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HUMAN RIGHTS AS ETHICS, POLITICS, AND LAW

Elena Namli

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Chapter I

Human Rights beyond Utopian Admiration and Political Pragmatism

The following is a study of human rights considered in terms of ethics, politics, and law. It addresses the question of how the moral, political, and legal dimensions of human rights are related – how they complement and challenge each other. Most recent research on human rights has focused narrowly on international human rights law, turning to ethics only in order to propose tenable interpretations of the law. Treating human rights as a political matter has largely been regarded as an ambiguous undertaking, with commentators often asserting that a political approach to human rights weakens or even undermines their legitimacy. Rejecting this precept, I will be arguing here that human rights should be understood and practiced as a set of moral principles with a unique capacity to inspire political action. Human rights law is an important result and instrument of such politics but it cannot be legitimately implemented if separated from morality and politics.

This volume is not just another introductory primer on the philosophy of human rights and international human rights law. Rather, its aim is to scrutinize human rights by paying special attention to three distinct challenges that have been leveled at the prevailing discourse on human rights. The first of these is a postcolonial skepticism towards the legitimacy of existing international mechanisms for protecting human rights. The second comprises developments within an international human rights "system" that typically regards human rights as largely an issue of legal regulations. The third is the lack of transparent instruments for dealing

with situations of conflicting human rights. Each of these challenges calls for serious attention; collectively, they attest to a severe crisis in the legitimacy of human rights.

The existence of global political and economic inequality is a key premise of the suggested analysis of human rights. It is, of course, nothing new to claim that human rights, predicated as they are upon a concept of equal human dignity, are undermined by persistent and spreading inequality. On the contrary, many elements of the modern culture of human rights have emerged as political and legal responses to different kinds of inequality. What is new is the fact that social and political inequalities are today closely tied to an ongoing process of economic globalization. Winners in the global competition for political and economic power dominate the discourse on human rights. One of the most tragic aspects of this dominance is the plight of millions of emigrants who, fleeing poverty and environmental catastrophes caused by global economic developments, encounter hostility in rich Western countries whose majority populations see refugees merely as a threat to their own security and economic stability. At the same time as the West excludes refugees from the system of protection of human rights, it is for the most part vocal in its criticism of efforts on behalf of other cultures to propose human rights models grounded on principles other than liberal individualism as it is understood and practiced in the West. Exclusion from the Western system of protection and cultural imperialism are the most visible aspects of global injustice as it relates to the issue of human rights.

It is my firm conviction that genuine protection of human rights should take the fact of global inequality as its point of departure. Whether a matter of historical contingency or not, the fact that the Western liberal states which typically dominate the discourse on human rights also are those which currently enjoy the greatest economic and political advantages creates a situation in which human rights protection is closely interwoven with the unequal distribution of global economic and political power. To ignore this fact is to undermine the ideal of human rights as a universal project. One goal of the present study is thus to treat human rights as they exist in the context of global inequality.

What is more, human rights are now being deployed as a means of preserving and strengthening the political and economic dominance of the West, such that Western advocacy of human rights serves for many onlookers as a reminder of previous attempts by colonial powers to violently emancipate other peoples by means of "universal values" such as Christianity or modernization. Accordingly, another central task of this study will be to examine human rights in relation to (neo)colonialist power.

The second starting point for this investigation is the need to balance human rights law with political instruments for protecting human rights. Since the creation of the current system for international protection in 1948, its legal monitoring mechanisms have grown in strength and now occupy a central place in the discourse on human rights. Liberal proponents of human rights, who regard this development with satisfaction, argue that legal regulation is the most effective way to promote human rights implementation. Indeed, it is sometimes even claimed that only legislation can transform human rights into politics. As Jürgen Habermas notes: "[…] human rights circumscribe precisely that part (and only that part) of morality which *can* be translated into the medium of coercive law and become political reality in the robust shape of effective civil rights".[1] And yet there are those who question this view, arguing that "political reality" can be created by a moral demand for justice that, in turn, is often articulated in terms of human rights. I find this critique highly persuasive and it is my belief that the legal dimensions of human rights are necessarily related to politics and ethics. This relation has at least two components. The first is the link between morality and politics as the two sources of legitimacy and interpretative bases of law. The second is the relation between legally protected rights on the one side and morally and politically recognized rights on the other.

In what follows I will highlight a critical shortcoming of the current legalistic culture of human rights, namely an alarming weakening of the links between human rights and democracy. Instead of viewing human rights as their own political responsibility,

[1] Habermas, Jürgen: "The concept of human dignity and the realistic utopia of human rights", in *Metaphilosophy* Vol. 41, No. 4, July 2010, p. 470.

many citizens prefer to behave as consumers of legally protected rights which they regard as commodities distributed by the state. Even the issue of how to reasonably prioritize between rights in cases of conflict is often treated as merely a question of distributing commodities. This development undermines the political potential of human rights even as it furthers the continuing normalization of a technocratic view of politics. By "technocratic" I refer to the articulated or implicit belief that politics is a matter of management rather than of collective praxis grounded in the interests of different social groups and inspired by different and often competing visions of social justice. The present study will argue that if human rights are to continue to function as an incentive for democratic participation, they must be conceptualized and exercised in terms of moral principle and political vision.

The third point of departure in my analysis of human rights is the need for a new approach to the challenge of how to make priorities between conflicting rights and values. Each chapter of this study examines a separate dimension of this crucial challenge to the legitimacy of human rights in a globalized world. Existing legal and political agreements and policies on human rights lack transparency when it comes to the following question: "On what basis do we make choices in situations where priorities between rights have to be made?" In what follows I will review candidates for a more transparent prioritization of rights, but only after first outlining an argument against the widespread belief that all human rights are universally equally important. Such rhetoric leads to an increased risk of introducing hidden priorities, based on symbolic or material power rather than on rational democratic deliberation.

Methodological considerations

Methodologically the most important starting point of this investigation is a rejection of the common belief that human rights are identical with the international agreements on human rights. Not least in order to further develop the international legal systems, it is important to continuously scrutinize their character and political

role. Throughout this book I will argue that both the genealogy and the substance of international human rights law are marked by a colonial legacy that *inter alia* tends to present contextual moral and political norms as universally applicable legal standards. The most devastating consequence of this belief is the experience of many non-Western political actors that their participation in debates about how to interpret and implement human rights is wholly inconsequential.

I am sceptical about current academic discourse that tends to elevate legal theory to the status of an exclusive guardian of meaningful interpretations of human rights. Both legal scholars and philosophers use to stipulate that human rights are identical with those legal norms that are agreed upon within the international system for protection of human rights. In this book I will argue against this view using both the tools of power analysis and critique of legal positivism.

My field of expertise is ethics. I view ethics as a philosophical discipline dedicated to the critical study of morality. If morality consists of conventional norms denoted by modalities such as good–bad and right–wrong, then ethics is the critical study of those conventions. An ethicist's main task is to suggest a theory or a theory-based approach that enables rational critique of social conventions. This is most often achieved by means of normative theory and/or a phenomenology of morality. Normative theory proposes criteria for right actions and good properties, while phenomenological approaches seek to describe the very phenomenon of morality. Aristotle gives us a normative theory of virtue, i.e. a set of criteria for good character and good society. Emmanuel Levinas does not develop a normative theory but claims that morality is recognized by its phenomenological form, something he describes in terms of a personal recognition of radical responsibility for the other. Immanuel Kant proposes an impressive normative theory based on duties while simultaneously arguing that morality has a universal phenomenological form which he understands as the autonomy of practical reason (will). What unites these and many other different thinkers is their critical attitude towards conventional morality. Where a moralist tries to make people follow a con-

crete set of norms, and a sophist confers rhetorical legitimacy upon conventional norms and roles, an ethicist subjects the moral conventions of contemporary society to the scrutiny of reason.

