduct within his culture. Basic rights cannot be efficacious if people see them as imposed from outside, or that their justification comes from doctrines that are extraneous to their tradition.[129] On the contrary, they are best thought of as rights associated with an idea of membership or inclusion in an organized political society. In order to have legitimacy, they must be "conquered" from within each community. Indeed, individuals are more willing to accept the universality of rights if violations are also disapproved

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[127] Charles R. Beitz, *The Idea of Human Rights,* Princeton University Press (2011), p. 190

[128] Charles R. Beitz, *The Idea of Human Rights,* Princeton University Press (2011), in Preface p. XII, p. 37

[129] D. Melidoro, *Sharia and Human Rights: Hemeneutics and the Risks of State-centrism,* Global Policy Volume 4. Issue 4. November 2013, h t t p : / / w w w . a c a d e m i a . e d u

and sanctioned at the local level. Along these lines, the respect for cultural traditions assumes the role of a decisive way to enforce human rights compliance. An-Na'im shares the belief that cultural legitimacy is essential for broadening and deepening the consensus for international standards:

> "If international standards on human rights are to be implemented in a manner consistent with their own rationale, the people (who are to implement these standards), must perceive the concept of human rights and its content as their own. […] Otherwise, those standards that are not accepted as culturally legitimate will remain ineffective unless we are prepared to contemplate attempts to impose these standards on people against their will!"[130]

Everyone shall build moral duties in a language rooted in his or her tradition. Fundamental rights can be embraced in various forms, depending on individuals' contingent relationships, social setting and historical circumstances: they are "the expression of a set of important overlapping moral expectations to which different cultures hold themselves and others accountable".[131] In this perspective, there is no reason to hold that moral standards can only be explicable in terms of a single master value. Human rights are not intended to delegitimize people's customs or to violate rights of cultural autonomy. On the contrary, they must be understood in the wider framework of individuals' social and religious beliefs. To make an example, Ignatieff explains that "believing in your right not to be tortured or abused need not mean adopting Western dress, speaking western languages, or approving the Western way of life […] The women in Kabul who come to Western human rights agencies seeking their protection from the Taliban militias do not want to cease being Muslim wives and mothers; they want to combine respect for their traditions with the right to an educational and professional healthcare provided by a women"[132]. Abdullahi A. An-Na'im

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[130] Abdullahi Ahmed An-Na'im, "Conclusion" in *Human Rights in Cross-Cultural Perspectives. A Quest for Consensus,* Philadelphia, University of Pennsylvania Press 1991, p. 431

[131] Sumner B.Twiss, "A Constructive Framework for Discussing Confucianism and Human Rights" in *Confucianism and Human Rights,* ed. W. Theodore de Bary and Tu Weiming, New York: Columbia University Press (1998), p. 31

[132] Michael Ignatieff , *Human Rights as Politics and Idolatry*, Princeton University Press (2011), p.69

considers the relationship between religions and human rights in terms of synergy and mutual influence. Between religions and human rights, he claims, there is neither "immediate compatibility", nor "permanent contradiction". This mutual influence must be understood as the following: believers cannot interiorize the universal discourse on human rights unless they perceive it as consistent with their creed and the integrity of their religious faith. In the communities where religion deeply influences the human system of behavior, the implementation of human rights standards requires well-informed engagement of religion. Otherwise the exclusion of the spiritual dimension would appear to be simply alienating for citizens.

2.8 Substantive Minimalism of Human Rights

As Rex Martin indicates, human rights are principles that "would be regarded as reasonable by persons at different times or in different context. And such principles, again cross-culturally, would be thought to have connection…with a fairly wide range of differing conventional moralities".[133] As object of intercultural agreement, human rights shall be accepted by people from their own perspective. An overlapping consensus, a term coined by John Rawls in *A Theory of Justice,* refers to how supporters of various comprehensive normative doctrines – that entail certain systems of religion, political ideology, or morality - agree on principles of justice despite "considerable differences in citizens' conceptions of justice provided that these conceptions lead to similar political judgments."[134] There is room for agreement on a range of reasonable stable and integrated structure of moral beliefs from reasons internal to individuals' culture. The core of basic values shared by secular and religious communities originates from the common concept of self-worth, human dignity and responsibility for society, politics and the environment. [135] All reasonable people have a core of morality, which suggests them what is undeniably wrong. As a consequence, there might be a kind of global ethics coming from human nature and a mutual vulnerability to suffering, the demands of universal reason, and some familiar themes among existing moral codes. Michael Walzer, one of America's foremost moralists, distinguished between the "thin" and the

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[133] Rex Martin, A System of Rights**,** Oxford University Press (1993), p.75

[134] John Rawls, *A Theory of Justice,* Harvard University Press, 1971, 1999, p.340

[135] Kofi Annan, *"We may have different religions, different languages, different colored skin, but we all belong to one human race. We all share the same basic values".* As quoted in *Simply Living: The Spirit of the Indigenous People* (1999) edited by Shirley A. Jones

"thick" principle. The former – detached and general - is applied across national boundaries, while the latter – specific and detailed - only applies within a given culture. A scheme for a just social distribution of goods is an argument that can only be made within a certain position; struggle against genocide and tyranny are more universal moral rules.[136] Indeed, few common principles shared by the major social moral codes provide for a foundation for any but the most essential prohibitions, e.g. murder, deceit, torture and oppression. We cannot conceive any circumstances in which we or anyone we know would wish to be held in slavery, discriminated, subjected to arbitrarily interference and arrested, etc. There is no case for tolerating those practices which cannot be reasonably regarded as an available option by anybody. This intuition, on the strength that what is pain and humiliation for you is bound to be pain and humiliation for me, derives from our faculty of imagining the pain inflicted to other human beings as if it was our own. At the time of apartheid, Nelson Mandela argued that black people "recognized that an injury to one is an injury to all and therefore acted together in defense of justice and a common human decency"[137]. Some abuses are intolerable, and so their justification. Horror and sadness are the universally experienced reactions for these abuses. As a consequence of this overlapping conception of the common good, a restricted core of human rights has a natural claim to universality. The central idea of substantive minimalism is to present a conception of human rights that is confined to protections of negative liberty and, even more particularly, to the guarantee against restrictions on negative liberty that take the form of forcible intrusions on bodily security. Human rights, as derived from substantive minimalism, are not intended to have an exclusive connection with a particular ethical or religious outlook.

2.9 From Overlapping Consensus to Progressive Convergence

Social an economic rights, as well as a richer class of civil and political rights, are not recognized by substantive minimalism. Their realization is too costly and the risk is to overtax the resources and disperse the attention required for monitoring and enforcing minimal human rights. Moreover, the enforcement of a more demanding list of human rights might subordinate the political self-

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[136] Michael Walzer, *Thick and Thin: Moral Argument at Home and Abroad*, University of Notre Dame Press, 1994

[137] Nelson Mandela, Nobel Prize acceptance speech (1993)

determination of peoples to the decision of outside agents, who justify their intervention in the language of human rights.[138] If we assume that nothing of the liberal tradition and of a more demanding list of human rights can be applied within cultures having different political, economic and social features, then we condemn those cultures to a kind of permanent regression. Domestic institutions regarded as unfair by internal dissidents could not even be criticized in principle. Substantive minimalism only refers to a minimum number of threats protected against. For instance, there is a human right against arbitrary arrest but not to freedom of occupation, fair wage, democratic institutions, higher education and so on. On the one hand, some interests are sufficiently generic that are reasonably expected to be recognized by everyone; on the other hand, there is a part of human rights doctrine – such as freedom of religious practice, the rights against discrimination on the grounds of sex, etc. – that falls outside such an agreement. What about the interests that might not be widely shared? They shall be brought under a more abstract description such as their importance can be recognized even by those who do not share it. An important feature of global human rights practice is the evolutionary character of the practice's normative content. In this regard, Beitz proposes to envision an intercultural agreement as arising not from the philosophical and moral beliefs that actually prevail in the world's major cultures, but instead from the best available elaboration of the basic normative materials of these cultures for the circumstances of modern life. As a consequence, the boundaries of this "overlapping consensus" would be set by these cultural contents as they might develop or evolve under pressures for adaptive reinterpretation. Beitz refers to this hypothesis as "progressive convergence", in order to distinguish it from an overlapping consensus deriving from the actual contents of existing moral cultures.[139] Agreement on human rights is interpreted as falling within progressive convergence of worldviews in a way which may require fresh elaborations of cultural and moral traditions. At some point in the history of humanity, every society lives in the middle of an oscillation between "old and new", "heritage and transformation", "identity and modernity", etc. When societies face values completely at odds, this internal conflict shall be solved through internal reasons which leads to enlightened interpretations of norms and moral principles of justice embedded in human reason. Within the framework of a particular society, doubts about the validity of a cultural norm in

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[138] Joshua Cohen, "Minimalism about Human rights: The Most we Can Hope For?", *Symposium: Toward International Consensus,* The Journal of Political Philosophy, Volume 12, Number 2, 2004, p. 192-193

[139] Charles R. Beitz, *The Idea of Human Rights,* Princeton University Press (2011), p.88

contrast with certain fundamental rights might facilitate the acceptance of those rights. In this case, a process of evolution would allow for a revised understanding of elements supporting human rights standards, in addition to replace the elements that restrict the agreement on these standards. For instance, the reform of Theravada Buddhism in the name of commitments such as nonviolence and local control fits for a modern, democratic, and socially just Thailand. The "Buddhist modernism" is a global Buddhist phenomenon that focuses on meditation, social engagement, internalization, and emphasis of equality and universality while deemphasizing ritual, mythology, and hierarchy. It has emerged out of an engagement with the dominant cultural and intellectual forces of modernity, e.g. Western monotheism, rationalism and scientific naturalism.[140] Regarding Confucianism, Cohen suggests reasons for supporting a conception of human rights by relying on an ethical outlook that understands people as embedded in social relations. People do not make the demands for human rights independently from the obligations associated with those relationships, but in their names. For example, protection against slavery, torture, arbitrary arrest, as well as from poor health, education, and absence of economic means is necessary in order to allow people to confidently fulfill social responsibilities. In this way, Confucianism supports a terrain of argument of a global public reason that comprises a conception of human rights.[141] In contrast with Confucianism, Islam conceives individuals as ultimate locus of responsibility and accountability. Muslim reformism offers an important possibility of dialogue in the field of human rights. Liberal and progressive movements in Islam have in common a religious outlook which mainly depends on re-interpretations of scriptures. They promote the individual autonomy for a critical examination of religious texts, in favour of gender equality, human rights, LGBT rights and a modern view of culture, tradition, and ritualistic practices. Abu Zayd, among others, calls for a dynamic understanding of the text of revelation: religious freedom and equality of the sexes form the cognitive horizon within which Muslims must attempt to rediscover the original dynamism of the Qur'anic message of liberation. Already in 1965, the Second Vatican Council had addressed relations between the Roman Catholic Church, its moral teaching and the exigencies of the contemporary world within the framework of a modern timeline and perspective. It was an intentional effort to renew the Church and redefine its dogmas. With the "Declaration of Religious

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[140] David L. McMahan, *Making of Buddhist Modernism*, Oxford University Press (2008), p.6

[141] Joshua Cohen, "Minimalism about Human rights: The Most we Can Hope For?", *Symposium: Toward International Consensus,* The Journal of Political Philosophy, Volume 12, Number 2, 2004, p. 205

Freedoms", the Church embraced a principled commitment to religious toleration founded on an idea of human dignity. At the same time, it rejected the doctrine that "error has no rights" and the associated thesis that toleration is an accommodation to political weakness. [142] Social codes are not only capable of change in response to their own internal critical dynamism but also thanks to forces in the surrounding social, economic and cultural environment. The intercultural dialogue - which leads to progressive changes within the world's moral traditions - allows various cultural options to converge towards a shared platform of social justice and human rights. Rawls coined the term "reflective equilibrium" and popularized it in his *A Theory of Justice.* In reflective equilibrium specific political judgments - those made consistently and without hesitation when one is under good conditions for thinking (e.g., "slavery is unjust") - support more general political convictions (e.g., "all citizens have certain basic rights") which in turn support very abstract beliefs about oneself and the world (e.g., "all citizens are free and equal"). Doing this inevitably brings out conflicts where, for example, a specific judgment clashes with a more general conviction, or where an abstract principle cannot accommodate a particular kind of case. One proceeds by revising these beliefs as necessary, bringing beliefs into relations of mutual support in order to increase the coherence of the whole. Any belief at any level of generality is subject to revision, if revision will help to bring considered convictions into greater coherence overall.[143] Leaving apart other contemporary and more detailed documents, the Declaration protects standards bearing on most significant dimensions of a society's basic structure, from defense against the misuse of a state power, to the organization of the economy, the level of public provision and general requirements for the legal system and political process. The normative content of human rights is to some extent open-ended. Since the beginning, human rights advocated have believed that the capabilities of any society would be enhanced, and the prospects of individual lives made better, with the entire human rights enterprise. [144]

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[142] Joshua Cohen, "Minimalism about Human rights: The Most we Can Hope For?", *Symposium: Toward International Consensus,* The Journal of Political Philosophy, Volume 12, Number 2, 2004, p. 201

[143] http://plato.stanford.edu/entries/rawls/

[144] Charles R. Beitz, *The Idea of Human Rights,* Princeton University Press (2011), p. 142, 204, 212

III - Islam and Human Rights

3.1 Origins of Islam: from Mecca to Medina

Whether nomadic or sedentary, the Arabs before the seventh century followed the unwritten oral law of the Bedouin society, based on tribal customs and the hierarchical tribal authority of the *shaykh.* In a society lacking a central political authority, individual protection was granted by the threat of family vendetta and the law of retaliation. Islam - which literally means "submission" – was founded in the Arabian Peninsula on the teachings of the Prophet Muhammad as an expression of surrender to the will of Allah, the creator and sustainer of the world.[145] Islam had a special role in the struggle for moral and civil justice in order to counterbalance socioeconomic inequities and oppression of the weak, in particular orphans, widows and slaves. The idea of dignity of human beings is a central core of Qur'an, the Holy Book. Prophet Mohammed defended the rights of the poor, while vividly condemning false contracts, bribery, usury and the general economic exploitation perpetrated by the Meccan powerful and prosperous oligarchy. In the seventh century, social justice was institutionalized by the payment of an alms tax *(zakat)*[146] and voluntary charity *(sadaqa)*[147] for people in need, stipulations of fixed shares of inheritance for women (Qur'an, IV: 19) and children (Qur'an, IV: 11) and regulations regarding the just treatment of debtors(Qur'an, II:279-280), widows (Qur'an, II:240), orphans (Qur'an, XC: 13-16) and slaves (Qur'an XXIV: 33). In this sense, Islam significantly contributed in encompassing a moral universe of individual ethical responsibility and social commitment. According to the religious message revealed in the Qur'an of the Meccan period, Jews and Christians of Arabia were regarded as natural allies whose faiths had much in common with Islam. In 622 A.D, when a community was established in Medina, Prophet Mohammed had granted Jews autonomy in internal religious affairs, but political allegiance and cooperation with Muslims was expected. The Jewish refusal to

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[145] See http://www.patheos.com/Library/Islam.html

[146] Hadith on *zaqat:* Bihar al-Anwar, Volume 74, Page 405; Al-Kafi, Volume 2, Page 258; Bihar al-Anwar, Volume 81, Page 252; Man La Yahdhuruhu al-Faqih, Volume 2, Page 7; Kanz al-Ummal, Volume 15, Page 831; Man La Yahdhuruhu al-Faqih, Volume 2, Page 183; etc.

[147] Hadith on *sadaqa:* Abu Dawood, *Sunan Abu Dawood,*15:2824; Abu Dawood, *Sunan Abu Dawood,* 17:2875; Muhammad al-Bukhari, *Sahih al-Bukhari,* 4:52:232; Muslim ibn al-Hajjaj Nishapuri, *Sahih Muslim,* 5:2204; Muslim ibn al-Hajjaj Nishapuri, *Sahih Muslim,*5:2199; etc.

submit to the Prophet resulted in their expulsion from Medina. Equality and unity were recognized only in the *Umma*, the Islamic community under the authority and protection of God. While in Mecca the religious message was mainly spiritual, at Medina it focused on the need of consolidating the Muslim dominance and to provide it with support against violent adversity of non-believers. In the Qur'an, there is a chronological evolution of the concept of war, from wide tolerance and purely defensive war up to the use of coercion against non-Muslims in order to convert them to Islam. Mohammed was both the religious and political leader at Medina. Since he was regarded as righteous and trustworthy, early companions and followers recounted what he did and said (*Sunna*).[148] His life provided the pattern that every Muslim was to emulate, e.g. rules about hygiene; what to eat and drink; diplomacy and warfare; how to treat friends, wives and enemies.

3.2 Systematization of the Islamic Sources

In the light of a direct communication with God, Muslims refuse the role of the clergy, priests, holy men and saints. The Islamic religion lacks a authoritative source of doctrinal readings, such as the Pope and the Catholic Church, entitled to decide what is dogma or not in Catholicism. Since the time of Mohammad, the Qur'an lent itself to various meanings. The authentic interpretation was the one dictated by the Prophet. After his death, single chapters (*surah*) of the Holy Book were diffused separately and each version differed from the others, until the third Caliph Uthman (577 – 656 AD) ordered only one version to exist. The 114 chapters were arranged according to their length, not in the chronological order of revelation. As we have seen, there is a progressive change in Mohammad's mission, from preaching wide tolerance and solidarity among people into inciting violence in order to consolidate the Islamic dominance. After the many contradictory verses were organized into a finalized Quran, there were still open questions regarding how to interpret the overall revelation. A longstanding debate developed between those who favored a more allegorical and rational approach to Islamic sources (Mu'tazilites) and supporters of a literal, strictly linguistic sense of the verses (*ahl-hadith,* or Ash'arites).[149] The Mu'tazili were courageous in challenging other theologians, even those with political power or ties to debating the true meaning of qu'aranic statements. They became a significant defending force for religious revelation, because they were able to discuss contentious issues with reason and logic, until the

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[148] See http://pages.uoregon.edu/aweiss/IslamGlobalForces/

[149] See http://sharia.law.emory.edu/

traditionist-Sunni opposition to the Mu'tazila found an elegant spokesman in Abu al-Hasan al-Ash'ari (935 AD). He provided a new basis of orthodox Islamic theology - a veiled fatalism, whereby everything that happens (even the bad and unjust) is actually by divine decree and has a divinely justified purpose - which has continued on to the present.[150] While the implementation of the Islamic doctrine have varied over the centuries and across cultures, all Muslims enjoy a unity of belief in the Qur'an and *Sunna,* absolutely binding as a matter of faith. The diverse readings of the Holy Book were discussed by Ibn Rushd, also known as Averroes (1126 – 1198), a medieval Andalusian polymath of the Maliki school of law. Averroes distinguished between three levels of interpretations of the religious sources: [151]

1. The first level is that of jurists, who are mainly concerned with a strictly textual, literalist approach to the verses
2. The second level is associated with the theologians, whose interpretation is based on a more rigorous and widely accepted view through debate
3. The third level addresses to philosophers, who are interested in finding reasonable principles that are incontestable by any human in his capacity as a rational being.

During the 2nd and 3rd centuries of the Muslim era (8th–9th centuries AD), Islamic jurists (*Ulema*) had already systematized the ethical and legal system of religion (*Shari'a*), using the Qur'an and the *Sunna*, as well as some ancient customary practices of the Middle East.[152] In *Shari'a*, the methodology *Uṣūl al-fiqh* allowed specific rules to derive from general principles thanks to the analysis of the origins and sources upon which the jurisprudence is based. Islam is a complete and comprehensive way of life (*al-Islam nizam kamil wa shamil*)[153], dealing with heterogeneous aspects, e.g. family, property and hereditary law, criminal and constitutional law, conduct in war and diplomacy. It is not surprising that the legislation provides guidelines about both the amount of money to inherit and the performance of the prayer. Furthermore, it deals with issues concerning etiquette and politeness, such as what to eat or drink and how to treat friends or

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[150] See http://www.mutazila.net/

[151] Abdullahi Ahmed An-Na`im, *Islam and the Secular State*, Harvard university Press (2010), p. 47

[152] Abdullahi A. An-Na'im, *Toward an Islamic Reformation: Civil Liberties, Human Rights and International Law,* Syracuse University Press 1990, chap. 2

[153] See http://www.quilliamfoundation.org/blog/human-rights-the-universal-declaration-vs-the-cairo-declaration

wives. The political and legal basis of the Islamic culture are deeply embedded in religion, which is regarded as the absolute literal readings of the Qur'an and *Sunna.* Since the times of Abbasids (750-1258), the military elites and the prominent civilian administrators secured their ties with the communities of believers by endowing mosques and Muslim colleges. The Fatimid and Mamluk governments, like those of Medina, the Umayyad and the Abbasids before them, were far from fitting a net separation between religion and state. This model continued throughout the pre-colonial era, and remnant are still in effect today: most Islamic institutions in the Middle East are funded by the state.[154]

3.3 The Shari'a Law and Human Rights: a View on Non-Muslims, Slaves and Women

Human minds derive norms of social and political order in response to their aspirations, which are of necessity flexible.[155;156] *Shari'a* norms took place within a specific historical background, radically different from our own. During its formative stages there was no conception of human rights anywhere in the world. Constitutionalism, human rights and citizenship were totally lacking among all societies until the modern age.[157] The *Shari'a* law - whose primary sources are the Qur'an and *Sunna* - lightened the harsh consequences of enslavement and discrimination but has never preached the abolition of some practices, which would be nowadays considered brutal and inhuman. At that time, communities were extremely hierarchical and differentiated between various categories of people: freemen and slaves, believers and non-believers, men and women. Traditional *Shari'a* assumed the existence of slaves and concubines, male guardianship over women, the social practice of female seclusion (*purdah*) - which took the form of physical segregation and imposed women to cover their bodies and conceal their forms - barbaric punishments such as the law of retaliation, intolerance towards unbelievers and independent minds of all kinds. The *Shari'a* law is mainly based on the texts of the Qur'an and *Sunna* of the Medinan period, when there was the need of consolidating and securing the *Umma*. The state hardly existed as a political institution and the authority had a very personal nature. Conversion to

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[154] Abdullahi Ahmed An-Na`im, *Islam and the Secular State*, Harvard university Press (2010), p. 65, 77

[155] Kai Hafez, Mary Ann Kenny, *The Islamic World and the West: An Introduction to Political Cultures and International Relations*, BRILL (2000), p. 37-38

[156] Frederic Volpi, *Political Islam: A Critical Reader, Routledge* (2013), p. 88

[157] Abdullahi Ahmed An-Na`im, *Islam and the Secular State*, Harvard university Press (2010), p. 53

Islam was the main interest of the Prophet. Conversions could be more efficient if religion offered nomad people a sense of belonging to the community, absent until then. Thereby, the teaching after *hegira*[158] addresses to specific issues about politics, economy, treatment of women and slaves that reflected the seventh-century Arabian cultural context, adapted to the particular demands of the *Umma.*

3.3.1 Muslim Community-Building and Criminal Law

Currently, the notions of human nature and dignity tend to have a universal understanding, but in the ancient Medinan society, it was unavoidable that people identified "the others", to whom the principle of reciprocity refers, only with other male Muslims of the *Umma.* As Ignatieff remembers:

   "While we may be naturally disposed, by genetics or history, to care for those close to us – our children, our family, our immediate relations, and possibly those who share our ethnic or religious origins – we may be naturally indifferent to all others outside this circle. Historically, human rights doctrine emerged to counteract this tendency toward particularist and exclusivist ethical circles of concern and care."[159]

 During the Medinan period, persecutions of religious minorities were encouraged on the ground of the need of community-building. Indulgence for unorthodoxy and dissent was regarded as a threat for the widespread of Islam in the Arabian Peninsula and beyond. On the basis of different <u>*Hadith*</u>[160] collections, apostasy became a *hadd* crime[161] punishable by death[162] (Qur'an,

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[158] The "Hijra", also Hijrat or Hegira, is the migration or journey of the Islamic prophet Muhammad and his followers from Mecca to Medina in June 622 CE: Fazlur Rehman Shaikh, *Chronology of Prophetic Events,* Ta-Ha Publishers Ltd (2001), p. 52

[159] Michael Ignatieff, *Human Rights as Politics and Idolatry*, Princeton University Press, 2011 (The Tanner Lectures)

[160] Hadith, Arabic Ḥadīth ("News" or "Story"), also spelled Hadīt , record of the traditions or sayings of the Prophet Muhammad, revered and received as a major source of religious law and moral guidance, second only to the authority of the Qurʾān, the holy book of Islam: http://www.britannica.com/EBchecked/topic/251132/Hadith

[161] Hudud (singular hadd, literal meaning "limit" or "restriction") is an Islamic concept, based on *Quran* and *Hadith*s, that define "crimes against God": Mohamed S. El-Awa, *Punishment in Islamic Law,* American Trust Publications (1993), pp. 1-68

[162] Samuel M. Zwemer, *The law of Apostasy,* The Muslim World Volume 14, Issue 4, pp. 373-391

2:217). The charge of apostasy has then been abused to suppress political opposition and intellectual growth, although the right to freedom of thought, conscience and religion is enshrined in Article 18 of the UDHR, and its denial is considered one of the main causes of international conflicts[163]. There is much controversy over many aspects of the criminal law of *Shari'a* that raise human rights concerns, including issues of religious discrimination in its application to non-Muslims.[164] Among others, the Islamic criminal law calls for the amputation of the right hand in case of theft, one hundred lashes to an unmarried convict of fornication and stoning to death if the offender is married. In the Muslim view, a religiously sanctioned punishment will absolve the transgressor from suffering a much harsher pain after death because God does not harm twice for the same offence. To people who hold this belief, however severe the Qur'anic treatment might appear to be, it is in fact extremely merciful and lenient in comparison to what the culprit will bear in the next life should the penance not be enforced on this earth.[165] From a humanist perspective, inflicting such a severe lawful sanction is cruel and degrading. It violates the most basic rights (Art. 5 UDHR), which were recognized in order to stop the inhuman use of human beings and to encourage the refusal of legal but immoral order.

3.3.2 Slavery

Long before Islam, slavery was an established institution in many legal systems, such as Roman law, Hebrew law, Byzantine Christian law, African customary law and Hindu law.[166] When forbidding Muslims to compel their slave girls to prostitution (Qur'an, XXIV: 33), or when encouraging liberation of slaves (Qur'an, II: 177), the Qur'an implicitly assumes the existence of slavery. The Prophet himself bought, sold, captured, and owned slaves, but tried to regulate forced labor so as to remove some of its cruelties. According to Mohammed's teachings, freeing slaves became a virtuous act (Qur'an, XXIV: 33) and their mistreatment was forbidden (Qur'an IV: 36). Restrictions on sale were introduced, e.g. slave-owners could not separate the mother from

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[163] Charles Kurzman, *Liberal Islam: A Source Book,* Oxford University Press (1998), p. 226

[164] Francis Deng, Abdullahi An-Na'im, Yash Ghai and Upendra Baxi, *Human Rights, Southern Voices*, Cambridge University Press (2009), p. 87

[165] Mark Goodale, *Human Rights: An Anthropological Reader,* John Wiley & Sons (2009) p.80

[166] See http://www.bbc.co.uk/religion/religions/islam/history/slavery_1.shtml

her child while the latter was under seven years old. Muslims were barred from enslaving other Muslims. Slavery was only allowed if the person was captured while leading a war against Islam, or if there was legal evidence that he was the descendent of an unbroken chain of people who had been lawfully enslaved.[167] Islamic legal schools differ in their dispositions about the treatment of war prisoners. The more liberal *Shafi'i* school considers four options: immediate killing, slavery, release with or without ransom. The *Maliki* school only recognizes the options of killing, slavery and release with ransom, while the extremely traditional *Hanafi* school further reduces the options to killing and slavery. Female prisoners of war were often forced to become concubines, women engaged in an ongoing sexual relationship with a man without being married to him. Although the Islamic law prohibits prostitution (Qur'an, XXIV: 3), it never opposed to the purchase of female slaves for sex. Concubinage was familiar to many other cultures – in Ancient Greece[168] and Rome[169], Judaism[170] and China[171] - and the Bible records that King Solomon owned concubines in addition to childbearing wives (1 Kings 11:1-3). The harem slave had some benefits: she was not sold after she had given birth, and became free after her owner's death. However, her freedom of choice was rather limited, as was that of women in general in an essentially male-dominated environment which restrained women's accessibility to men not belonging to the family. Slavery persisted until the 19th century in many places, later still in certain countries. In some cases, the pressure to end forced labor came from colonial powers, e.g. Britain and France, that had only recently abandoned it in their dominions. In others, enslavement was seen as an imperialist behavior that was incompatible with growing anti-colonialism. Only in the 20th century the legal and institutionalized ownership of human beings was condemned by all states. Some of them outlawed forced labor only comparatively recently: Qatar in 1952, Yemen and Saudi Arabia in 1962, Mauritania in 1980. Generally, its ban was in conjunction with cultural changes such as urbanization, education, a different demand for labour and eventually a desire to relate to

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[167] See http://www.jihadwatch.org/2012/07/james-m-arlandson-slavery-in-the-quran-traditions-and-classical-law

[168] James Davidson, *Courtesan and Fishcakes: The Consuming Passions of Classical Athens,* University of Chicago Press, 2011

[169] Grimal, *love in Ancient Rome,* University of Oklahoma Press, 1986

[170] Adam Dickter, "ISO: Kosher Concubine", *New York Jewish Week,* December 2006

[171] "Concubines of Ancient China". *Beijing Made Easy,* 2012

Western nations as equals. The idea that slavery was necessary for economic growth has been progressively abandoned. The Cairo Declaration on Human Rights in Islam of 1990 finally proclaimed that: "Human beings are born free, and no one has the right to enslave, humiliate, oppress or exploit them, and there can be no subjugation but to Allah the Almighty […]"[172] Slavery has been recognized as one of the most serious obstacles to the will to be free and is (almost) unconceivable nowadays. Its prohibition is an emblematic example of acceptance of an international human right discourse that limits national sovereignty.