A tenable ethical approach additionally needs to strike a balance between nihilism and utopianism. Both extremes are present in contemporary theoretical discussion of human rights and very often marked by different political preferences. By nihilism in relation to human rights I have in mind a position that regards human rights exclusively as a set of rhetorically effective but politically powerless and morally outdated norms. Post-colonial critics such as Chandra Mohanty view human rights as an impotent discourse that is heavily inflected by colonialism. As such, human rights disregard social and political tensions and are a convenient tool of dominant classes. Liberal theorists such as Martha Nussbaum and Jack Donnelly have instead drawn up utopian lists of rights that would guarantee a dignified life to every human being. While each side offers a perspective that has relevance for critiquing as well as developing human rights, both are characterized by an overly dogmatic "take it or leave it" logic. My own view is that a theoretically tenable and politically relevant ethical approach should be informed by insights from both the nihilist and utopian camps while trying to avoid the problematic "certainty" incorporated in these opposite approaches.

This being said, ethicists, while rightly avoiding the extremes of moralism, nihilism, and utopianism, should not refrain from substantive political discussion. My argument here will be that a tenable critical analysis of morality must be grounded on a critical evaluation of concrete forms of social institutions. Proposing a coherent normative theory is not enough. In order to function as a critique of moral convention, ethical theory should be informed by politics and economics. An ethicist who involves herself in a dialogue with political philosophy and economic theory creates a more reliable platform for her critical evaluation of institutionalized morality. I will therefore seek to relate my analysis of human rights to both political philosophy and political economy. Issues such as different forms of power, political communication, and public rationality will be addressed, with particular attention being

devoted to the institutional (material) level of social life. Indeed, it is my firm conviction that political philosophy and political economy alike have much to learn from entering into a dialogue with ethics. In exposing the hidden normative presumptions within "objective" political and economic theories, ethical analysis can supply efficient tools for a more transparent and scientific approach.

Are all critics corrupt?

The arguments of this book are my own. However, behind some of them may be heard the critical voices of those often ignored in research on human rights, namely, those who do not share the widespread belief in the legitimacy of the liberal monopoly on human rights protection. If a human rights-related critique of liberalism by the Western Left is rehearsed in at least some academic forums, the critique leveled by non-liberal agents is often dismissed without any substantial deliberation. The most frequent argument made against non-liberal approaches is that they originate in those in power who question human rights for the sole reason that human rights constitute a threat to their hegemony. This claim is both descriptively false and politically unproductive.

It is axiomatic that unlimited power and human rights are incompatible. For any right statement to carry the force of moral authority, it must be articulated in terms of a legitimate claim and a correlative duty for those who have the power to protect this legitimate claim. Let us take as an example a value statement such as "it is good for A to get access to the educational system". It becomes a right statement (A has a right to education) if and only if it is connected to the correlative duty (B has a duty to guarantee A access to education). In this way it can be seen that human rights always involve subjecting the exercise of power to control and restriction.

Furthermore, power analysis is one of the most important tools for a deeper understanding of several dimensions of human rights. As is well known, one of the groundbreaking theoretical approaches to human rights law, namely Ronald Dworkin's interpretation of

rights as legal norms based on the moral principle of equal respect and concern,[2] is directly related to the potential of power analysis. I will argue that Dworkin's model of balancing rights and policies, as well as his arguments in favour of ethical interpretation of competing rights, is a reasonable candidate for legitimate prioritization precisely because it takes into account unequal distribution of power. The same reasonable claim can, and in some cases should, be handled differently when asserted by subjects with clearly unequal access to economic, political and cultural power.

What is equally important is that each and every power is challenged by human rights if we do take them seriously. A democratic government is challenged by human rights insofar as the latter restrict its freedom to implement policies that efficiently promote the interests of the majority. In Dworkin's celebrated formulation: "The institution of rights is therefore crucial, because it represents the majority's promise to the minorities that their dignity and equality will be respected."[3]

How then should we evaluate the widely accepted practice of dismissing non-liberal agents' critique of human rights? Like Islamic documents on human rights, the discourse on "Asian values" is often dismissed as a creation of those in power. Rather than thoroughly deliberating the arguments presented by their opponents, Western proponents of human rights ask the rhetorical question: "Is it anything more than the ruling establishment's attempt to perpetuate its power by taking advantage of people's resentment against the Western world?"[4] This approach is problematic in two regards. First, it indicates that in non-liberal cultures holding power is regarded as a violation of human rights, while Western governments are viewed as the defenders of human rights. Second, it ignores the fact that much critique of the liberal monopoly on human rights discourse originates in non-governmental and oppositional actors.

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[2] Dworkin, Ronald: *Taking Rights Seriously*. Harvard University Press, Cambridge 1978, p. 273.
[3] Op. cit., p. 205.
[4] Tatsuo, Inoue: "Liberal democracy and Asian orientalism", in Bauer, Joanne and Bell, Daniel: *The East Asian Challenge for Human Rights.* Cambridge University Press, Cambridge 1999, p. 29.

The following study adopts a different approach. On the one hand, I try to include an analysis of power in each of the case studies under consideration. For example, it is important to acknowledge that established democracies are not immune to selective invocation of human rights as an instrument for promoting their own economic and political interests. Democracy does not automatically guarantee respect for human rights and human dignity. Following human rights theorists such as Robert Alexy and Ronald Dworkin, I argue that democratic power (based on majority-rule) is challenged by and should be restricted by human rights. Regrettably, this insight has not been incorporated into the political reality of Western democracies. Many leaders of democratic states are as eager to protect human rights abroad as they are reluctant to handle domestic issues in terms of human rights. This becomes especially visible when "non-traditional rights", such as those of non-citizens or ethnic and cultural minorities, enter the human rights discourse. It is reasonable to believe that these rights are questioned because they simultaneously challenge the traditional liberal view of democracy and the privileged position of majorities in Western democracies. Accordingly, this study will argue in favour of an approach that acknowledges a number of fundamental tensions between democracy and human rights.

Conversely, I believe that it is morally and politically wrong to dismiss arguments originating in non-liberal agents merely by invoking the fact that they hold positions of power. Throughout this study I will be applying the communicative principles articulated by Jürgen Habermas. In his ethics of communication Jürgen Habermas calls for a long-overdue revision of the traditional Kantian understanding of practical reason. In the place of Kant's monological categorical imperative, by which only those maxims of action are moral that "your will" would approve of as universally valid law,[5] Habermas introduces the fundamental principle of discourse ethics: "[…] only moral rules that could win the assent of all af-

[5] Kant, Immanuel: *Grundlegung zur Metaphysik der Sitten.* Fünfte Auflage. Verlag von Felix Meiner, Leipzig 1920, p. 44.

fected as participants in a practical discourse can claim validity."[6] Habermas replaces the Kantian procedure of formal universalization of valid norms with a set of principles governing practical discourse, including "freedom of access, equal rights to participate, truthfulness on the part of participants, absence of coercion in taking positions, and so forth."[7] Habermas's theory of justification of moral norms is based on the notion of an ideal speech situation that is free of distortions such as coercion, exclusion, manipulation, and the like. The main advantage of this approach, as I see it, is its clearly articulated insight that reasonable justification of moral norms cannot be disconnected from the institutional settings of different societies through which norms are put into practice. Habermas has demonstrated on several occasions how his discourse ethics can be applied to political issues, as, for example, in his analysis of terrorism as a type of violence caused by distortion in communication.[8] More recently, he has addressed the issue of religion and politics, arguing that traditional liberal views of religion unjustly exclude religious rationality from public discourse. [9]

My own conviction is that if it is to have a future for human rights politics must dramatically improve its institutional communicative standards. The dismissal of critical voices as simply corrupted by power is an example of disturbed communication in the Habermasian sense. The tendency of many Western proponents of human rights to accuse the other of being *a priori* dishonest renders further communication meaningless. Power analysis is important but it should be applied reciprocally, and the obligation to listen to the other should be considered generally and equally binding.

More specifically, while arguing in favour of a human rights interpretation that takes global injustice seriously, I will try to give a

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[6] Habermas, Jürgen: *Justification and Application.* Polity Press, Cambridge 1993, p. 50.
[7] Op. cit., p.56.
[8] Habermas, Jürgen: "Fundamentalism and terror", in Borradori, Giovanna: *Philosophy in a time of terror.* The University of Chicago Press, Chicago 2003, pp. 25-43.
[9] Habermas, Jürgen: "Religion in the public sphere", in Habermas: *Between naturalism and religion.* Polity, Cambridge 2008, pp. 114-148.

hearing to Islamic, Christian and Jewish opinions. While it is not my ambition to provide an extensive overview of these voices, this study will attempt to incorporate some non-liberal critical perspectives into the theory of human rights, rather than suggesting a comprehensive theory to be accepted wholesale.

Law, politics, and morality

The argument of this book is thus an attempt to reclaim the importance of morality for effective protection of human rights in a global situation. As already stated, my own view is that human rights cannot be reduced to conventional and legally protected rights. Moreover, in order to protect conventional rights effectively we need to be able to articulate their moral content while remaining aware of their political dimension.

My understanding of the relation between legal, moral, and political levels of human rights is based on two main presumptions. The first is a constructivist theory of morality, and the second is a belief that moral motivation does affect political sphere. Moral norms and values are social constructions: they are formed and sustained by social cooperation and are dependent upon several institutions. What is viewed as right and wrong in a society is strongly related to how that society functions. My interpretation of ethical constructivism is materialistic in the sense that I believe that social institutions determine the development of moral conventions. This does not mean that moral conventions cannot be questioned by reason. What it means, rather, is that in order to change moral conventions we need to examine their relation to social institutions and seek to transform those institutions. As a critical theory of morality, ethics must be related to institutional critique if it is to have political impact.

The very emergence of the current system for protection of human rights is an example of how norms and values are socially constructed. It is only with the growth of a modern capitalist market characterized by an objective need for social mobility that the moral utopia of equality has established itself in terms of human

rights. Under feudalism it would have been meaningless to talk of everyone's equal (!) freedom. However, even with the capitalist economic system in place, it took a long time before the conditions for institutionalized human rights emerged. As Thomas Humphrey Marshall has shown in his classical essay "Citizenship and social class"[10], for example, the evolution of rights was connected to the notion of equal citizenship on the one hand and to persistent or growing social inequality in capitalist society on the other:

> [Civil rights] did not conflict with the inequalities of capitalist society; they were, on the contrary, necessary to the maintenance of that particular form of inequality. […] And civil rights were indispensable to a competitive market economy. They gave to each man, as part of his individual status, the power to engage as an independent unit in the economic struggle and made it possible to deny to him social protection on the ground that he was equipped with the means to protect himself.[11]

Using Britain as an example, Marshall has shown how a set of rights that constituted the modern notion of citizenship was extended as a result of social tension between claims to equal citizenship and persistent, class-related inequality.

The unique situation at the end of the Second World War offered an historic opportunity to establish an international organization to coordinate peacekeeping efforts and human rights protection. The United Nations and the regional systems for protecting human rights are the product both of a global political power balance and of a widely-shared desire to make the world a better place for all. When dealing with human rights, it is therefore as important to recognize the political dimensions of international bodies as it is to highlight their capacity to further the development of human rights protection.

Following their emergence as a result of complex social processes, human rights have continued to be an object for social construction in terms of how they are sustained, interpreted, and im-

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[10] Marshall, T.H: *Citizenship and social class.* Cambridge University Press, Cambridge 1950.
[11] Op. cit., pp. 33-34.

plemented. One of the examples that will be discussed in this study is the issue of discrimination and human rights. Most of us agree that human rights are incompatible with discrimination, i.e. restricted opportunities for members or perceived members of particular social, ethnic, or religious "groups". At the same time the history of human rights confirms that a belief in human rights does not necessarily entail a rejection of negative discrimination. African-Americans, women, and immigrants are just a few examples of "groups" that have been or are excluded from rights by people who style themselves supporters of human rights. One explanation for this phenomenon is that people reason and act within social institutions that make it psychologically possible to believe in human rights even while violating them. When Swedish courts fail to identify discrimination in the vast majority of cases where it clearly has occurred, the reason lies in the institutional environment and heritage of Swedish judges: a social background marked by an absence of personal experience of discrimination; a strong tradition of legal positivism; and historical developments that have fostered a naïvely uncritical self-image of Swedish society.[12] Changing this situation and making discrimination visible will take more than merely educating judges in the provisions of human rights law. A number of institutions will need to be transformed if radical improvement is to be achieved.

Although I argue for a materialist view of how institutions relate to values, I believe that moral convictions can have a significant impact on politics. The experience of injustice and the desire for justice are powerful driving forces for political consolidation and social reform. Human rights have been, and still are, a kind of morality that inspires political engagement in the name of justice. In order to preserve this emancipatory potential, it is important, I believe, to view human rights as a moral vision of human liberation. The current form of global capitalism has created, and is sustaining, a view of politics as a field of professional management in which the sphere of political choice is restricted to matters of consumption. In the case of human rights this trend manifests itself

[12] *Diskriminering i rättsprocessen. Om missgynnande av personer med utländsk bakgrund. Brås rapport 2008:4.* Stockholm 2008.

mainly in the widespread pragmatic attitude that rights are a matter, not of social transformation and political struggle against social injustice, but of ensuring that international conventions are signed by governments and implemented by the courts. It is precisely for this reason that many politically involved groups and individuals do not view human rights as a suitable tool for their (political) aims. Those fighting global inequality today are suspicious of human rights that look very much like an effort by the liberal legal establishment to protect the status quo, and anything but a politically progressive and relevant moral vision.

In this study it will be argued that international human rights can function as tools for human liberation if they are viewed and practiced as a set of agreements based on some fundamental principles of political morality. These principles should guide political action and serve as an interpretative cornerstone for international as well as traditional, state-based legal regulations. What, then, are these principles?

Justification of human rights

In current human rights discourse there are two well-known candidates for a grounding moral norm. The first is the principle of human dignity, and the second is the aforementioned principle of equal concern and respect. It is beyond the scope of this study to present a comprehensive analysis of these principles. However, as a way to make the discourse on human rights as politically transparent as possible, I will argue in support of the goal of explicitly elaborating on such underlying moral convictions. Let me give just a few examples of the transparency I am looking for.