3.3.3 The Status of Women in Marriage

The *Shari'a* law and cultural customs provide guidance in all aspects of the Muslim woman's life, such as marriage contract, employment opportunities, justice in case of sex crimes, dress, prayers, inheritance, divorce, etc. Even though so much Qur'anic legislation is aimed at protecting women in the context of marriage, wives cannot claim equality with their husbands. Traditional *Shari'a* denies women (and non-Muslims) the same degree of freedom and social justice recognized to some extent to Islamic men. It prohibits weddings between a Muslim woman and a non-Muslim guy, while allowing Christian or Jewish brides to espouse a Muslim groom. Any children from such marriage automatically belong to Islamic father's faith. Both sexes are precluded from marrying an atheist, that is one who does not believe in the heavenly revealed scriptures of Islam, Christianity or Judaism. This is in contrast with Article 16 of the UDHR about free marriage choice: the right for adult men and women to wed and found a family without any limitation on the basis of race, nationality and any other distinguishing feature. As we saw in the first chapter, the Universal Declaration of Human Rights lacks of any qualifiers to restrict gender and religious equality. Article 16 also recognizes that both sexes have the same rights to marriage, during marriage and after its dissolution. Implicitly, according to Islam, a non-Muslim husband cannot be the guardian of his Muslim spouse.[173] Male guardianship (Qur'an: IV, 34) was typical of the hierarchical societies of the eighth century, when girls and wives constantly faced the threat of being harassed in public spaces. At that time, women were in danger outside the household; therefore they were also

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[172] Article 11, Cairo Declaration on Human Rights in Islam, Aug. 5, 1990, U.N. GAOR, World Conf. on Hum. Rts., 4th Sess., Agenda Item 5, U.N. Doc. A/CONF.157/PC/62/Add.18 (1993)

[173] Bharathi Anandhi Venkatraman: Islamic States and the United Nations Convention on the Elimination of All Forms of Discrimination Against Women: Are the Shari'a and the Convention Compatible? 44 American University Law Review 1949 (1995)

suggested to pray at home rather than in a public mosque[174]. Whenever a woman prays in a private and hidden place, that is more convenient for her, as the Prophet said: "A prayer in her house is better than her prayer in her courtyard, and her prayer in her bedroom is better than her prayer in her house."[175] Although praying alone was preferable, girls and wives were not forbidden to go to the mosque, so long as they asked for permission[176] and were properly covered. In keeping with the orthodox Judeo-Christian teaching, differentiated gender roles were endorsed, with mothers as child-bearers and fathers as bread-winners responsible for the family. The exchange and control of women was very common, as well as the restraint of their choice in marriage, central to the maintenance of patriarchal property relations. The Qur'an states a Muslim guy might marry up to four brides, provided that he treats them equally (Qur'an, IV: 3). On the other hand, Muslim girls are not allowed to engage in polyandry. As was customary for Arab chiefs, Mohammed had a number of spouses. Most of them were widows of his companions in need of protection, considering that remarriage was extremely difficult for non-virgins women at that time. In its original purpose, polygamy was intended to be for the safeguard of orphans and widows.[177] It is still lawful nowadays. Moreover, female children who reached sexual maturity, regardless of their age, might be forced to wed without their willingness and consent. In these cases, they are prevented from exercising the fundamental rights of free marriage choice. Although marriage in Islam is a contract – and, as such, it presupposes that the contracting parties are both consenting adults[178] - these despicable weddings are approved by traditional *Shari'a* because authentic *hadiths* - Sahih Bukhari and Sahih Muslim – state that the Prophet espoused his third wife Aisha when she was six and consummated the marriage before she reached the age of ten. Within this not reassuring framework, the human ability must struggle for achieving a quality of life compatible with human dignity and well-being.

3.3.4 Women in Muslim Societies

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[174] Reported by Abu Dawud in al-Sunan, Baab maa jaa'a fee khurooj al-nisaa' ilaa'l-masjid: Baab al-tashdeed fee dhaalik. See also Saheeh al-Jaami', no. 7458

[175] Reported by Abu Dawud in al-Sunan, Baab maa jaa'a fee khurooj al-nisaa' ilaa'l-masjid. See also Saheeh al-Jaami', no. 3833

[176] Sahih Muslim, 4/161, kitab al-salah, bab khuruj al-nisa' ila'l-masajid

[177] William Sweet, *The Dialogue of Cultural Traditions: Global Perspective*, CRVP (2008), p. 83

[178] V.A. Mohamad Ashrof, *Islam and Gender Justice: Questions at the Interface,* Gyan Books 2005), p. 261

Many centuries ago, everywhere it was customary to discriminate between sexes since their birth. Until Mohammed abolished it, female infanticide was a frequent practice among pagan Arabs: son were regarded as gifts while daughters as a damnation. The Prophet raised the status of Arabian women - e.g. granting them a better treatment, property rights and fixed shares of inheritance – although their benefits remained unequal to those of men. A number of Qur'anic verses specify woman's inheritance rights (Qur'an, IV: 7-11; 19; 33): she receives less than the share of a Muslim guy when both sexes have equal degree of relationship to the deceased person. Unequal, as well, is the right to divorce (Qur'an, II: 228): a man may divorce his wife, or any of his wives, by unilateral repudiation, while a woman can obtain divorce only by consent of the husband or by judicial decree for limited specific grounds such as the husband's inability or unwillingness to provide wealth for his wife.[179] Male guardianship and female subjection were not challenged. After all, these were common features of all ancient societies and non-Arabian women were not better off than Muslim ones at that time. In some cases, male guardianship became the Sword of Damocles which keeps wives under constant threat. The lack of an authoritative source of doctrinal interpretation made it easier for extremists to gain influence and promulgate their views. Currently, for political reasons also related to cultural traditions and prejudices, the female status might be lower than as prescribed in the Qur'an. No text in the Qur'an and no authentic *hadith* prevent a woman from working, as long as the employment is not unlawful and she does not neglect her role as mother and wife.[180] When women have the right to work and are educated, their job opportunities might nevertheless be unequal to those of men. In Egypt, for example, female workers have limited chances to be employed in the private sector because they are still expected to put their role in the family first, which causes men to be seen as more reliable in the long term.[181] Saudi women are not even allowed to leave the house if not accompanied by a *"mahram",* who is usually a male relative. They are also prevented from driving a car, going for a swim and having political rights. Girls and wives cannot challenge their alleged "lack of capacity", because the powerful Saudi tribal elite aims at presenting itself as the guardian of a strict Islamic

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[179] Mustafa Köylü, Chapter III "Human rights: an Islamic approach" in: http://www.crvp.org/book/Series01/I-39/ch3.htm

[180] Yusuf Al Qaradawy, *The Status Of Women In Islam.* Chapter: "The Woman as Member of the Society: When is a woman allowed to work?" in: onlinebooks@pobox.upenn.edu, 1998

[181] Assaad R., "Gender & Employment: Egypt in Comparative Perspective", in Doumato, E.A. & Posusney, M.P., *Women and Globalization in the Arab Middle East: Gender, Economy and Society, Colorado*, Lynne Rienner Publishers 2003

orthodoxy, of its moral purity and austerity. Decency in the interaction between genders has been advocated since the Islam of the origins. The Qur'an admonishes women to dress modesty (Qur'an, XXIV: 31), without specifying the design of the clothing and the garment to wear in presence of men not belonging to the family. Historically, the dress code of Muslim societies has distinguished male from female, believers from non-believers and between people having a certain occupation or social status. Styles have changed over the centuries and across regions. Nowadays, the veil is a symbol of religious expression and cultural identity. In some Arabic societies, it is (officially) a matter of personal choice, while it is mandatory in a handful of Islamic countries such as Iran and Saudi Arabia. Although the Qur'anic purpose was to make it safe for women to go about their daily business without fear of sexual harassment or molestation (Qur'an XXXIII:59), Iran and Saudi Arabia have put them behind veils and locked doors under the cloak of protecting their chastity. These days, women are the targets of serious violations of human rights in many countries of the Middle East. Marriage is a social contract between the future husband and the legal representative of the bride, and divorce is extremely difficult for the latter, although the Qur'an clearly asserts that the divorced parents of a minor child must decide by mutual consultation how he or she is to be raised.[182] In most Muslim states, mothers are separated from their sons - generally at age 7 - and their daughters - generally at age 12 -. It is difficult to imagine an act of greater cruelty than depriving a mother of her children simply because she is divorced.[183] Furthermore, many Islamic legal doctrines do not include domestic violence; thereby judiciary protection available to women is limited. Generally, the murder of wives on behalf of their husband – with particular reference to honor killing - is one of the most common crimes.[184] Sex is permitted to women only with their husband. Extramarital and premarital sex represent *zina,* a religious crime on the same level of murder of a Muslim and theft of a Muslim's property.[185] Also rape is included in the notion of *zina,* unless the rapist confesses or the victim can establish coercion with four male Islamic eyewitnesses. Since the crime is often committed without

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[182] See http://www.thewaytotruth.org/womaninislam/rightsofwomen.html

[183] Indrani Sen Gupta, *Human Rights of Minority and Women's: Women and human rights development,* GyanPublishing House (2005), p.10

[184] United Nations Report of the Special Rapporteur, Ms. Asma Jahangir, on Civil and Political Rights, Including Questions of Disappearances and Summary Executions (New York: United Nations, Jan. 2000), p. 27

[185] Sidahmed, A. S. (2001). "Problems in contemporary applications of Islamic criminal sanctions: The penalty for adultery in relation to women", *British Journal of Middle Eastern Studies*, 28(2), pp. 187–204

observers, failure to provide evidence is common. Not only are women treated as false accusers and denied justice, they are also charged with fornication or adultery.

3.4 The Cairo Declaration of Human Rights in Islam

Islamic countries have chosen to be bound by a minimum set of international human rights agreements. Among others, Afghanistan, Egypt, Iran, Iraq, Lebanon, Pakistan and Syria voted in favor of the Declaration. Nevertheless, in 1982, the Iranian official Said Raja'i Khorasani claimed that it is impossible for Muslims to implement the human rights standards as formulated in the UDHR without contravening the religious law.[186] In this view, secular states of Western Europe and North America negotiated the relationship between theology and politics in their own historical context, which is radically different from that of Islamic societies. A normative system – such as the human rights doctrine - cannot be culturally neutral because everything human beings do, from mundane everyday activities and interactions to what is profoundly spiritual or symbolic, is culturally rooted. Thereby, difficult is to speak of universal values without dealing with the reality of permanent and inherent customs diversities.[187] Religious sentiments have a special role in the struggle of a people for achieving a sense of identity and self-respect. In the case of Islam, there are indications that a growing number of believers are beginning to reflect seriously upon the teachings of the Qur'an as they become disenchanted with capitalism, communism and western democracy.[188] The absolutist reinforcement of a Muslim identity leads to enormous difficulties in the field of a modern social and juridical reform and raises a number of serious political challenges. Members of the Organization of the Islamic Conference in 1990 adopted the Cairo Declaration of Human Rights in Islam[189]. As for the Universal Islamic Declaration of Human Rights of 1981, the CDHRI restates basic rights through an undefined interpretation of *Shari'a* which removes the universality underpinned in the UDHR. According to the LSE Masters student

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[186] David Littman, "Universal Human Rights and Human Rights in Islam", *Midstream* (New York, Feb/Mar 1999)

[187] Abdullahi Ahmed An-Na`im, *Islam and the Secular State*, Harvard university Press (2010), p. 24-25

[188] Indrani Sen Gupta, *Human Rights of Minority and Women's: Women and human rights development,* Gyan Publishing House (2005), p. 104

[189] The Declaration is published in English in: *Conscience and Liberty. International Journal of Religious Freedom,* Spring, 1991: 90-95

Jonathan Russell, the Cairo Declaration uses the cover of the *Shari'a* Law to justify the legitimacy of practices that compromise the integrity and dignity of human beings.[190] For instance, Article 18 of the UDHR is in contradiction with Article 10 of the CDHRI. The former proclaims the universal right to freedom of thought, conscience and religion, which allows to change religious beliefs and to manifest them in public and private life. On the other hand, the latter denies these freedoms while stressing the superiority of Islam as "the religion of true unspoiled nature" and leaving open the door to the persecution of thousands of people because of their different creed. In addition, while the Cairo Declaration acknowledges that men and women have equal dignity, nowhere does it state that they have equal rights.[191] Islamic *Shari'a* as commonly known contemplates several rules that establish different rights and duties between Muslims and non-Muslims, wives and husbands, free people and slaves. Its level of safeguard of rights is not sufficient when judged by the standards of the UDHR, which require equality of all human beings, without distinction on such grounds as sex, religion or belief[192]. In case of conflict between *Shari'a* and human rights, the CDHRI prescribes that prevalence must be accorded to the former. As Article 25 states, "The Islamic Shari'a is the only source of reference for the explanation or clarification of any of the articles of this Declaration". Article 2 about safety from bodily harm maintains that "[…] it is prohibited to breach it without a Shari'a-prescribed reason"; thus it implicitly validates the harsh judicial punishments still practiced in countries such as Iran, Sudan and Saudi-Arabia. The Muslim criminal law calls for the amputation of the right hand in case of theft and public stoning to death for a married adulterer. From a humanist point of view, these severe lawful sanctions for such offences are cruel, inhuman and degrading: they violate Article 5 of the UDHR. It follows that the CDHRI cannot replace the Universal Declaration and the Covenants since it limits fundamental rights enshrined in contemporary international documents. According to radical Islam, the respect of cultural norms prevails over the possibility of criticism. Nonetheless, on the basis of evidence available to any reasonable and well-informed person, some customary practices appear to be indefensible. How can individuals accept that primitive and cruel rituals are perpetrated, women

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[190] LSE The London School of Economics and Political Science: MEC blog, Human Rights: The Universal Declaration vs The Cairo Declaration (2012)

[191] According to Article 6 of the Cairo Declaration: "Woman is equal to man in human dignity, and has her own rights to enjoy as well as duties to perform […] The husband is responsible for the maintenance and welfare of the family".