The principle of human dignity as *the* grounding norm behind human rights protection is complex. It is often the case that human dignity is understood in Kantian terms, i.e. as dignity inherent to humanity as such. Immanuel Kant understood human dignity as having intrinsic worth and (re)formulated his categorical imperative as an absolute principle of always treating humanity in every

person as an end in itself and never as a means only.[13] It is obvious that, for Kant, respect for human dignity does not mean always protecting the well-being of individual humans. What deserves protection is the humanity that, for Kant, as for many other rationalistic philosophers, inheres in the autonomy of the human mind. Humanity is special and deserving of moral respect as a consequence of its capacity for creating and following reasonable laws. According to Kant's logic, to accept a rule that runs contrary to practical reason, even when promoting your well-being, shows a lack of respect for human dignity. This logic is still of relevance for human rights, however, not least because it can be used to limit the unfortunate current trend of viewing human rights as a culture of egoistic individualism and escalating consumption. At the same time, it is clear that what human rights proponents are looking for is protection of reasonable claims by all human beings, and not merely protection of a particular image of free-minded humanity.

There are two main directions for a further development of the principle of human dignity beyond its purely Kantian understanding. The first is the idea that the characteristic feature of humanity is not defined exclusively in terms of autonomous reasoning, even if human dignity is related to humanity. Respecting human dignity means dignifying some basic properties of humanity. The approaches taken by Amartya Sen and Martha Nussbaum fall into this category. They propose an advanced philosophical anthropology which regards it to be important for human beings to have capabilities to function in a fully human way. Human rights are thus related to the protection of those capabilities.[14]

The second interpretation of the principle of human dignity is genealogical and seeks to define human dignity as an extension of the recognition of a social status. Jürgen Habermas argues in favour of human dignity as an extended recognition of social status. As he rightly observes, the category of human dignity entered legal discourse much later than that of human rights. Habermas shows that human rights protection has historically been accompanied by

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[13] Kant, Immanuel: *Grundlegung zur Metaphysik der Sitten,* p. 54.

[14] Nussbaum, Martha: *Women and Human Development. The Capabilities Approach.* Cambridge University Press, Cambridge 2000, pp. 71-74.

an expansion of the notion of dignity from a quality linked to a specific social position to an attribute shared by all humans. Human dignity, Habermas writes, is still related to "the social recognition of a status" but has been extended to "the equal human dignity of everybody".[15]

Habermas poses the question: "Why does talk of 'human rights' feature so much earlier in the law than talk of 'human dignity'?"[16] The answer he offers is that the moral notion of human dignity has always been implicitly present in the notion of human rights as a result of the experiences of those without an acknowledged social status whose human dignity has been violated:

> […] from the beginning human dignity forms the 'portal' through which the egalitarian and universalistic substance of morality is imported into law. The idea of human dignity is the conceptual hinge that connects the morality of equal respect for everyone with positive law and democratic lawmaking in such a way that their interplay could give rise to a political order founded upon human rights.[17]

Habermas's "realistic utopia" is thus one in which human rights "anchor the ideal of a just society in the institutions of constitutional states themselves".[18] The legal norms of political bodies are related to morality (the universal duty to respect the inherent worth of every human being) via the notion of human dignity. Habermas's human dignity is Kantian in that it refers to a universal moral duty to respect the humanity of every being, but transcends Kant in that it connects this duty to the concrete political demands of those whose dignity has been violated.

Hans Joas advances a similar interpretation of human rights that also foregrounds the importance of the idea of human dignity and its historical extension. As he writes: "the history of human rights is a history of sacralization – the history of the sacralization of the

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[15] Habermas, Jürgen: "The concept of human dignity and the realistic utopia of human rights", in *Metaphilosophy* Vol. 41, No. 4, July 2010, p.464.
[16] Op. cit., p. 465.
[17] Op. cit., p. 469.
[18] Op. cit., p. 476.

person".[19] Human person becomes "sacred" in a very broad sense of acquiring a special status surrounded by prohibitions (certain actions are forbidden if directed at the sacred). Joas's approach is sociological in the sense that he does not "believe in the possibility of a purely rational justification for ultimate values"[20] but instead turns his attention to social developments that have contributed to the historical extension of human dignity. Calling this approach "affirmative genealogy", Joas argues that the history of universal human rights is a history of inclusion and "value generalization" rather than a history of triumphant universal reason. He defines inclusion as "integration into the category of human being, integration of those – such as criminals or slaves – who had not been self-evidently included within this concept."[21] Joas's perspective is productive in that it seeks to connect the universal appeal of human rights to concrete experiences of political struggle against exclusion and violence.

Although Joas's notion of the sacredness of human person offers a promising approach to the question of how to interpret the notion of human dignity and the universality of human rights, it is not fully developed. Above all, it has not been tested as a tool for the critique and development of human rights policies. By contrast, Ronald Dworkin's elaboration of the guiding principle of equal concern and respect has been invoked in numerous cases relating to human rights. The principle of equal concern and respect is of Kantian origin and Dworkin admits that his understanding of this principle is in many regards a legacy from John Rawls.[22] As Dworkin writes:

> The institution of rights against Government […] is a complex and troublesome practice that makes the Government's job of securing the general benefit more difficult and more expensive, and it would be a frivolous and wrongful practice unless it served some point. Anyone who professes to take rights seriously, and who

[19] Joas, Hans: *The sacredness of the person. A new genealogy of human rights.* Georgetown University Press, Washington 2013, p. 5.
[20] Op. cit., p. 2.
[21] Op. cit., p. 49.
[22] Dworkin, Ronald: *Taking Rights Seriously*, pp. 150-183.

> praises our Government for respecting them, must have some sense of what that point is. He must accept, at the minimum, one or both of two important ideas. The first one is the vague but powerful idea of human dignity. […] The second is the more familiar idea of political equality. This supposes that the weaker members of a political community are entitled to the same concern and respect of their government as the more powerful members have secured for themselves.[23]

For a weaker member to be entitled to the same concern and respect in many cases involves entitlement to greater protection than that afforded more powerful citizens. The most obvious example of such protection is affirmative action as a human rights policy. What makes Dworkin's usage of the principle of equal concern and respect an attractive candidate for a grounding norm behind human rights is its capacity to function as a criterion for a transparent prioritization between rights. On the one hand, Dworkin makes clear that rights are related to a set of very concrete obligations on behalf of the government. On the other hand, he uses power analysis as a tool for political and legal decision-making. In the following study, power analysis will be applied to cases in which marginalized groups have been refused protection of their rights in consequence of a failure to recognize the occurrence of social injustice.

In my analysis of human rights as ethics, politics, and law I will follow these and other theorists in showing that legitimate and efficient human rights protection demands a transparent discussion of the basic principles behind the idea and practice of human rights. My argument relies heavily upon Dworkin's contention that equal concern and respect should be regarded as a grounding moral norm within human rights discourse. The main advantage of this perspective, as I see it, is its potential to handle cases of conflicts between rights in a transparent and non-paternalistic fashion. When reasonable claims by individuals and/or groups need to be prioritized it is more effective to address the challenge by means of power analysis than by asserting a general hierarchy of rights (related to capabilities). While capabilities are related to/described as those of rights holders, the principle of equal concern and respect

[23] Dworkin, Ronald, op. cit., pp. 198-199.

stresses the duty of those in power. In a globalized world it is difficult to argue for a reasonable general priority of capabilities that does not also favor a liberal worldview at the expense of other cultures. Consequently, I will try to argue that the moral principles needed for interpreting and developing policies and legislation should be formulated in such a way that the responsibilities of those in power are emphasized and, moreover, related to "the realistic utopia" of equal concern and respect.

Critique of legal positivism

As already mentioned, I regard human rights as a set of moral principles that inspire political action and constitute a basis for the legal protection of human beings. There is a clear limit to how far moral principles can be transformed into legal norms and rules. It is therefore important to discriminate between human rights as a moral and political vision and practice, and human rights as legal conventions. But it is equally important to keep sight of the role played by moral beliefs within the legal sphere. In several of the following chapters I will draw on Dworkin's critique of legal positivism as articulated by Western proponents of human rights. I agree with Dworkin that within the legal sphere to transparently handle difficult issues of competing claims implies to explicitly articulate moral content of protection of human rights.

In *Justice in Robes* (2006) Dworkin applies his view of the relation between law and morality to a handful of legal cases, some authentic and some hypothetical. He contrasts the concept of law as it relates to morality with different forms of legal positivism and pragmatism:

> We understand law not as separate but as a department of morality. We understand political theory that way: as part of morality more generally understood but distinguished, with its own distinct substance, because applicable to distinct institutional structures. We might treat a legal theory as a special part of political morality distinguished by a further refinement of institutional structures. […] I would encourage us to see jurisprudential questions as moral ques-

> tions about when, how far, and for what reason authoritative, collective decisions, and specialized conventions should have the last word in our lives.[24]

Strikingly, this passage includes the question "for what reason?". This question is of crucial importance for Dworkin's approach to hard cases, i.e. cases that cannot be decided by the conventional protocols of legal reasoning within the American legal system. When hard cases come to trial, the court must rely on the basic moral principles underpinning legislation, rather than on the vague and thus non-transparent notion of judicial discretion. Human rights-related issues are very often hard cases. How to decide in such cases when a claim that is covered by human rights provisions clashes with a different claim that is protected by the same regulations? According to Dworkin, the only transparent and tenable answer is: "[e]verything depends on the best answer to the difficult question of which set of principles provides the best justification for the law in this area as a whole".[25] Very much like Habermas, Dworkin argues that moral justification of a norm cannot be separated from its application, and that every legitimate application of a norm should be explicitly related to how the norm is justified.

While Dworkin focuses his analysis on the legal system of the United States, I will be applying his model of non-positivistic legal reasoning to human rights cases from other contexts. It is beyond the scope of this study to offer a detailed model for legal reasoning in human rights cases. My primary aim is to demonstrate that strong legal positivism, i.e. the belief that proper legal decisions exclude moral considerations, undermines the *legal* legitimacy of human rights. The blindness of Justice is only a legal virtue to some degree. When the courts of European countries are incapable of recognizing racist motifs behind the rhetoric of critique of Islam, they demonstrate a blindness that threatens to jeopardize the public's fundamental trust in the legal justice. I will argue that delivery of transparent and predictable decisions in human rights-related

[24] Dworkin, Ronald: *Justice in Robes.* Harvard University Press, Cambridge 2006, pp. 34-35.
[25] Op. cit., p. 144.

cases places a great burden upon the ability of judges to combine judicial method in a tenable fashion with reasoning around the basic moral principles of human rights.

Human rights and liberations

The following study will also call into question a pragmatic approach towards human rights, one based upon the notion that so long as we can reach agreement on human rights, we need not worry about grounds of that agreement. This view has been formulated most explicitly and with the greatest theoretical nuance by John Rawls. In *Political Liberalism*, first published in 1993, Rawls argues that liberalism rightly distinguishes between citizens' political and comprehensive views. Political views, where human rights belong, are grounds for generally accepted "constitutional essentials and basic institutions of justice". Although comprehensive views about good life may differ, citizens can still agree upon a *common* political morality. They justify this common morality by means of different comprehensive views. As Rawls writes:

> […] the history of religion and philosophy shows that there are many reasonable ways in which the wider realm of values can be understood so as to be either congruent with, or supportive of, or else not in conflict with, the values appropriate to the special domain of the political as specified by a political conception of justice. […] This makes an overlapping consensus possible […].[26]

In several chapters of this study I will problematize Rawls's ideal of overlapping consensus. There are two main reasons for my scepticism towards this ideal. First, I disagree with Rawls on the issue of how comprehensive justification of a norm is related to its political content. I believe that the way a norm is justified does influence its content. Human rights practices have demonstrated this link many times. When a comprehensive justification of political morality of human rights is based on the idea of social solidarity,

[26] Rawls, John: *Political Liberalism*. Expanded edition. Columbia University Press, New York 2005, p. 140.

as has been articulated in some Islamic contexts, it advocates (constitutional) interpretations and priorities that differ from traditional liberal interpretations and priorities. Even liberal states, which are often reluctant to admit to having strong cultural and religious traditions of their own, interpret human rights differently because they differ in their comprehensive understandings of human dignity, personality, content of freedom etc.

Second, it is my firm conviction that what makes human rights universally attractive is their potential to promote the social liberation of the oppressed. Oppression has many faces, which makes it unreasonable to define liberation solely in terms of emancipation as understood by liberal ideology. I therefore disagree strongly with Rawls's view that a tenable consensus on human rights can and should be reached merely by recognizing the rights stipulated in liberal constitutions. Rawls is both explicit and wrong when he states that political morality, as expressed in the liberal understanding of human rights, is a universally valued political morality that other cultures should accept but *may* justify in their own ways. This imperialistic approach has also been questioned by political philosophers such as Michael Walzer, who has shown that this kind of universalism is linked to a state of mind characterized by "if not pride, then certainly confidence".[27] Missing in this "state of mind" is any appreciation of the other's very different experience of oppression as well as liberation. I agree with Walzer and will argue that for human rights to become truly universal it will need to incorporate different experiences of oppression as well as different visions and practices of liberation.

At the same time, I am not suggesting that all visions are equally legitimate: ethicists must subject all moral and political conventions to critical scrutiny. Moreover, it takes more effort to understand and evaluate a foreign tradition. *Pace* Rawls, what "history has shown" is that both oppression and liberation can have many faces. The following study will demonstrate how traditional, and in many cases non-liberal, visions of emancipation can challenge as

[27] Walzer, Michael: "Nation and universe. The Tanner Lecture on Human Rights". Oxford University, Oxford 1989, p. 513.

well as enrich common liberal understandings of universal human rights.

As a matter of clarification, I do not reject the idea of overlapping consensus in the sense that there could be a set of basic human rights norms about which it is possible to reach broad agreement. What I wish to cast doubt upon is the idea, expressed by Jack Donnelly and others, that human rights conventions should be seen as precisely such a consensus. My argument is that in order to understand better that which we have agreed upon, we need to learn more about the substantial variations between different cultures of human rights.

How to read this book

This book results from a research project funded by the Swedish Research Council and conducted at Uppsala University, Sweden during 2010-2013. As such, it is as much a product of traditional scholarly work as it is of my own teaching experiences. For many years I have been fortunate to teach courses in human rights, supervise doctoral projects in ethics, and to test my ideas critically in an ongoing dialogue with my talented and devoted students. Several chapters of this book are directly related to the curriculum of the Master's Degree Program in Human Rights at the Department of Theology. Chapter Two ("Universal Consensus Re-examined. Critique of a Liberal Defense of the Universality of Human Rights") and Chapter Five ("Freedom of Speech – A Colonial Saint in the Catalogue of Rights") were written during intense and challenging discussions with my students in the Master's course "Rights in Conflict". The aim of this course is precisely to investigate the potential of different theoretical approaches for understanding and handling situations in which rights and values clash. Chapter Three ("Universal or Corporeal Reason? On the Russian Critique of Western Rationalism and its Political Relevance") and Chapter Six ("Identity and the Stranger. A Christological Critique of Refugee Politics") were written in the context of the Research Seminar in Ethics at the Faculty of Theology, Uppsala University, one of

whose priorities is the relation between philosophical ethics and different theological traditions.