[192] Abdullahi A. An-Na'im, *Islam and Human Rights*: *Beyond the Universality Debate, ASIL Proceedings, 2000*

are stoned, and non-Muslims are denied the profession of their faith? The claim that only believers in Allah can have a complete understanding of human rights - as asserted by Grand Ayatollah Mohammad Ali Taskhiri, an advisor to Iran's supreme leader - diametrically contradicts the universalistic essence of fundamental rights.[193] The CDHRI, published under the auspices of Islam, introduces absolutist judgments and presupposes certain requirements of faith to apply to citizens in countries that do not even implement the *Shari'a* to its full extent. This is a tremendous oversight. By its nature and purpose, *Shari'a* can only be freely observed by believers; its principles lose their moral authority and value when enforced by the state. To pass such a document off as declaration of human rights is incongruous. Indeed, fundamental rights neither discriminate against religions nor presuppose negative evaluations of secularism to society. The possibility to be myself requires me to allow others to be themselves too, on their own terms. This principle of reciprocity, or Golden Rule (the Islamic *mu'awada*), is the ultimate cross-cultural basis of universal rights.[194] The Preamble of the 1948 UDHR reads that human rights are "common standards of achievement for all people and nations": the acceptance of this understanding is the prerequisite moral, legal and political basis for their enjoyment.

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[193] At the fourth German-Iranian Human Rights Conference in November 1994, Ayatollah Taskhiri from Ghom emphasized the pre-eminence of the Islamic understanding of human rights, on the grounds that it is based on divine revelation rather than on mere human directives: Kai Hafez, Mary Ann Kenny, *The Islamic World and the West: An Introduction to Political Cultures and International Relations,* BRILL (2000), p. 49-50

[194] Abdullahi Ahmed An-Na`im, *Islam and the Secular State*, Harvard university Press (2010), p. 4, 24

IV - Islamic Modernist and Reformist Thought

4.1 The Ethical Core of the Islamic Message in Mecca

Times of severe crises, as experienced by Arab societies today, should lead Muslims to question prevalent assumptions and challenge existing institutions that have failed to deliver on the promise of liberation and development.[195] In the absence of an authoritative source of doctrinal reading, the *Shari'a* lends itself to various interpretations, from individual ethical responsibility to political commitments in order to consolidate the Islamic dominance in the world. The only possible approach to achieve a reform is to quote those passages of the Qur'an and the *Sunna* which are incompatible with universal human rights and to explain them in their historical context and other special circumstances: Muslim spiritual values are not those who emerged from the particular needs of the Medinan period. At the same time, an Islamic reform shall quote the religious sources that do not depend on the cultural background and are deprived of harmful political commitments. The first Qur'anic verses written in Mecca have a noble and universal understanding: their deep spirituality defines the essence of the new creed. They refer to human dignity, responsibility and to man's calling as God's "deputy" on earth. There is some basis for interpreting such verses as grounds for a commitment to human rights. Many liberal, intellectual and reform-oriented Muslims are concerned to reduce *Shari'a* to its religious-ethical core, if the divine message is to be preserved under the most various circumstances. *Shari'a*, they argue, literally means "pathway to be followed" rather than law or jurisprudence.[196] It is a regrettable perversion that this moral path has become an instrument of authoritarian regimes or militant power politics.[197] The Qur'anic chapters (*sura)* related to issues about political behavior and public civil law have been exploited by the absolutists for their own advantage. As a consequence, the Holy Book was degraded as a tool of reactionary politics, in disagreement with its original

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[195] Abdullahi Ahmed An-Na`im, *Islam and the Secular State*, Harvard university Press (2010), p. 27

[196] Irshad Abdal-Haqq, Cahapter 1 "Islamic Law – An overview of its Origin and Elements", in *Understanding Islamic Law – From Classical to Contemporary* (edited by Aminah Beverly McCloud), AltaMira Press (2006), p. 4

[197] Kai Hafez, Mary Ann Kenny, *The Islamic World and the West: An Introduction to Political Cultures and International Relati*ons, BRILL (2000) p. 52

meaning. That such an alteration can exist within the framework of Islam - which, in theory, rejects the idea of there being any intermediary between believers and God - represents both a profound irony and a great tragedy.[198] In light of this perspective, Ustadh Mahmoud Mohamed Taha (1909 – 1985), a Sudanese Muslim reformer, developed a coherent methodology for what he called "the evolution of Islamic legislation", that is the reformulation of the legal aspects of *Shari'a*.[199] According to his theory, the Qur'an contains two broad and contradictory messages. The one revealed in Mecca holds a different view on equality between the sexes and religious freedom than do the verses divulged while Muhammad was living in Medina.[200] Through Taha's approach, it is possible to disregard the principle of male guardianship, as well as every feature of discrimination against women. The Sudanese reformer encourages jurists to set aside the texts of Qur'an and *Sunna* of the Medina stage as having served their transitional purpose, while favoring the return to the pluralistic values of the early Meccan *Umma.* The Meccan message is inspired to ideals of justice, in turn based on principles of liberty and equality: the Prophet significantly contributed in encompassing a moral universe of individual ethical responsibility and civil commitment. He fostered social fairness, in order to counterbalance economic inequities at the expense of people in need, orphans, widows and slaves. So many Qur'anic verses address to justice in the context of family relations. The home, as a microcosm of the world community, becomes "the abode of peace" through decent living.[201] In Qur'anic terms, individuals - being called as God's deputies on earth - have a supreme task to achieve justice, the prerequisite for authentic peace.[202] In view of the vital need for peaceful coexistence in today's global society, Muslims shall emphasize the eternal message of universal solidarity in Mecca rather than the exclusively religious bonds of the Medinan community. There are a number of Meccan verses

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[198] Christof Heyns and Karen Stefiszyn, *Human Rights, Peace And Justice In Africa: A Reader*, Pretoria University Law Press (PULP) 2006

[199] Abdullahi Ahmed An-Na'im *Muslims and Global Justice,* University of Pennsylvania Press (2011), p. 137

[200] Gerhard Lichtenthaler, "Mahmud Muhammad Taha: Sudanese Martyr, Mystic and Muslim Reformer". *Institute of Islamic Studies*. Evangelical Alliance of Germany, Austria, Switzerland. Retrieved 30 July 2014.

[201] Indrani Sen Gupta, *Human Rights of Minority and Women's: Women and human rights development*, Gyan Publishing House (2005), p. 104

[202] John (jurista) Witte, Johan David Van der Vyver, Van der Vyver, *Religious Human Rights in Global Perspective: Religious Perspectives*, Volume 1, Martinus Nijhoff Publishers (1996) p. 386

which admonish violence and advocate tolerance, pluralism and compromise.[203] War was only allowed under circumstances which oppressed believers and even in those circumstances, strict guidelines for war had to be followed, e.g. not engaging in violence with non combatants and not to destroy the crops of the enemy lands.

4.2 Shari'a Law in the Modern Society

If the aim is to recover the original ethical commitment of Islam, liberal Muslims warn that it should be considered the present global context. How can traditional *Shari'a* be adapted to meet the changing circumstances of contemporary societies?[204] *Shari'a*-based reasoning shall be employed in political debate with a view to contributing to a broader civic consensus. On the ground of dignity and equality all individuals should enjoy, some practices – e.g. death as a legal punishment for apostasy, female seclusion, enslavement etc. - cannot be tolerated. Given the drastic cultural, economic and political changes over the centuries, an understanding of religion that was developed more than a thousand years ago is bound to face some practical difficulties today.[205] It is not unreasonable to state that, in modern times, most believers would not be able or wishful to live by a conception of *Shari'a* as formulated in the seventh-century Arab society. In the same way in which Islam of the origins could not ignore the context in which it was born, the current jurisprudence cannot reject the modern human rights arguments. We will see how a critical lecture of the theological doctrine offers an important possibility of development to ancient practices such as those embedded in the penal code, polygamy, male guardianship and slavery.

- *Hudud crime*

The so-called "hudud crimes" (crimes against God) comprise <u>adultery</u>, <u>fornication</u>, <u>homosexuality</u>, accusing someone of illicit sex but failing to present four Muslim eye-witnesses, <u>apostasy</u>,

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[203] Qur, 2:256; 2:285; 3:64; 4:134; 5:5; 5:8; 5:48; 11:118; 29:46; 49:13; 60:8-9. All references are from Ahmed
Ali, *Al-Qur'an: A Contemporary Translation*, Princeton: Princeton University Press, 2001.

[204] <u>Israr Hasan</u>, *The Conflict Within Islam: Expressing Religion Through Politics,* iUniverse (2011), p. 97

[205] *Women's Rights in Islamic Shari'a: Between Interpretation, Culture and Politics* in Muslim World Journal of Human Rights. Volume 11, Issue 1, Pages 1–24, ISSN (Online) November 2014

consuming intoxicants, highway robbery and theft.[206] Punishments for "hudud crimes" range from amputation of hands, public lashing, stoning to death and execution.[207] According to Professor An-Na'im, there is room for mitigating the penalties. Indeed, the Islamic code only provides for a very narrow definition of these offences and makes an extensive range of defenses against the charge available to the accused person. Strict standards of proof are required, as well as total fairness in law enforcement. The state must fulfill its duty to ensure social and economic justice, and decent standards of living for all citizens before it can apply such inhuman treatment. In An-Na'im's view "the prerequisite conditions […] are extremely difficult to satisfy in practice and are certainly unlikely to materialize in any Muslim country in the foreseeable future." Cross-cultural dialogue might also be helpful in this regard. Jewish jurists, for example, have agreed on stricter procedural requirements so as to limit the practical application of equally harsh punishments.[208] Similarly, in the Islamic case, psychological disorders, kleptomania or economic need might be taken as a defense against criminal responsibility, barring punishment for theft.[209] The problem here is that prescriptions of *Shari'a* can be mitigated but they are still regarded as valid, although in a specific and limited range of circumstances.

- *Family law*

As early as the end of the nineteenth century, Muhammad Abduh, then Grand Mufti of Egypt (the highest official of religious law) suggested that Islam does not endorse polygamy.[210] Effectively, the Qur'an recognizes the theoretical possibility of a man's marrying more than one woman, as long as he treats all his wives equally – a requirement which is rarely met. Male guardianship – also implied in the statement that marriage between an Islamic girl and a non-Muslim guy is

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[206] Mohamed S. El-Awa, *Punishment in Islamic Law,* American Trust Publications (1993), pp. 1-68

[207] Hadd Oxford Dictionary of Islam, Oxford University Press (2012)

[208] Abdullahi Ahmed An-Na'im, *Muslims and Global Justice*, University of Pennsylvania Press (2011), p. 112-114

[209] An-Na'im, "Towards a Cross-Cultural Approach to Defining International Standards of Human rights: the Meaning of Cruel, Inhuman, or Degrading Treatment or Punishment", in *Human Rights: An Anthropological Reader,* by Mark Goodale, John Wiley & Sons (2009), p. 79

[210] Christof H. Heyns, Karen Stefiszyn, *Human Rights, Peace and Justice in Africa: A Reader* PULP (2006), p. 137

prohibited while Christian or Jewish brides are allowed to marry a Muslim husband - derives from the need of protecting women, both economically and socially. Since the modern legal system is supposed to guarantee economic opportunity and security for all citizens, female dependence on men is not necessarily true. As a consequence, male guardianship over women, as well as Muslim guardianship over non-Muslims, should be rejected. Demands for a reform of family law leading to an improved female legal status might be supported by religion with arguments which can be acceptable to more conservative believers.

- *Slavery*

A number of Islamic reformers argue that the Prophet's teachings aimed at ending slavery by limiting opportunities to acquire new slaves and allowing existing slaves to become free. While *Shari'a* allows enslavement under certain conditions, it is almost inconceivable that those conditions could ever occur in today's world, and so forced labor is effectively illegal in modern Islam. In practice, it seems virtually impossible that there will ever again be a *jihad* declared according to the strict letter of the Qur'an, and there are no living descendants of lawful slaves, which means that legal enslavement is unthinkable.[211]

Muslim countries resorted to non-religious documents in order to ban slavery, still formally permitted by *Shari'a*. With the exceptions of Saudi Arabia and states that reintroduced the *Sharia* criminal law – e.g. Iran, Pakistan, the Sudan - many legal issues are regulated by an official secular code in most judicial systems. Otherwise, for example, citizens and their governments could not pay any interest on loans (*ribba*). Similarly, they could not conclude contracts of insurance. Indeed, speculation in commercial dealings (*gharar*) is taken to invalidate contracts of insurance where the obligations of the parties are contingent on whether or not something happens in the future. These days, it is impossible to have viable economic systems without these practices. Already Muhammad Abduh (1849 –1905) had given an interpretation of *Shari'a* that opened to the acceptance of a moderate use of interest, commonly considered forbidden. He made possible the creation of the first Islamic Bank in the world, that allowed and regulated interests charges on loans in a way that did not create strong opposition.

4.3 Muslim Reformism: the *Shari'a* Principles as Humanely Understood

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[211] See http://civics.sites.unc.edu/files/2012/05/EasternSlaveTrade_MiddleEastNorthAfricaEastAfrica.pdf

As we have seen, even with an enlightened understanding of *Shari'a*, the contrast between some Muslim requirements and the human rights doctrine remains. For instance, slavery, polygamy and inhuman punishments are still formally permitted by the religious law. The defense of human rights in the domestic politics is unlikely to be realized if principles like male guardianship of women (*qawama*), sovereignty of Muslims over non-Muslims (*dhimma*), and offensive *jihad* are maintained. Cultural values shall be subjected to the human rights of all citizens, men and women, believers and non-believers, fairly and without discrimination. Consequently, equality can only be realized if the Islamic jurisprudence (*fiqh*) is revised and the relevant provisions of the Qur'an and *Sunna* given a radical re-interpretation in the light of modernity. In this regard, liberal Muslims maintain that *Shari'a* represents the theological norms as humanely understood and not a direct divine decree. Only the meaning of *Shari'a* is the revelation of God's will and guidance, while its knowledge essentially derives from human activity.[212] What its rules mean is the product of human experience in a specific socio-historical context, rather than an immutable divine command.[213] By emphasizing the inherently fallible nature of individuals, Muslim modernists pave the way for a religious reform. They argue that the jurisprudence distinguishes between "duties towards God" (*ibadat)* which include the ritual obligation of prayer, fasting, alms-giving and pilgrimage, and "duties towards other human beings" (*muamalat)* covering all other fields of life from the family and politics to the economy and international relations.[214] Duties towards God are personal and classified as part of the perpetual core of Islam, while duties towards men are subject to change and re-definition through *ijtihad* - a form of critical thinking - without questioning matters of faith. Indeed, the human understanding of *Shari'a* is seen as evolving over time and open to flexible adjustments resulting from the necessities of life. As a consequence, there is the need to differentiate between 1) the true requirements of religious laws and 2) the historically situated interpretation of those laws. The whole process of formulating a public policy is influenced by ideological or political bias, or by its proponents' economic interests and social concerns, which means that it can always be challenged without violating the standards of right

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[212] Charles Kurzman, *Liberal Islam: Prospects and Challenges* in http://www.liberalinstitute.com/LiberalIslam.html

[213] See https://serdargunes.files.wordpress.com/2008/05/the-quran-in-its-historical-context-gabriel-said reynolds.pdf

[214] See http://www.centerforinquiry.net/isis/islamic_viewpoints/is_islam_compatible_with_democracy_and_hum an_rights/

conduct, as set down by God. Whether a given proposition is said to be based on *fiqh* it is subject to the same risks of human error, therefore it shall be amended so as to fit the current circumstances of Islamic societies.[215] Muslim reformism calls for greater autonomy of the individual in a critical examination of the sacred texts and doctrines under changed conditions. It urges that *ijtihad* be used to develop a more progressive form of Islam with particular respect to the status of women and religious freedom. Ethical and cultural norms of re-interpreted *Shari'a* might remain a source of inspiration for individual behavior, in order to influence the legitimacy of the human rights standards. The split between a flexible (earthly) and an unchangeable (divine) domain reflects the difference between human and God's responsibility. The fundamental value of personal responsibility that cannot be delegated or abdicated is one of the recurring themes of the Qur'an (for example, 6:164; 17:15; 35:18; 39:7; 52:21; 74:38). In recognition of their mortality and fallibility, men should strive to conduct their communal life in a system which is open to reform. Once the centrality of human agency is accepted, many creative opportunities for improvement will emerge. [216] Individuals shall seek to understand what is right and provide moral instruction, whereas God is responsible for entering final judgments on the sincerity of belief and righteousness of conduct: man's modesty complements God's sovereignty.[217] This is a sign of respect for God's transcendence and superior moral authority. Associated with this distinction is the principle that there is to be "no compulsion in religion". Private faith is the only guarantee for authenticity, since it promotes honest piety and diminishes the cases of hypocrisy among believers. On the other hand, when a specific rule is formulated as a legal obligation that is valid for all within the national boundaries, *Shari'a* loses its spiritual content: the norms enforced by the state cease to be religious in nature. Compliance with *Shari'a* cannot be compelled by fear of domestic institutions because the risk is to implement a theological view through the government's coercive authority. The Egyptian scholar Ali Abdel Raziq (1888-1966) attacked as blasphemy the arrogance of a system which provided the caliph with the title "God's shadow on earth". While arguing against using God's name in the service of power politics, Raziq opposed to a role for religion in political life and to the political prescriptive value of sacred texts, which should

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[215] Abdullahi Ahmed An-Na`im, *Islam and the Secular State*, Harvard university Press (2010), p. 11, 35

[216] Abdullahi Ahmed An-Na`im, *Islam and the Secular State*, Harvard university Press (2010), p. 10, 27

[217] Joshua Cohen, *The Arc Of The Moral Universe And Other Essays*, Harvard University Press (2010), p. 342

remain neutral in the social debate for civil institution building.[218;219] To conclude, a liberal and humanistic understanding of norms of *muamalat* reflects mature ethical beliefs and embeds essential freedoms and fundamental rights. This adjustment appears to be the most appropriate means for constructing the modern public law of Islam out of the Qur'an and *Sunna* as rooted in the present historical context. The work of the early jurists must be reformulated by contemporary liberal Muslims. An-Na'im – who joined the Islamic reform movement of Ustadh Mahmoud Mohamed Taha[220] - describes a method of "evolutionary interpretation" of the theological sources which could produce political principles compatible with most of international human rights standards.[221] Taha's comprehensive methodology is premised on the following view: as the context in which what is commonly known as *Shari'a* has changed drastically for present day Arab societies, many public law aspects would have to be redefined if they are to remain relevant or applicable.[222] In this perspective, sacred texts that were once interpreted as expressing certain requirements might now be explained differently. According to the Egyptian Qur'anic thinker Abu Zayd, religious freedom and equality of the sexes form the cognitive horizon within which believer must attempt to rediscover the original dynamism of the Qur'anic message.

4.4 Traditional Islam and its Refusal of Muslim Reformism

The dominant Islamic doctrine is hostile to a veiled form of innovation (*biddah*) – as it calls a version of *Shari'a* developed in the light of the human rights discourse. Muslims do not accept the possibility of prophets after Muhammad, who is considered to be the sole legislator, judge and commander. No one is capable of holding its supreme position in determining how people shall uphold their faith. The Qur'an is the conclusive divine revelation, that has been handed down from one generation to the next. Ergo, individuals shall not engage in autonomous thought, for their

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[218] Souad T. Ali. *A religion, not a state: Ali 'Abd al-Raziq's Islamic justification of political secularism*, University of Utah Press, 2009

[219] Kai Hafez, *The Islamic World And The West. An Introduction To Political Cultures And International Relations,* BRILL 2000

[220] Brief Biography of Ustadh Mahmoud Muhammad Taha in http://www.alfikra.org/index_e.php

[221] Charles R. Beitz, *The Idea of Human Rights,* Princeton University Press (2011), p.89

[222] See http://aannaim.law.emory.edu/

thinking is determined by Islam and the religious identity cannot be negotiated.[223] Once a principle of norm is officially identified as "decreed by God", it is extremely difficult for believers to resist or change its application in practice.[224] The split between private faith and public secular life has not yet been accepted in the Arab world, where the sources of law - the same of theology - are presented as mandated by the divine will. There is another reason to explain why traditional Islam rejects *modernist* reform movements: the critique of the *Shari'a* jurisprudence is regarded as a surrender to Western forces, which for long time showed an imperial contempt towards Arabic societies. Muslims see themselves as victims of a history of European dominance. Their idea of human rights - considered a prolongation of the Christian Crusades or the aggressive cultural mission of the colonial rulers - are consequently colored by a very real fear of the enforcement of a Western moral code. They suspect a renewed dependence, in a political, economic and cultural sense, on the more powerful states[225]. The Occident has already lost its credibility in the claim for universal values in the past. Indeed, Wilson's Fourteen Point Declaration of 1918 was interpreted in almost all Middle Eastern countries as a proof of their right to independence. But they quickly realized that self-determination celebrated by the victorious powers only applied to the European peoples. In his *A Modern History of the Islamic World,* Reinhard Schulze maintains:

"When the peace conferences of Versailles and Paris were convened, numerous delegations from widely different Islamic regions travelled to France to demand that the promise of independence be carried out […] they waited in vain in the conference anterooms and the dozens of 'black books' or 'white books' in which the nationalists tried to describe the dramatic situation in their homelands were ignored."[226].

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[223] Raja Bahlul, *Toward an Islamic Conception of Democracy: Islam and the Notion of Public Reason,* Jura Gentium. Rivista di filosofia del diritto internazionale e della politica globale (2009) in http://www.juragntium.org/topics/islam/law/en/public.htm

[224] Peri Bearman, Bernard G. Weiss, Wolfhart Heinrichs, *The Law Applied: Contextualizing the Islamic Shari'a,* I.B.Tauris (2008), p. 334

[225] Heiner Bielefeldt, "Universalism versus Relativism on the Necessity of Intercultural Dialogue on Human Rights", *The Islamic World and the West. An Introduction to Political Cultures and International Relations*, Kai Hafez, Mary Ann Kenny, BRILL 2000, p. 46

[226] Reinhard Schulze, *A Modern History of the Islamic World,* I.B.Tauris Publishers 2000, chapter 3. The Years of War 1909-1919, par. Islamic Nationalism and the Promise of Independence

The experience of shame, resentment and humiliation Muslims suffered has left lasting scars. Nevertheless, the refusal of the human rights all individuals shall enjoy confirms the final victory of power politics and that Western states have been wholly successful in completing their work of destruction at the time of colonialism.[227]

4.5 Opponents of Traditional Islam: Fundamentalists and Muslim Modernists

The dominant religious doctrine is opposed by both fundamentalists and modernists (Muslim reformers), for radically different reasons. The orthodox and ultraconservative fundamentalists reject traditional Islam, which is regarded as insufficient for granting the institutional continuity of the holy doctrine. This current has found a common point of reference in Wahhabism[228], based on the strict observance of the Qur'an and *Sunna*, according to the teachings of Muhammad ibn Abd al-Wahhab (1703-1792). As the academic John Esposito argues, one of the most defining features of fundamentalism is belief in the "reopening" of the gates of ijtihad so as to allow the murder of every Muslim who pleads for the suspension of the *Shari'a*,[229] although this is unsupported by the Qur'an. Indeed, Professor Bassan Tibi asserts, "the command to slay reasoning Muslims is un-Islamic, an invention of Islamic fundamentalists".[230] Also liberal reformists call into question traditional Islam, but their objective is obviously different. They denounce the incapacity of a theocratic state to understand the fruit of modernity and to be neutral with regard to the ethical issues embedded in the core of the human rights discourse. At the same time, they hold that any restriction of free debate - in order to prevent the emergence of a new consensus in favor of contemporary needs - is inconsistent with the religious nature of *Shari'a* itself. No human authority is entitled to declare that reform is not permitted. Freedom of dissent has enabled agreement to evolve around certain views that matured into established principles through acceptance and practice by generations of Muslims in a wide variety of settings. According to a

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[227] Akeel Bilgrami, *Che vuol dire essere musulmani? Impegni fondamentali e identità culturale,* Filosofia e questioni pubbliche, 2005 pp. 35-36

[228] J. Phillip London, CACITeam, *Our Good Name: A Company's Fight to Defend Its Honor and Get the Truth Told About Abu Ghraib,* Regnery Publishing (2008), p. 720: "wahhabism is considered in particular an ultra-conservative orientation"

[229] John L. Esposito, *Voices of Resurgent Islam,* Oxford University Press, 1983

[230] Bassam Tibi, *The Challenge of Fundamentalism: Political Islam and the New World Disorder,* University of California Press (1998), p. 155

hadith attributed to Mohammed, "The difference of opinions (*ikhtilaf*) is a mercy for the Islamic *Umma*".[231] When there was a scholarly dispute on a certain issue, an individual claim that contrasted with one's own could not be condemned. As the Sudanese jurists and human rights activists An-Naim underlines, toleration is the only way to remain responsive to the demands of believers.[232] Liberal movements involve professed Muslims who have produced a considerable body of liberal thought on the internal renewal of Islamic understanding and practice. They support reason (*ijtihad)* against authority *(taqlid)*, not in a very different way from the Western philosophers of the Enlightenment (1650-1800). Reason is the premise for a peaceful acceptance of modernity while authority represents a symbol of closure, whether traditionalist or fundamentalist, to social progress.

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[231] al-Suyuti al-Jami al-Saghir Ibn al-Hajib Mukhtasar

[232] Abdullahi Ahmed An-Na`im, *Islam and the Secular State*, Harvard university Press (2010), p. 30-31

V - Human Rights and "Asian Values"

5.1 The World Conference on Human Rights

Human rights issues have come to international prominence in the post-Cold War world, when a active debate on the universal nature of rights and values, and whether these are compatible with the principles common to East Asian peoples, has attracted the attention of scholars and politicians in Asia and elsewhere.[233] The World Conference on Human Rights - convened in Vienna in June 1993 with the original purpose of supporting the idea that human rights were both related to the public sphere and to personal relations in the private realm - also introduced the discussion about civil and political rights. Civil liberties, such as expression, assembly, association and so on, harassed a number of leaders of Asian countries, whose sympathy with political dissent was very limited, if totally absent. The relationship between human rights and the so-called "Asian values" came briefly to the fore as a topic of major significance, one that for a time questioned the applicability of universal human rights in different cultural, economic and social domains.[234] The main difficulty in establishing common principles – it was said in Vienna- was embedded in the idea that each tradition has its frame of reference and deduces the validity of its norms from its own sources. At the World Conference, several official delegations stressed values differences between East Asia and the West, particularly the senior minister of Singapore Lee Kuan Yew, Malaysia's Prime Minister Dr Mahathir bin Mohamad and the Chinese leadership. Their claim was the following: cultural heritage shapes Asian behavior and the economic, social and political development of East and Southeast Asian countries. Local values - religious, political and legal practices included - properly define modes of socio-economic organization, as well as the existence and scope of civil and political rights enjoyed by the individuals in a given society. The universalistic perspective is inconsistent with what is local, and standards of judgment are internal

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[233] Alfred M. Boll, "International Review of the Red Cross" Article No. 841, *The Asian values debate and its relevance to international humanitarian law,* ICRC International Committee of the Red Cross, 31-03-2001

[234] Saw Swee-Hock, Danny Quah, *The Politics of Knowledge*, Institute of Southeast Asian Studies (2009), pp. 42-44

to particular contexts or to group customs.[235] While emphasizing regional diversity, Asian leaders informed they would have not accepted a declaration which put the interests of the individual above the community needs and the right to live in an ordered society.[236] The Singaporean prime minister warned that "universal recognition of the ideal of human rights can be harmful if universalism is used to deny or mask the reality of diversity", and the Chinese foreign minister Liu Huaqiu even put on record the proposition, apparently applicable in China and elsewhere, that "individuals must put the states' rights before their own".[237] In an ambiguous way, China was trying to overcome its outdated attitude of total refuse of human rights standards by adopting a more sophisticated and nuanced approach (Sebastiano Maffettone, "Human rights and cultural diversity: a philosophical vision"). According to it, for developing countries, fundamental rights mean nothing but right to progress.[238] The emerging Asian societies give priority to the right to survival and to its consequent eradication of poverty.[239] As a consequence, civil and political interests could be legitimately suspended to ensure political stability under the capable leadership of good government in the light of economic growth. At the same time, the Foreign Minister Wong Kan Seng of Singapore - a state which combines political autocracy with financial capitalism - remembered that democracy in Western countries took 200 years or more to fully evolve: civil and political rights could be achieved only after the outstanding development of the Occident in the last two centuries. The Indonesian government supported this statement, too. Furthermore, Malaysian's leaders showed that a state characterized by limited space for freedom of expression and assembly could experience a staggering success. The Malaysian Monarchy – it was noted - had one of the best economic

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[235] See http://www.eastasiaforum.org/2010/10/09/universal-human-rights-cultural-relativism-and-the-asian-values-debate/

[236] "Debate over Rights: Rejecting Western Pressure, Asia Tables Its Own Definition", *Asiaweek,* 30 June 1993, p. 24

[237] Amartya Sen, "Human Rights and Asian Values," *The New Republic*, July 14-July 21, 1997. See https://www.mtholyoke.edu/acad/intrel/sen.htm

[238] China's Deputy foreign Minister Liu Huaqiu, "*when poverty and lack of adequate food and clothing are commonplace and people's basic needs are not guaranteed, priority should be given to economic development*", World Conference on *Human Rights,* Vienna *1993.*

[239] Xiaoming Huang, *Politics in Pacific Asia: An Introduction*, Palgrave Macmillan (2009), p. 225

records in Asia, with great advantage of its people. In the whole, political rulers of the East Asian tiger economies were raising substantial challenges to the legitimacy of universal human rights. At the UN Conference, the division was clear. On the one hand, East Asian regimes blamed the West for interfering with the domestic affairs of countries having different social and cultural settings. They supported the communitarian and context-dependent interests strongly related to local needs and expected to stress social and economic rights. On the other hand, Western democracies maintained that universal standards of human rights – such as the full and equal participation of both sexes in political, civil, and cultural life, or the refusal of all forms of exploitation - should be observed everywhere, in the name of human dignity and worth of all people.[240] Human rights violations could legitimize humanitarian assistance as well as external limits to national sovereignty.