It is my hope that this book will prove useful not only to researches within the field of human rights but also to those studying and teaching human rights. Although the individual chapters can be read in any order, or even separately, they form an integrated whole that has been organized according to the investigative logic described above. The volume is divided into two parts. Part One comprises the Introduction and two additional theoretical chapters. Chapter Two provides a critical discussion of the dominant liberal understanding of the universalistic claims of human rights. Taking issue with this understanding, as it has been articulated by Jack Donnelly, I show how traditional Western claims about the universality of human rights law are linked to Western political and cultural dominance as well as to a strong tradition of legal positivism. I conclude my analysis by introducing an alternative vision of the universality of human rights that I term "open universality".

Chapter Three examines rationalism as an important feature of current discourse on human rights. I agree with the postmodern critique of rationalism which holds that Western rationalism often leads to what Gianni Vattimo calls "violent thinking", i.e. a tendency to refuse to hear, or to dismiss as irrational, all alternative arguments. I trace the implications of this critique for the discourse on human rights, and challenge it by means of a comparison with the critique of rationalism produced within Russian philosophy. This philosophy accuses "Western rationalism" of being a means for effectively devaluing the experience of suffering. I describe this Russian criticism and demonstrate its theoretical and political potential as well as its shortcomings.

Part Two of the study comprises four chapters that develop my main theoretical arguments further by focusing on concrete issues and contexts. Chapter Four ("Human Rights versus Sharia? Reflections on the Moral and Legal Dimensions of Human Rights Law and Sharia") questions the traditional liberal understanding of international human rights law by means of a comparison with two alternative conceptions of the meaning of Sharia. I propose that human rights law should be viewed as a set of principles of politi-

cal morality that are to be creatively interpreted and implemented in concrete cultural and political contexts. To present international human rights law as positive legislation effectively obscures its political nature while disregarding its moral potential. Similarly, I believe that the only tenable view of Sharia is as a universal moral and religious law that must be responsibly interpreted when applied within legal sphere. A version of this chapter was published in *Religion and Human Rights* 8 (2013).

Chapter Five examines the interpretation of freedom of speech within contemporary discourse in Sweden. I show that this discourse is heavily marked by a colonial self-image of Sweden as a just society that, unlike other (less good) cultures, need not engage in open discussion of the principles by which rights and values are prioritized. Using a series of case studies, I show how freedom of speech is viewed as "naturally most important" within the liberal culture of Sweden. The chapter's argument supports the view that all participants in human rights discourse are equally responsible for transparently presenting their justification of policies relating to the handling of conflicts between rights. This is especially important in cases when the rights being prioritized are those of a dominant majority.

Chapter Six argues that current European refugee policies derive from a morally problematic view of personal identity. This view presupposes that refugees can and should prove their identity. Invoking the Biblical view of identity as a gift that a master should offer a stranger in his house, I argue that this modern individualistic view of identity should be challenged. European individualism includes a complex Christian legacy and I therefore also propose a re-interpretation of Christology that can radicalize its potential to strengthen the rights of refugees. Refugees cannot be granted human rights if the majorities in European countries believe that it is the responsibility of refugees to prove that they are not a threat to European security. My argument is that the strangers' identity is our shared responsibility. I draw on the philosophy of Hermann Cohen in order to describe this kind of identity. An earlier version of this chapter appeared in *Political Theology* in 2011.

Chapter Seven ("Orthodox Theology and the Temptation of Power") is an elaboration on religion and its role in the public discourse. By means of a case study of the Russian Orthodox Church's involvement in politics, and, in particular, of its view of human rights and human dignity, I argue that legitimate political participation must include an explicitly articulated social ethic. As the example of Russia shows, framing political discourse in terms of identity is problematic on several counts. One is that identity discourse, focusing as it does on historical heritage as the main legitimizing factor, tends to disconnect politics from discussions about moral and political justice. Another is that it increasingly runs the risk of conducting politics explicitly in terms of holding power. I end this chapter by suggesting ways in which the theological heritage of the Russian Orthodox tradition might be developed in order to improve the quality of Russian politics as well as to strengthen the legitimacy of the Russian Church's political involvement.

The volume concludes with a reflection on the most significant challenges to the transcultural legitimacy of the human rights project that have been raised in the respective chapters. Although human rights may reasonably be questioned, I argue, it remains possible to hope for a revitalizing of their moral and political potential for the goal of human liberation.

Chapter II

Universal Consensus Re-examined

Critique of a Liberal Defence of the Universality of Human Rights

The idea of human rights, the belief that every human being is entitled to make some demands on those who possess political power is one of the most influential and attractive moral and political ideals of modern times. It has an almost unquestioned status and has become an uncontroversial and sometimes even dominant component of the public discourse. States and some other subjects of power declare their readiness to restrict the use of it by promising people certain rights. For example, when the *International Covenant on Civil and Political Rights* in its Article 6 stipulates that "every human being has the inherent right to life" it immediately points out what the states should and should not do in order to protect that right. Being part of the convention, a state must incorporate the protection of the right into its legislation, it may not arbitrarily deprive anyone of their life and so on. The same logic can be shown in all the international treaties on human rights. Every document specifies a number of ways in which states must restrict their sovereignty in using power in order to ensure the protection of human beings within their territories.

International conventions on human rights are signed and ratified by the majority of states. Some scholars and politicians even speak of a universal consensus on human rights. An American professor of political science and one of the leading theorists of human rights, Jack Donnelly, argues that "there is an international

legal and political consensus on the list of rights in the Universal Declaration of Human Rights and the International Human Rights Covenants".[28] Donnelly states that the existence of such a universal consensus is not threatened by the fact that there are obvious contextual differences when it comes to interpretation and implementation of human rights. On the contrary, in order to claim universal legitimacy of human rights we need to point out some common features of those rights as well as to leave space for cultural and ideological diversity. According to Donnelly, it is, therefore, both possible and desirable to discriminate between *universal* rights as "the concept, an abstract, general statement of an orienting value" and rights on the practical level of interpretation and implementation.[29] Elsewhere Donnelly says "that universal human rights do not require identical human rights practices. In fact, substantial second-order variations, by country, region, or other grouping, are fully compatible with the relative universality of internationally recognized human rights".[30]

There are two main lines of argument that support the idea of a universal consensus and the possibility to discriminate between a universal and a contextual level within the human rights discourse. The first is of historical or descriptive character and the second is conceptual (theoretical). Donnelly uses the descriptive argument by stating the importance of the Universal Declaration and implying that the understanding of rights found within this document must be seen as universally agreed upon. He stipulates that "human rights have what I call international legal universality because they have been accepted by states as binding in international law".[31] Then he turns to the conceptual argument which states that non-discrimination, an adequate standard of living, individualism, and interdependency of human rights are important features of every meaningful discourse and practice of rights.

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[28] Donnelly, Jack: *International Human Rights.* Third edition. Westview Press, Boulder 2007, p. 24.
[29] Donnelly, Jack: *Universal Human Rights in Theory and Practice.* Cornell University Press, Ithaca and London 2003, p. 23.
[30] Donnelly, Jack: *International Human Rights,* p. 49.
[31] Donnelly, Jack: "Human Rights: Both Universal and Relative", in *Human Rights Quarterly,* 30, 2008, p. 195.