5.2 The Bangkok Summit

The East Asian position held in Vienna was elaborated in the regional preparatory meeting of Bangkok (Thailand) between 29 March and 2 April 1993. At the Bangkok summit, the Asian governments had the opportunity to advance their aspirations and commitments to human rights in the global agenda. In particular, they opposed to any claim of presenting standard values as purely universal. In their opinion, the evidence of cultural diversity allows reasonable people to disagree over the specific content, reason, understanding and application of the hard core of general principles.[241] There were discords about the nature of human rights and their origins, their purpose, their official institutionalization, etc. More than forty Asian states signed the Bangkok Declaration, with the idea that universality should consider the effects of local particularities, the active processes of norm-setting, and various historical, ethnic and spiritual backgrounds.[242] The priority traditionally accorded by international documents to political and civil rights - with their claims on democratic and protest rights - at the expense of social and economic ones was rejected. In the areas of political and civil liberties, the Western perspective was dismissed as

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[240] A detailed account of the World Conference on Human Rights in Vienna and the parallel non-governmental organization activities can be found in *Terra Viva*, an independent daily published by the Inter-Press Service between 11 and 25 June 1993

[241] Eva Pföstl, *Human Rights and Asian Values,* Editrice Apes (2008), p. 10

[242] Rein Mullerson, *Human Rights Diplomacy,* Routledge (2014), p. 82

contrary to "Asian values". Instead, the right to progress was intended as an integral part of fundamental human rights, whose importance is not forgiven once the issue of democratic freedom has been amply publicized. The Bangkok-statement called for establishing international conditions in order to encourage development, within a just and fair world economic order. Principles of national sovereignty, self-determination, and noninterference were also given a new emphasis. This concern is revealed by the wish to "discourage any attempt to use human rights as a conditionality for extending development assistance", to emphasize the importance of the "non-use of human rights as an instrument of political pressure", and to reiterate "that all countries, large and small, have the right to determine their political systems, control and freely utilize their resources, and freely pursue their economic, social and cultural development".[243] East Asian states could not bear international intrusion in the region, rejecting it as an effort to enforce a set of standards which were unfamiliar to Asian customs.[244] The Western philosophy and political theory – with its freedoms based on tolerance, individual agency and secularism – had nothing to do with the jurisprudence and thought of other societies. Thus, a parochial system of values – Asian leaders claimed – could not be imposed on cultures to which those values were alien. The non-governmental organizations attending the Vienna Conference regarded the meeting in Thailand as bringing to an underlying antagonism to human rights, and tensions with the West. In their own declaration, launched at the same time of the Bangkok summit, around 100 NGOs identifies the contemporary challenges to be those of indivisibility and the denial of cultural practices which disregard the universally accepted rights.[245] Eventually, the Vienna Declaration recognized development as "a universal and inalienable right" (Article 10). Nevertheless, it asserted that progress could not be invoked to justify systematic abuses. To conclude, freedom from hunger and poverty – and a fair distribution of resources and income - can only be guaranteed when people are able to exercise their civil and political rights, for example, to organize and form trade unions so as to protect their economic interests.

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[243] Gerrie Ter Haar, James J. Busuttil, *Bridge Or Barrier: Religion, Violence, and Visions for Peace,* BRILL (2005), p. 335

[244] See http://archive.unu.edu/unupress/asian-values.html

[245] See http://therightsfuture.com/common-tracks/asian-values/ [The Rise of Asian Values]

5.3 What are the "Asian Values"?

Cultural values, as standards by which one may judge the difference between good and bad, and the right and wrong things to do[246], are embedded in every world's social tradition. From the internal and external perspective, East Asia has been described as a single and distinct system with its own peculiarities, in the context of an East-West dichotomy: this is one among the crudest generalizations. [247] The acknowledgment of inner variety is very important, because we are currently bombarded by oversimplifications about "Asian values," "Islamic cultures", "Western moralities" and so on. [248] The idea of East Asia as an homogeneous entity originates from a mere Eurocentric standpoint, which ignores that Asian traditions diverge among themselves. [249] Historically, the term "The Orient" has always denoted the European positional vision, as it contemplated the direction of the rising sun, and since long time it meant what Asia is today. [250] However, there are certain cultural traits shared by people of many nationalities and ethnicities living in East Asia.[251] Asians may have in common some characteristics transcending national, religious and ideological differences, although there are no quintessential values which fit all part of this immensely large society (60 percent of the world's population). The advocates of Asian particularism allow internal heterogeneity within the region, but in the framework of a collective concern for the community, respect for hierarchies, social order and discipline, and a mistrust of political liberalism, regarded as typical of the Western culture, particularly Greek and Roman, and of the Christian tradition. For instance, Professor Karel van Wolferen, which studied the relevant features of the Japanese power structure, described the Japanese as a dutiful, obedient and

[246] See http://www.asianweek.com/2012/04/28/introduction-to-basic-asian-values/

[247] "Asian Values" and Democracy in Asia. See http://archive.unu.edu/unupress/asian-values.html

[248] Elliot Turiel, *The Culture of Morality: Social Development, Context and Conflict,* Cambridge: Cambridge University Press, 2008

[249] Amartya Sen, "Human rights and Asian values: what Kee Kuan Yew and Le Peng don't understand about Asia", The New Republic July 14, 1997 v217 n2-3 p33(8). See http://www.hmb.utoronto.ca/HMB303H/weekly_supp/week-02/Sen_Asian_Values.pdf

[250] Amartya Sen, "Human Rights and Asian Values," *The New Republic,* July 14-July 21, 1997. See https://www.mtholyoke.edu/acad/intrel/sen.htm

[251] "Asian Values" and Democracy in Asia. See http://archive.unu.edu/unupress/asian-values.html

conformist people totally uncaring of the state interferences in their private affairs. [252] To begin with the principal characteristics of East Asians, it is often alleged that they accord primacy to group orientation: social cohesion and stability take place over the welfare of the individual, which is not an isolated being, but part of a much larger family, clan, neighborhood, and state. [253] Relationships among members of the community are built on mutual duties and responsibilities, rather than on the cold letter of the law - even if the law is usually called upon to implement principles implying that public interests is prior to those of the individual. It should not be ignored however that values such as communitarian attitude and filial duties may also be associated to the essence of most human rights. [254] Contrarily to what happens in the atomized and liberal West, East Asian behavior is said to be primarily motivated by careful responsibilities towards the others, frugality and personal sacrifice, self-effacement to the greater good. Complaining – especially against authority, hierarchy and state interference into the private space of individuals - is identified as a mark of weakness. In employment situations, Asians tend to avoid to join trade unions, denounce hard work, demand for raises, or find a different job when not satisfied with their own, because the maintenance of harmony creates a bias against transition and change. They might be less likely to be promoted into management, and as a rule, underpaid when compared to Americans having similar training, work experience or skills.[255] Also the electoral results support this alleged preference for coherence and consensus, and adversity to dissent. A number of examples clarify the point: in Indonesia, the ruling Golkar party, supported by the military, has won all elections since the present political system was established in 1975; a similar longevity of power has been experienced by the United Malays National Organization in Malaysia, the elite in Thailand, the Liberal Democratic Party in Japan, the alliance of bureaucratic and

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[252] See http://archive.unu.edu/unupress/asian-values.html

[253] Tommy Koh, "The 10 Values Which Undergird East Asian Strength and Success", *The International Herald Tribune,* 11-12 December 1993, p. 6.

[254] Sebastiano Maffettone, "Human rights and cultural diversity: a philosophical vision". From the lectures on "Political Philosophy and Human Rights", in the Government Department of Harvard University.

[255] Stanley C. Igwe, *How Africa Underdevelops Africa,* iUniverse (2012), chapter: "An Appraisal of Asian Traditional Values", p. 67

military forces until recently in South Korea, and the Kuomintang in Taiwan.[256] In order to overcome a possible concern about the restriction of individual liberties, governments have repetitively underlined the duties of States and citizens to one another, as well as the respect for family loyalty and political leadership. The balance between civil freedoms and social stability was valued as necessary for preserving group harmony and allowing all members to live safe and fulfilled lives, in compliance with the sake of others.[257] Eventually, proponents of "Asian values" - a number of public intellectuals who are usually associated with the ruling regimes of Malaysia and Singapore - encourage preference for socio-economic well-being of the community, even at the expense of individual interests. They endorse the Asian-style authoritarian governments, more appropriate – in their view - for the region than the liberal values and institutions of the Occident. In contrast to the consensual approach of Asian values, Western democracies stress the personal comfort of the individual - which is not secondary to that of the group as a whole – and are less likely to involve sacrifice as a matter of course. The perspective adopted in Europe and USA is connected with individual initiatives, confrontation and dissent, transparency through independent public debate and press freedom, a universalistic outlook and universal practices.[258;259] Great importance is placed on civil and political rights and on the universality of human interests on the basis of liberal traditions. Some scholars maintain that Western values developed as a moral consequence of the widespread dehumanization in some modern capitalisms, which steamrolls over local economies and eventually leads to subjugation of poor countries.

5.3.1 The Role of Religions in Shaping the "Asian Values"

Religions – with particular reference to Confucianism, Buddhism, Islam and also Christianity - are a central element of the so-called "Asian values," which refuse to separate the spiritual aspect from the other spheres of life, as it often occurs in the Occident. While the Western secularization

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[256] Jason Brownlee, *Durable Authoritarianism In An Age Of Democracy*. See http://202.28.199.34/multim/3120423.pdf

[257] "Asian Values" and Democracy in Asia. See http://archive.unu.edu/unupress/asian-values.html

[258] Eva Pföstl, *Human Rights and Asian Values*, Editrice Apes (2008), p. 8

[259] Mike Douglass, K.C. Ho, Giok Ling Ooi, *Globalization, the City and Civil Society in Pacific Asia: The Social Production of Civic Spaces*, Routledge, 2007

resulted in a moral void and in the negative impulses of individualism, East Asia is proud that religions still have a great role in shaping its identity and group orientation.[260] Most Asian values are influenced by Confucianism, typically the forgoing of personal freedom for the sake of family-centred aspirations and reverence towards the government. Individual self-interest is tempered by notions of solidarity within the family and the larger group, as well as the desire for consensus. In political terms, this tends to strengthen the state's power within the framework of the "common good" and generates docile citizens which accept submission to hierarchy.[261] Regimes argues that they are developing a distinctively Asian model of politics which may prevent a disruptive class-consciousness to emergence and to disturb the harmony of the social network. As well as many other schools of thought, Confucianism is anyway far too broad and rich to be classified in a strict way.[262] It is a fusion of spiritual and political ideas, which could also encompass a role for dissent in order to ensure the good behavior of government officials. Indeed, social responsibilities may entail a right of refuting to serve, when the demands of the ruler are wrong or immoral. Confucius never commanded blind and devoted allegiance to the state in every circumstance. In the words of Amartya Sen, he was "no more authoritarian than, say, Plato or Augustine".[263 ; 264] For instance, there is a well-known story about the irascible scholar Hai Rui who planned to disagree with the king; he had previously bought his own coffin. Whatever the consequences might be – this is the moral of the story - the erudite man has a very strict duty to oppose to the monarch, to which he is linked in a relationship of filial piety. Superiors are bound to ensure the welfare of subordinates,

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[260] http://archive.unu.edu/unupress/asian-values.html

[261] Cristina Jayme Montiel, Noraini M. Noor, *Peace Psychology in Asia,* Springer Science & Business Media (2009), p. 310

[262] See http://archive.unu.edu/unupress/asian-values.html

[263] "When the [good] way prevails in the state, speak boldly and act boldly. When the state has lost the way, act boldly and speak softly" [Confucius] ; See also: the Governor of She told Confucius, "Among my people, there is a man of unbending integrity: when his father stole a sheep, he denounced him." To this, Confucius replied: "Among my people, men of integrity do things differently: a father covers up for his son, a son covers up for his father and there is integrity in what they do" - Amartya Sen, *Development as Freedom*, Oxford University Press (2001), p. 235

[264] When Zilu asks him "how to serve a prince", Confucius replies: "Tell him the truth even if it offends him" - Larry Diamond, *The Spirit of Democracy: The Struggle to Build Free Societies Throughout the World*, Macmillan (2008), p. 29

because their power derives from the obedience of the latter.[265] As a consequence, those who assert that the universal right to dissent masks the subjugation to values prevalent in Western Europe and America are unquestionably wrong. Nevertheless, the kind of criticism described in the novel is far from representing the democratic principle of the universalistic approach. It is rather an exclusive prerogative of those very people whose disagreement is directed at preserving the political structure. Without relying on a liberal conception of people as autonomous choosers, some elements of Confucianism might still encourage the advancement of a greatly simplified view on human rights. In a collection on *Confucian Traditions in East Asian Modernity*, Professor Tu Weiming asserts that "the Confucian concern for duty is not at variance with the demands for rights".[266] With this in mind, citizens might claim certain kinds of treatment as requirements for observing the responsibilities they are assumed to have. Slavery, torture, and threats of arbitrary arrest, as well as poor health, lack of education, and absence of sufficient economic means, would all hamper the capability to fulfill the duties that flow from social relationships. It is clear that Confucianism does not deliver an idea of human rights based on the assumption of free and equal individuals, with special worth and dignity so as to be able to plan or modify their aims independently from their ethical identities. Again, we are not dealing here with a democratic political outlook. However, even if Confucius was not a great champion of liberal freedom, yet there is good reason to question the monolithic image of an authoritarian Confucius which is supported, in some dangerously simplistic interpretations, by the contemporary advocates of Asian values. Confucius's teachings - closely embedded within the Chinese society - are also intermixed with Buddhist, Jainist, Taoist and other doctrines with all kinds of contradictory implications. For instance, Buddhism displays a variety of standpoints on tolerance and equality, while allowing much room for volition and free choice. The component of freedom in the Buddhist thought does not annihilate the discipline emphasized by the Confucian ethics, but it would be a mistake to take Confucianism to be the only tradition in Asia or in China. [267;268]

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[265] See http://archive.unu.edu/unupress/asian-values.html

[266] See http://iis-db.stanford.edu/evnts/6805/j.cohen.minimalism.pdf

[267] Deconstructing Asian Values – See http://www.mllora.com/article3.htm

[268] Joel H. Rosenthal, Carnegie Council on Ethics & International Affairs*, Ethics & International Affairs: A Reader,* Georgetown University Press, (1999) p. 178