Donnelly's position is rather common and, I believe, is shared by the majority of Western scholars and practitioners. However, precisely due to the fact that the majority in the West agrees on this point it is of crucial importance to re-examine it continually. In what sense does the Universal Declaration represent a universal model for understanding human rights? Are individualism and interdependency necessary for every meaningful and effective rights language? Is it possible and desirable to discriminate between an abstract and universal concept of rights on the one hand and contextual implementations of rights on the other?

These three questions may appear purely speculative but I maintain that this is not the case. To the extent that human rights are tools for the power of recognising the necessity of self-restriction, there is a need for careful analysis of the ideas about human rights which appear to be self-evident. The fact that some features of the human rights discourse are seen as obvious by the dominant liberal (Western) culture indicates that in order to keep the discourse reliable for other cultures, we must demonstrate an openness towards a critical analysis of precisely these features. As many have pointed out, it is of great importance for every functional communication that all participants, especially those with more power, are ready to openly argue about their own beliefs. An ongoing discussion on the meaning of universal legitimacy of human rights has a theoretical value as well.

The main purpose of this chapter is to analyse a number of arguments which support the idea that there is a universal consensus on human rights. Such a universal consensus is assumed to cohere well with persisting differences in interpretation and implementation of rights. I am going to develop three critical points against the idea of universal consensus. The first is descriptive and claims that the belief in an already existing consensus is ungrounded. The second critical point concerns the very attempt to isolate an abstract, conceptual level within the human rights discourse. According to my understanding, the practice of human rights is closely connected to the meaning of the concept of human rights. The third point is

a critique of liberalism when it tends to monopolise the concept of human rights by ignoring its own contextuality.

I am going to use the writings of Jack Donnelly,[32] who has been defending the idea of universal consensus for quite a long time. My choice of Donnelly depends on two circumstances. The first one is his prominent role within the current discourse on human rights. The second and crucial circumstance is that Donnelly's understanding of human rights is peculiar to the Western liberal culture.

Is there a consensus on human rights?

Let us provisionally discuss the two above-mentioned lines of argument in favour of the universality of human rights as they are understood within the Universal Declaration and the Human Rights Covenants, the universality which is assumed to coexist with contextual interpretations and implementations of rights. The first question is whether the factual agreements reached within the universal system of human rights are really universal consensus. The argument which supports a positive answer is that almost all of the world's countries signed and ratified the documents on human rights. For example, the *International Covenant on Civil and Political Rights* is ratified by 167 states (January 2014) and the *Convention on the Rights of the Child* by 193 states (January 2014). This is usually taken as proof of the existence of the universal agreement on human rights. In order to evaluate this rather common interpretation we need to reflect on how the United Nation's instruments for the protection of human rights work. As is well known, the treaties are signed and/or ratified by states which are expected to implement the obligations under the ratified documents. The states should incorporate human rights in their legislation as well as form policies in conformity with their obligations.

[32] The aim of the chapter is to examine common theoretical arguments; therefore I pay more attention to the second edition of Donnelly's monograph which I find more challenging. The third edition does not include his discussion of individualism, liberalism, and collective rights which are of crucial importance for the current situation.

The treaties should be interpreted and implemented in accordance with the objectives articulated in them. One instrument for this is the limitation of reservations which the states are allowed to make while ratifying a treaty. As, for example, the *International Convention on the Elimination of All Forms of Racial Discrimination* stipulates in Article 20, "A reservation incompatible with the object and purpose of this Convention shall not be permitted, nor shall a reservation the effect of which would inhibit the operation of any of the bodies established by this Convention be allowed. A reservation shall be considered incompatible or inhibitive if at least two thirds of the States Parties to this Convention object to it."

In order to support the states in their efforts to interpret and implement the human rights treaties, the majority of treaties have committees that supply the states with guidelines. The states have access to the supervision of the committees and even opportunities to acquaint themselves with each other's opinions, but they are sovereign powers and the United Nations does not exercise any executive power within the domain of human rights. There are mechanisms for monitoring implementation among which examination of state reports by the committees and a number of special procedures (for example special rapporteurs) are often discussed. I mention these familiar features of the human rights system in order to emphasize the fact that there is a clear gap between the high status of ratification and persisting difficulties in getting states to implement the obligations. Many states do not report to the United Nations, while others delay reports or deliver poor reports. When committees announce their concluding observations, final statements in connection with state reports, they have no power to get the states to follow the recommendations if they choose not to do so.[33]

There are efforts being made to improve the situation and I believe that it is possible to achieve better efficiency, at least to some extent. One challenging issue arising here is whether such an im-

[33] Sweden has for decades refused, and still refuses, to follow recommendations of the UN committee which states that all parties under the *Convention on the Elimination of All Forms of Racial Discrimination* are obliged to prohibit racist organisations.

provement would require a stronger executive level within the international human rights system which would make it compatible with national systems of legislation. Among those who argue for a more effective system of international enforcement is the Canadian theorist and politician Michael Ignatieff. He states that agreements which are not connected to any effective mechanism of enforcement undermine the very idea of an international *policy* of human rights. Human rights, originally designed as instruments for all human beings to preserve their human agency, have been transformed into a moralistic idol selectively used by those who already posses political power.[34] While Ignatieff argues that in order to improve the implementation we need to promote human rights as the Western individualistic discourse, many post-colonial thinkers and practicians claim that dominance by the West is precisely what undermines the authority of international instruments of human rights. For people who have experienced colonialism in its many forms the existing system of human rights appears as yet another form of Western colonialism. This implies that in order to bring legitimacy into human rights as a universal project it is necessary to fight every form of colonialism.

Let us leave aside the issue of what kind of mechanisms are needed in order to strengthen the implementation of human rights and for the moment just point out that the current situation does not fully support the thesis that there is a universal consensus on human rights. The states agree on the documents, but it is possible to ignore the obligations under them to a rather significant extent. Unfortunately, using the language of human rights on an international or very abstract level while neglecting the responsibilities when it comes to a practical domestic implementation is widely accepted. One can object to this, as Donnelly does, by arguing that an agreement on an abstract level is still an agreement (consensus in this case).[35] But if we speak of a consensus in terms of an accord constituted by international treaties, it is problematic to say that ignoring the obligations under a treaty does not devaluate the very

[34] Ignatieff, Michael: *Human Rights as Politics and Idolatry.* Princeton University Press, Princeton 2001.
[35] Donnelly, Jack: *International Human Rights*, pp. 38-39, 44-45.

agreement. In fact, there are many participants in the human rights discourse who are seriously concerned that the lack of consistency in implementation is a threat to the reliability of the international system of human rights.

Reflecting further on how human rights are applied by states, it is useful to compare the constitutional level with other levels of domestic legislation. I believe that in most countries the use of human rights language within constitutions is accepted[36] and, at the same time, it is unusual to apply the language of human rights in other kinds of legislation and even more unusual to use it in courts of law. One may argue that it is not essential to implement human rights through courts. On the other hand, it is precisely on the executive level that the seriousness of political ideas can be proved. If a state recognizes its obligations with respect to human rights; if, in Ronald Dworkin's famous words, a state takes human rights seriously, then it must create a judicial system in which the use of human rights language is both accepted and efficient.