5.4 Authoritarian Regimes in East Asia

Unfortunately, a kind of cultural relativism that does not allow any room for external criticism can be exploited by rulers to deny civil liberties and fend off foreign reproach. In particular, the ambiguous rhetoric of "Asian values" might be at times too easily a façade behind which high officials resist change, de-legitimize scrutiny, and ban political opposition. Under the umbrella of this vague interpretation of Asian values, illiberal and repressive policies have been passed off, despite such policies have no philosophical justification. Such interpretation, it is argued by supporters of universal human rights, is not genuinely held by East Asian citizens, but it is an ideological construct of regimes which cloak their coercive methods in arguments of cultural exceptionalism. At the Vienna Conference, regimes used the indefinite notion of "Asian values" as a cynical strategy to define their understanding of human rights. Cultural values have been corrupted, without considering that there are several dissimilar voices within the area: any presumption of speaking for all Asians risks to minimize these voices.[269] What's more, Dalton and Ong, maintain that there is not a necessary link between respect for hierarchies within the family and respect for political authority in East Asia [270], although "Asian values" have been appealed to defend repressive governments. With their analysis, the two researchers call into question the erroneous idea that Asian values provide the basis for illiberal institutions and represent a significant cultural challenge to democracy. The reason of debating these issues is to illustrate a conscious theorizing upon tolerance and freedom within considerable aspects of the Asian culture.[271] Furthermore, ancient practices might be re-interpreted in order to make them relevant for the circumstances of today and, last but not least, customs from other cultures might be taken into account. But some Asian rulers have represented a threat to the cause of human rights. They were reluctant to adopt major instruments of international protection. For instance, countries such

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[269] Lucie Cheng, Arthur Rosett, Margaret Woo, *East Asian Law: Universal Norms and Local Cultures*, Routledge (2003), p. 73

[270] Russell J. Dalton and Nhu-Ngoc T. Ong, *Authority Orientations and Democratic Attitudes: A Test of the 'Asian Values' Hypothesis,* Center for the Study of Democracy, 3151 Social Science Plaza, University of California, Irvine, CA 92697-5100. See http://www.socsci.uci.edu/~rdalton/archive/jjps05.pdf

[271] James A. Gross, Lance A. Compa, *Human Rights in Labor and Employment Relations: International and Domestic Perspectives*, Cornell University Press (2009), p. 23

as China, Indonesia, Malaysia, Singapore and Thailand did not sign the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. Evidently, if national leaders are regarded as the only adjudicators to define human standards and the common good, they might not satisfy the wishes of the people, but those of the powerful elites, using the advocated "Asian values" for self-serving purposes. As the Humana human rights country rating reports, several East Asian countries have reliably been ranked as below average. There are no relevant bodies for the defense of human rights in the area, due to a combination of historical and political circumstances that has made their establishment extremely difficult.[272] Most offenses have been documented in the People's Republic of China, the largest East Asian state. Here, detainees are mistreated; torture is rampant; the recourse to the death penalty remains systematic and non-transparent; there is a lack of civil freedoms, judicial independence and fairness in the courts.[273] Despite, harassment and brutal imprisonments - especially faced by human rights defenders, worshippers and Falun Gong adherents, in the areas of Xinjiang and Tibet – the regime says to govern according to the rule of law and liberal policies. The extent to which human rights are recognized in China is still an argument of dispute between foreign organizations, on the one hand, and the oppressive leadership, on the other. The latter contends that "to effect the international protection of human rights, the international community should stop acts that endanger world peace and security, such as gross human rights violations caused by colonialism, racism, foreign aggression and occupation".[274] The government underlines the public necessity of "an environment of social and political order"[275], but such idea of the "common good" always makes the advantages of particular groups.[276] Not only in China but also in other Asian countries, censorship, manipulation of data or attacks to the formally independent judiciary power are everyday practices. Nepotism and favoritism, as well as corruption and bribery, are recurring. In the private sphere, patriarchy is not completely eradicated: arbitrary statements about ethnic and

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[272] See http://archive.unu.edu/unupress/asian-values.html

[273] See http://www.thetibetpost.com/en/outlook/opinions-and-columns/1375-chinas-abuse-of-human-rights-in-tibet-is-getting-worse

[274] China, Information Office of the State Council, *Human Rights in China,* pt. X.

[275] Bangkok Declaration, *Time,* 14 June 1993

[276] See http://archive.unu.edu/unupress/asian-values.html

religious identity threaten women's rights. [277] In the name of cultural relativism – Asian rulers maintain at their advantage- there is no room for external or internal criticism because the respect of cultural and religious traditions prevails over the possibility of judgment. These values may be improperly used as an instrument to deem opposition as subversive, to control dissent and freedom of speech, to deny general freedoms as conceived in the liberal thought. In few cases, a certain reading of "Asian values" became a deliberate tool used by authoritarian leaders to preserve their alleged supremacy, a mere excuse for failing to respect human rights standards.[278] The world cannot ignore arbitrary detention and painful tortures for political or religious reasons. Those who disregard the human rights of their citizens shall not be allowed to play the part of the defender of the oppressed as well. The claim that the denial of rights is helpful in protecting the economic system from disorders is – to keep it mildly – disputable. [279] The manipulation of ethical norms is challenged only if people are aware of having certain fundamental rights simply as, and because they are, human beings. In the Declaration of 1948, signed after the experience of the holocaust in Europe and the Japanese atrocities in Asia, human rights are defined in universal terms. They transcend culture, time and systems of values: as a perspective on human conduct, they are not the exclusive realm of the Western tolerant societies, though this perspective has been defended - by the mere force of rhetoric - by Asian authoritarians and Western chauvinists. The commitment to democracy and political freedom has taken its particular shape relatively recently, and it is hard to see its antecedents only in the "traditional" values of the Occident.[280;281] Antecedents can be found in the Asian culture, too. Physical security and liberty, basic material goods like health care or adequate nutrition, etc. do not solely flow out of parochial Western concerns. The widespread activism all over the world witnesses it. As an extraordinary instrument of collective emancipation, human rights liberate people by barriers of any kinds. This universal

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[277]   Religious Diversity and Human Rights-Clashes and Convergences in Asian-European Dialogues,See: file:///C:/Users/USER/Downloads/Clashes%20and%20Convergences%20on%20HR,%202006.pdf

[278] See http://therightsfuture.com/common-tracks/asian-values/

[279] Sebastiano Maffettone, "Human rights and cultural diversity: a philosophical vision". From the lectures on "Political Philosophy and Human Rights", in the Government Department of Harvard University.

[280]   See http://www.carnegiecouncil.org/publications/archive/morgenthau/254.html

[281]   See Amartya Sen, "Human Rights and Asian Values," *The New Republic*, July 14-July 21, 1997. See https://www.mtholyoke.edu/acad/intrel/sen.htm

approach results from a responsibility to respect the humanity of the other, and to see in the person outside of oneself an image of oneself. [282] Given our shared humanity, the very idea of being able to protect people and their dignity is independent from the constitutional law, local legislation, or citizenship in any nation. [283]

5.5 "The East Asian Economic Miracle"

A different reason to support authoritarian governance in East Asia has also received attention. It argues for authoritarian governance in the interest of rapid development. Thus, rigid policies have been secured on the ground of their alleged effectiveness in promoting economic success. A strong determination to maintain order, consensus and harmony - if necessary at the expense of some individual liberties - has been held up as the driving force behind the Asian record growth rates, the so-called "East Asian Miracle" to which all the world is familiar. It has brought new prosperity to millions of citizens and significantly lowered the number of them living in poverty. At the same time, it concealed the memories of riots - due to the miserable conditions of the lower classes - in Malaysia, China and Singapore. Nowadays, these states ruled by non-liberal regimes grow much faster than many less authoritarian ones, such as Costa Rica, India, Sri Lanka or Jamaica.[284] East Asian leaders stress the importance of economic and social rights, as well as cultural differences, and accord low priority to cosmopolitan individual liberties, to the free exchange of ideas and the rigorous political debate. Their speech is clear: imagine to see a peaky, indigent beggar dying of excessive cold or heat, if not hunger, and to give him a straightforward choice between a meal on the one hand and the possibility to denounce the system that keeps him starving, on the other. What he would choose is obvious. The malnourished man on the verge of death cannot relieve its unease through the constitutional guarantee to be allowed to denounce that his necessities remain unfulfilled.[285] Of course, the importance of economic growth in measuring human rights conditions is promoted within the world-wide community. As a study commissioned by the UN

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[282] Saw Swee-Hock, Danny Quah, *The Politics of Knowledge,* Institute of Southeast Asian Studies (2009), p.48

[283] Sebastiano Maffettone, "Human rights and cultural diversity: a philosophical vision". From the lectures on "Political Philosophy and Human Rights", in the Government Department of Harvard University.

[284] Robert Alan Dahl, *The Democracy Sourcebook,* MIT Press (2003), p. 444

[285] See https://www.opendemocracy.net/democracy/article_1431.jsp

Centre for Human Rights suggests, poverty and increasing disparity between the North and the South are "endangering the ethical foundation of our Planet".[286] Poverty and disparities were therefore identified as the key obstacles to the advancement of human rights. The former prime minister of Singapore Lee Kuan Yew argues that, in a developmental context where stability and basic welfare are the priorities, autocracies shall be preferred to democracies. A strong government insulated from political pressure, and the denial of basic civil and political rights, can actually improve economic conditions. In this case, the collective goal of growth is carried out by the regime with efficiency, discipline and stability, without being unduly hampered by the democratic checks and balances. The implication of this theory is that authoritarianism is necessary in the interests of the society, which should worry about democracy later, if at all. At the Vienna World Conference, Lee showed how Singapore was able to develop without political liberalization. The cultural inclination to avoid dissent and to respect authority, as well as discipline, hard work and thrift played a fundamental role in pursuing its success. Asian values, Lee's thesis goes, created a new path of progress that does not presuppose the civil and political liberties embedded in democratic regimes. Currently, the extreme disparity between the Singaporean reforms in the economic field and those within the political sphere is striking. While the country is ranked in the top ten for economic freedom [287] - with particular reference to international trade and low regulation – it is classified as "partly free" if considering its political rights and civil liberties.[288] Echoing Lee Kuan Yew, Malaysia's former Prime Minister Mahathir acknowledged that, despite Western attacks on Asian values and governments, "East Asian countries had all grown at a rate well above that of the developed countries of the West. And their growth can be shown to have benefited people as a whole". Mahathir continued, "hard work, discipline, a strong commitment to the community, thrift and moderation are Asian values which have in fact contributed to the emergence of the Asian Tigers and Dragons".[289] On the other hand, the Occident was said to indulge in hedonistic materialism which results in the collapse of the

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[286] Asian Values in the Burmese Context – See http://www.asiantribune.com/node/873

[287] Fraser Institute, *Economic Freedom of the World: 2008 Annual Report,* Fraser Institute website, http://www.freetheworld.com

[288] Freedom House, *Freedom in the World – Singapore (2008),* Freedom House website, http://www.freedomhouse.org . Countries are ranked 1-7, with 1 the most free and 7 the least.

[289] David S. G. Goodman, Gerald Segal,*Towards Recovery in Pacific Asia,* Routledge (2002), p. 60

family, a general decline of morality, disorder and chaos.[290] The knowledge of the Occident reflected stereotyped conceptions on the basis of general features, such as the lack of decency and ethical standards, greediness, and degradation. At the same time, positive qualities, e.g. virtue, moral code and progress are attributed to the East. Asian states have a new-found confidence in themselves, held to be the promoters of the high levels of growth they experienced. Their model is championed by zealous advocates to challenge the Western standpoint, its fecklessness and decadence. East Asians' patterns of behavior are in contrast with the ill discipline, excessive individualism, and lack of cohesion, teamwork and public duty, which led to the socio-economic deteriorating of the Occident. There is resistance to the universalization of an abstract and liberal vision of rights: the East Asian practices have simply proved to be more successful.

Dissenting Voices

At the other side of the coin, it is worth-noting that the Asian culture was for long seen as an obstacle to modernization. Moreover, someone argues that the same principles which were supposed to have produced the Asian miracle could also be the cause of its financial downturn of the late 1990s. Finally, progress not always coincides with an improvement of human rights standards. Although rapid growth is a legitimate concern in poor countries, development policies are often associated with unbearable abuses, unequal burdens and social dislocation. I mean, people might be forced to leave their homes for projects of urban sprawl and deprived of their means of livelihood. [291] In similar cases, authoritarian regimes - shored up by traditional values - have not proved adequate for mitigating transitional tensions and satisfying people's needs. Nevertheless, the society can still change from inside, and can transform itself through the effort of a few committed activists into a place where wealth and prosperity are achieved in a just way. [292] To borrow from Theodore Roosevelt, when there is a conflict between human rights and

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[290] Gudrun Kramer, "Visions of an Islamic Republic. Good Governance according to the Islamists*", The Islamic World and the West. An Introduction to Political Cultures and International Relations*, Kai Hafez, Mary Ann Kenny, BRILL 2000, p. 34

[291] Asian Values in the Burmese Context – See http://www.asiantribune.com/node/873

[292] See http://therightsfuture.com/common-tracks/asian-values/

economic - or property - rights, "human rights must have the upper hand; for property belongs to man and not man to property" [293].

Although some dissenting voices, advocates of human rights deliberately report that economic progress is essential for decent standards to be fulfilled. But such economic progress has been linked with the idea that the denial of political and civil liberties is beneficial in encouraging growth. This assumption is based on very selective and limited information, rather than on any general statistical testing over the wide-ranging data that are available. There is little evidence, for instance, that the rapid development of China is a proof that autocratic regimes performs better than democracies. The diversity of experiences and local circumstances call for more investigation. Regarding East Asia, the integration into the global political economy may explain its extraordinary success story. [294] A number of policies - including openness to competition, the use of internet markets, a high level of literacy and education, successful land reforms, and public provision of incentives for investments, exporting, and industrialization – are fairly agreed to be the reason of rising living standards and welfare. In the case of Singapore, currently one of the richest countries in the world, various factors describe its fast growth rates. These factors are especially related to the small size and its highly homogenous economy – about 2/3 of its GDP is composed of services – which enable the government to exert what has been called a carefully calibrated control. None of these policies, in Singapore and abroad, is inconsistent with the guarantee of individual liberties or absolutely require to be sustained by elements of authoritarianism or of any harsher government system. [295] As Amartya Sen asserts, there is certainly no ultimate proof that authoritarian regimes boost improvement. [296] In the age of science and technology, to give up individual freedoms in order to prosper is ridiculous. Also the recent Indian experience shows that the guarantee of civil and political rights is not in conflict with economic performances; on the contrary, what is needed for generating faster growth is a friendly climate rather than repressive

[293]   France (April 23, 1910); in "Citizenship in a Republic", *The Strenuous Life* (vol. 13 of The Works of Theodore Roosevelt, national ed., 1926), chapter 21, p. 515–16.

[294] See http://archive.unu.edu/unupress/asian-values.html

[295] Amartya Sen, "Human rights and Asian values: what Kee Kuan Yew and Le Peng don't understand about Asia", The New Republic July 14, 1997 v217 n2-3 p33(8). See http://www.hmb.utoronto.ca/HMB303H/weekly_supp/week-02/Sen_Asian_Values.pdf

[296]   Amartya Sen, *Development as Freedom,* New York: Random house (1999), p. 150

policies. There is no contemporary necessity which requires development to come at a price of oppression and exploitation. The jailing of dissidents, the hounding of minority groups, death penalty, and all the other ravages of political despotism are neither necessary to rapid growth nor to the system's long term interests. Progress can be achieved without denying a duty to respect for human dignity, in a way that is reasonably fair. The hope is that, as East Asian countries make economic and social advancement, they find wider adherence to the core principles of human rights. Notably in Taiwan and South Korea, increasing prosperity under authoritarian rule gave rise to democratic transition led by an emergent middle class, and then to individual freedoms e.g. the right of dissent and opposition. It has been broadly discussed that free market development precedes civil liberties and even democracy, as indeed it did in the West.[297]

5.5.1 The Case of Singapore

Singapore is the typical example of maintaining a repressive government in a modern economy. Many researchers - first of all Molly Elgin, chief of Staff at the Center on International Cooperation at New York University - refutes the idea that Singapore's authoritarian regime results from the implementation of "Asian values" in the country. Repressive policies, researchers argue, do not rise from Asian values, but from Singapore's strategy for power. The strong state capacity is preserved through control of information, lack of independence of the judiciary and an institutionalized anxiety. The latter refers to a feeling of weakness and insecurity defined by the collective fear of an immediate invasion, economic disaster, or internal disorder.[298] If the carefully ordered society is not maintained, chaos would doubtless occur. Since the general perception is that political freedom leads to chaos, dissent continues to be easily defined as the most serious threat for the community. The favored method of the ruling party to keep its power is through the targeted but complete defeat of adversaries, which are accused and prosecuted until they are penniless. The recently deceased leader of the opposition, Joshua Benjamin Jeyaretnam, was charged several times - with overall damages of around S\$ 1.6 million – for acting against the People's Action Party[299], which has been ruling Singapore since its independence in 1959, under the leadership of Lee Kuan Yew between 1959 and 1990. In a number of ways the regime has

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[297] See http://archive.unu.edu/unupress/asian-values.html

[298] Molly Elgin, *Asian Values. A new model for development?,* Stanford Journal of East Asian Affairs, Stanford University (2010)

[299] See http://www.iht.com/articles/ap/2008/09/30/asia/AS-Singapore-Obit-Jeyaretnam.php

prevented the civil society from becoming stronger and able to challenge the political establishment; for instance, through advantageous housing policies which control living arrangements so as to counterweight ethnic riots, experienced in the early days of independence. Another aspect of this attempt at reducing racial tensions includes the introduction of mandatory subjects at school: Chinese students can know more about Malays and Singapore's other minorities, and vice versa.[300] The government plan for monitoring citizens also extends to national and international press: the International Herald Tribune, to mention just one case among others, was forced to pay fines if wanted to continue to work. [301] Through a sophisticated infrastructural capacity, the state constantly gathers information as well as evidence of threats to the maintenance of power. The Internet penetration rate is one of the highest in the globe. Heavy guidelines limit political expression while banning all sources that might be against the "public interest, public morality, public order, public security, [and] national harmony" or that "offends […] good taste and decency"[302;303]. To conclude, a deeper analysis demonstrates that rather than deriving from a specific set of "Asian values", most of the uncritical submission to the authority experienced in Singapore is created and perpetuated by the despotic capacity of the state.

5.6 The Discourse on Universal Human Rights

This last paragraph addresses the post-Cold War challenge to the contemporary universal understanding of human rights and its repercussions for the regional partnerships between East Asia and the West. Professor Yash Ghai of the University of Hong Kong traces the rise of Asian values back to the 1990s. The Occident boasted ideological victory in the aftermath of the Cold War, and sought to define a global cultural dominance by striking its beliefs under the façade of universalism. The Western democracies furthered their advantage in various fields, specifically to establish or secure political affairs, and to justify external interference, with developed countries exploiting the unindustrialized world through new allies, such as the ruling classes or major

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[300] Diane Mauzy and R.S. Milne, *Singapore Politics Under the People's Action Party,* New York: Routledge, 2002, p. 100

[301] William Glaberson, *Paper to Pay $214,285 in Singapore Libel Case,* The New York Times, november 29, 1995, World Section

[302] Internet Code of Practice, http://www.sba.gov.sg/, 1996

[303] Nina Hachigian, Lily Wu, *The Information Revolution in Asia*, Rand Corporation (2003), p. 64

multinational companies.[304] Thus, the discourse on universalism was seen as reproducing the past colonial legacy by adopting a more sophisticated way of ethnocentrism that was expressed in the language of human rights and international entities.[305] The theories of justice and democracy reflected a kind of "moral imperialism" and the supremacy the West still owned upon its former colonies and vulnerable people living there, deprived of their history and customs. There was the need to resist cultural hegemony, in the context of an ideological conflict between the communist States and the Occident, the former stressing social and economic rights, the latter civil and political rights. The championing of "Asian values" as a political doctrine is often associated with the idea of contrasting external intrusions. Asian values protect tradition against alleged damaging influence, in compliance with the idea that East Asia's economic and social success is based on local peculiarities, just as the crisis and moral decadence of the West are the effects of its concern with rights.[306] Advocates of "Asian values" accuse global powers of imposing their principles on them, through the use of the international doctrine as an instrument to subjugate and undermine the self-determination of foreign people (Sebastiano Maffettone – "Human rights and cultural diversity: a philosophical vision"). Because of their great impact on the world institutions and practices, Western ideas shape the prevalent understandings of the law and disregard the perspective of East Asians. The European and US democracies are also blamed for ignoring the issue of freedom when it is convenient to do so[307]. When achieving their own economic and security advantages, they arbitrarily implement the international standards. The strong and predominant states only address to regions where they have a deliberate interest to safeguard human rights, and this is not the case of East Asia. For instance, human rights records in China have been historically given low priority. The Occident at times denounces China for its domestic abuses

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[304] See http://archive.unu.edu/unupress/asian-values.html

[305] V. Gentile, *Global Justice as Recognition: Dealing with Diversity in a Pluralised World,* Special Section "Globalising Justice: a Multidimensional Approach: 2. Recognition", Global Policy Volume 4 . Issue 4 . November 2013, http://www.academia.edu

[306] International Committee of the Red Cross - See https://www.icrc.org/eng/resources/documents/misc/57jqzl.htm

[307] Chomsky: *There's no western concern for atrocities and human rights abuses if there's a profit to be made from it*, CP MacLochlainn@CPMacL2008, South East, England, https://twitter.com/cpmacl2008/status

and mistreatment of dissenters; yet it has never abstained from ensuring economic partnership to its authoritarian regime. Western leaders are ready to accept levels of injustice that they would not bear at the national stage. They accord primacy to the demands of companies to be in good relations with the ruling governments and to those of citizens trading with East Asians. This attitude clearly contrasts with ethical universalism, which asserts that any morally significant subject should be treated equally. Since Western democracies may reject the universal language of human rights in order to make their interests, the statement that human rights necessarily benefit the Occident is not reasonable.

Conclusion

To conclude, the thesis "Human Rights and Cultural Relativism" presents human rights as the dominant moral doctrine for evaluating the respect of the basic moral guarantees everyone owns, by virtue of his or her humanity. Calling these guarantees "rights" suggests that they shall be invoked by individuals before national and international entities whether or not they are recognized and implemented by the domestic legislation. The prerequisites for leading a minimally good life have been identified by the United Nations in a collection of declarations and agreements since 1948, explicitly motivated to prevent the future occurrence of the atrocities committed in the past by Western or Eastern countries, religious or non-religious communities, capitalist systems or bureaucratic states. In response to the most vicious denials of human rights, exemplified by the Holocaust, the United Nations adopted a series of documents: among others, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on *Economic*, *Social and Cultural Rights, which form the so-called* International Bill of Human Rights. Specific objectives – referring to the civil, political, economic and social fields – have been strengthened by a number of other Conventions. They encompass the contemporary human rights discourse, which provides a normative basis for attempts at overthrowing despotic regimes and replacing them with political systems promoters of the new emancipatory ideals of freedom and equality.

The thesis also highlights the main arguments of those who have challenged the universality underpinned in the human rights standards. The philosophical debate between universalists and relativists has been widely analyzed within the last three chapters. Advocates of moral (and cultural) relativism criticizes the philosophical validity of human rights as an ethical and objective doctrine. They argue that global moral principles do not exist because criteria of judgment are contingent to particular contexts and group customs.[308] Moral beliefs are social and historical phenomena, valid only for those cultures in which they were born and where they are broadly accepted. Therefore, the alleged universality of human rights would be an attempt to establish a global cultural dominance over developing countries and the unindustrialized world.[309] Relativists

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[308] See http://www.eastasiaforum.org/2010/10/09/universal-human-rights-cultural-relativism-and-the-asian-values-debate/

[309] See http://archive.unu.edu/unupress/asian-values.html

also emphasize the huge impact of culture on human behavior: it provides both the individuals and the community with the values to be pursued in life, as well as the means for pursuing them. [310] No culture is ethically univocal: even within a single, contemporary society, there is a range of variety of decent standards and practices which reveals that the same perspective might not be shared by everybody. A practical example could be that of abortion. In his *Human Rights as Politics and Idolatry*, Ignatieff suggests that in the American abortion debate "both sides agree that the inhuman use of human life should be prohibited and that human life is entitled to special legal and moral protection". "Yet this is hardly common ground at all", he continues, "since the two sides disagree as to when human life commences and as to whether the claims of the mother or the unborn child should prevail".[311] On the one hand, supporters argue that the choice of abortion is a woman's right that should not be limited by religious or governmental authority. On the other hand, opponents maintain that personhood begins at conception; therefore abortion is the immoral killing of an innocent human being. In a case such as this, there is not an overarching way of judging which side is right and which is wrong. Again, those who have been the victims of the Hindu caste system for centuries claim for a favorable treatment nowadays, even at the expense of other citizens.[312] Of course, within the Indian society, upper classes do not encourage the implementation of this policy, while its promoters see the favorable treatment as a tool to stop continual harassment and abuses so as to guarantee effective equality among citizens. There are no comprehensively valid principles to solve the tensions between the universal conception of justice (and human rights) and a kind of special protection, particularly towards certain religious or cultural groups. For some scholars and politicians, the universal discourse on human rights does not allow room for the unavoidable inherent pluralism of contemporary societies. Furthermore, human rights if fully implemented can damage social cohesion, and replace central values of one civilization with those of another. This case is better explained by referring to the individualism embedded in the human rights discourse. Even when individual rights call for the implementation of group rights, the ultimate purpose of the latter is to safeguard the individuals without whom the

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[310] Thoko Kaime, The African Charter on the Rights and Welfare of the Child: *A Socio-legal Perspective,* PULP (2009), p. 33

[311] Michael Ignatieff, Human Rights as Politics and Idolatry Princeton University Press (2011), p. 21

[312] Neera Chandhoke, S K Agrawal, *Protecting the Unprotected: A Comparative Study of Social Protection Policies in South Asia*, Routledge India, 2012

group would cease to exist. [313] The emphasis on individual rights threatens the communal moral complexion of many Asian and African societies, reproducing the past colonial legacy through a sophisticated way of ethnocentrism under the façade of universality. [314]

However, the reference to cultural diversity and to the need of preserving social stability offers neither a philosophical justification for relativism, nor a sufficient critique of universalism. Indeed, moral duties might be built in a language rooted in different traditions. Fundamental rights can be embraced in various forms, depending on individuals' contingent relationships, social setting and historical circumstances. In this perspective, there is no reason to hold that ethical standards can only be explicable in terms of a single master value. Human rights are not intended to disregard people's customs or to violate rights of cultural autonomy. On the contrary, in order to have legitimacy, they must be "conquered" from within each community. As a matter of evidence, individuals are more willing to accept universal principles whose violations are also disapproved and sanctioned at the local level. Along these lines, the respect for cultural traditions assumes the role of a decisive way to enforce human rights compliance. The thesis explains that there is room for agreement on a range of established structures of moral beliefs from reasons internal to each culture, because their core values originate from the mutual concept of self-worth, human dignity and responsibility for society, politics and the environment. [315] There is a common normative principle that is able to legitimize global human rights standards: "one should treat others as one would like others to treat oneself"[316]; thereby "what you do not wish for yourself, do not do to others". This Golden Rule, called "principle of reciprocity", is an ethical code whose moral force can

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[313] Michael Ignatieff, *The Rights Revolution*, Toronto: Anansi 2000, chapter 3

[314] V. Gentile, *Global Justice as Recognition: Dealing with Diversity in a Pluralised World*, Special Section "Globalising Justice: a Multidimensional Approach: 2. Recognition", Global Policy Volume 4 . Issue 4 . November 2013, http://www.academia.edu

[315] Kofi Annan, "We may have different religions, different languages, different colored skin, but we all belong to one human race. We all share the same basic values". As quoted in *Simply Living: The Spirit of the Indigenous People* (1999) edited by Shirley A. Jones

[316] ed. (1979). "golden rule". A Dictionary of Philosophy. London: Pan Books in association with The MacMillan Press. p. 134. This dictionary of philosophy contains the following exact quote under the entry for "golden rule": "The maxim 'Treat others how you wish to be treated'. Various expressions of this fundamental moral rule are to be found in tenets of most religions and creeds through the ages, testifying to its universal applicability."

be appreciated by all individuals regardless of their culture, race, sex, religion, nationality, sexual orientation, or any other distinguishing feature. As the corollary to the cardinal virtue of impartiality, it may be seen as the most essential basis for the guarantee to just treatment, and to a reciprocal responsibility to ensure justice for others [317]. An intercultural agreement shall arise from the best available elaboration of the basic normative materials for the circumstances of modern life. International exchange can be either a tool of oppression capable of destroying individual and group identity or an extraordinary instrument of collective emancipation to liberate people by barriers of any kinds. The reconciliation depends on the ability to realize a communication that is increasingly participative and able to support the autonomy of the subjects. It happens that relativist arguments are promoted by rulers of those countries where systematic denials of civil liberties have worried the advocates of human rights. At its worst, the doctrine of cultural relativism might be exploited in an attempt to resist change, de-legitimize scrutiny, and ban political opposition. Cultural values can be corrupted so as to be improperly used as an instrument to deem dissent as subversive and to reject general freedoms as conceived in the liberal thought. [318] They become ideological constructs of regimes which cloak their coercive methods in arguments of ethnic exceptionalism. In a world of unequal power, dominant groups or classes tend to maintain manipulated interpretations of moral norms that support their own interest. Such interpretations are unilaterally proclaimed to be the only valid view for that society. In the absence of freedom of speech and belief, the claims of the dominated groups difficulty rise. While arguing about the alleged incompatibility between human rights and contingent values, relativists do not consider that the so-called "third generation" of human rights has sometimes been thought to be a political accommodation to communally oriented societies. In the drafting of Covenants and Declarations, members have always tried to assume a universal approach for formulating human rights criteria, which needed to be suited for a culturally plural world where there is a high degree of variation among the world's major societies. Eventually, rights articulated in these documents are

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[317] Paden William E, *Interpreting the Sacred: Ways of Viewing Religion,* Beacon Press 2003, pp. 131-132

[318] See http://therightsfuture.com/common-tracks/asian-values/

commonly accepted in the domestic legal practice of states.[319] No longer shall human rights be accused of being "culture-blind".

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[319] Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law,* Oxford: Clarendon Press (1989) chapter 2

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