Therefore, as I see it, there is an insufficient argumentation in favour of the universal consensus constituted by the agreement on the Universal Declaration and other treaties on human rights if we recognize that most states use the agreements when criticising others but hesitate to fulfil their own obligations under the same documents. If human rights are instruments for people to achieve non-discrimination and an adequate standard of living we cannot be satisfied with an abstract consensus but need a practical one, meaning that those who reach an agreement on human rights are ready to use it as a tool for self-restriction of their own power.

My criticism of Donnelly can be expressed in a slightly different way. Donnelly's argument in favour of an abstract consensus seems to refer to the term abstract as the opposite of the term concrete, or contextual. He means that states agree on an abstract level while they implement rights in many different ways.[37] Unfortunately, the current situation indicates another connotation of the term

[36] Beck, Colin., Drori, Gili, and Meyer, John: "World Influences on Human Rights in Constitutions: A Cross-national Study". Available online http://www.allacademic.com/meta/p306048_index.html [Accessed 2010-07-15].
[37] Donnelly, Jack: *International Human Rights*, p. 48.

"abstract". "Abstract" can be used as a contrast to "practical" and I believe this is precisely what happens when states relate themselves to human rights obligations. They agree on an abstract level, i.e. a level which does not demand any strenuous political actions, while ignoring the obligations which include practical demands to change the policies of the states.

Why don't the states implement their obligations under the conventions to a greater extent? One answer is rather trivial and it posits that it is the destiny of all norms of political morality not to be practically implemented or fully respected. But there is another and more specific answer. It appears that the very character of the agreements on human rights creates an opportunity to implement the obligations selectively and inconsistently. The mere fact that the Universal Declaration, together with other documents on human rights, lists a great number of rights, 44 according to Donnelly,[38] without suggesting any mechanism for prioritising conflicting rights exposes the agreements to potential misuse. On the abstract level the states agree upon the need to respect and protect human rights. When it comes to their implementation they ignore or at least underestimate the obligations which seriously restrict their sovereignty in political and legal spheres. While some Muslim countries state that they accept human rights obligations as long as they don't contradict the moral teaching of the Quran and Sharia, many Western countries restrict the freedom of religion by referring to their own traditions of secularism. That is why I don't share Donnelly's (and many others') belief that the current international system is in fact an international consensus on the legitimacy of human rights. There is a persisting challenge to transform abstract obligations under the documents into readiness of the states to implement these obligations on their territories (and sometimes even outside them). There is thus a need for a more careful examination of the question of why the states do not fulfil their own obligations while vigorously blaming others for not respecting human rights.

[38] Donnelly, Jack: *Universal Human Rights in Theory and Practice*, p. 24.

Is there any abstract conceptual universality at all?

My disagreement with Donnelly seems to be on a descriptive level and thus concerning the question of whether there *is* a consensus or not. But I would like to argue that the main issue is, in fact, Donnelly's attempt to discriminate between an abstract conceptual and a concrete practical level within the international discourse on human rights. Donnelly seems to argue that there is an abstract level of human rights, which different societies, groups, and individuals agree upon (or at least can agree upon), and that this abstract consensus coexists alongside many social, cultural, and other differences. My main argument against Donnelly's attempt to separate an abstract universal level of human rights from a contextual practical level is that such a separation underestimates the political dimension of human rights precisely at a time when this dimension becomes more obvious and important to be dealt with.

Donnelly uses John Rawls's idea of an overlapping consensus in order to prove that the existing agreements on human rights have universal legitimacy on a conceptual level in spite of all the differences in interpretation and diversity of implementations. Donnelly states that

> […] the idea of overlapping consensus offers a plausible answer to the question 'How is it possible that there can be a stable and just society whose free and equal citizens are deeply divided by conflicting and even incommensurable religious, philosophical, and moral doctrines?' Although formulated initially for domestic societies, this idea has an obvious extension to international society, particularly a culturally and politically diverse pluralistic international society. Human rights can be readily derived from a considerable variety of moral theories […][39]

The most important point here is the belief in a possibility to combine human rights as presented in the Universal Declaration with different moral theories as well as various religious and philosoph-

[39] Donnelly, Jack, op. cit., p. 40.

ical doctrines.[40] The quotation refers to *Political Liberalism* by Rawls and, according to my understanding, demonstrates two difficulties with Donnelly's use of the overlapping consensus in relation to the existing system of human rights. The first one is his interpretation of Rawls. As it is obvious from the quotation, Donnelly states that it is legitimate to extend Rawls's model, originally designed for a well-ordered liberal national state, to the international community as a whole. However, the world we live in is neither well-ordered nor liberal. Instead, it is marked by sharp economic and political conflicts. Their recognition makes it unrealistic to claim that we already agree on the most important values of political morality. Take for example the conflict between Israel and Palestine. Both sides "agree" that peace is what they strive for, but there is no agreement at all when it comes to the issue of which conditions characterize peace. Both sides use the language of human rights when looking for international support while proposing radically opposite solutions to the situation. Careful examination of the differences shows disagreements about what kind of competitive values are to be protected by the instruments of human rights. There is no agreement either on the question of whose rights must be protected in the first place when different groups claim rights that conflict with the interests of other groups. I see no way of claiming the existence of a conceptual consensus on human rights issues in the situation of Israel and Palestine. Instead, it is of crucial importance to seek an understanding of the differences (in regard to the concept of human rights) between those who are involved in the conflict.[41]

Another, at first glance less dramatic, example has to do with differences between countries in response to the interpretation of the role of religion in the public sphere. While countries such as Iran, Poland, and Russia argue that it is permissible to restrict freedom of speech and expression in order to protect freedom of religion, countries such as Belgium, France, and Turkey, while appealing to the protection of human rights, forbid individuals to use

[40] Donnelly, Jack: *International Human Rights*, pp. 40-41.
[41] For the moment I leave out the important issue of how we should approach situations where human rights are or seem to be in conflict with peace building.

religious symbols in the public sphere. Is it constructive then to speak of a consensus about the right to exercise one's religion and freedom of speech? Yes, if by overlapping consensus we mean the consensus valid in the absence of conflicts between crucial interests. No, if we expect a consensus which comprises principles regulating the conflicts. These and many other similar examples demonstrate that it is problematic to claim an overlapping consensus on a conceptual level of human rights in a world characterized by serious conflicts. This claim can be used and actually is used as a means to veil the conflicts which need to be articulated and resolved. As for example Chantal Mouffe has shown, the consensus claim tends to interpret political morality as being almost free from politics, understood as a sphere of real conflicts.[42]

The second problem with Donnelly's optimism about the overlapping consensus is already presented in Rawls and concerns the idea that it is possible to extricate norms of political morality from class, religion, culture, and so on. As is well known, Rawls states that it is possible for citizens in a liberal society to reach a consensus about the norms of social justice, including those on human rights, while having different political, religious, cultural, and other preferences.[43] Rawls argues for an egalitarian moral theory which includes two main principles of just distribution, and states that citizens with different interests and backgrounds can accept these principles. I believe that Rawls's argument has a serious limitation even if applied within a stable democratic society. We can speak of an overlapping consensus on the issue of social justice when those who "lose", due to the application of the principles of social justice, are nevertheless satisfied with the situation, thus preferring to keep the agreement rather than risk losing it (on liberal institutions). For example, it is reasonable for a prosperous citizen in Sweden not to fight against a democratic decision anchored in human rights to build a mosque in his city even if he actually does not

[42] Mouffe, Chantal: *The Democratic Paradox.* Verso, London and New York 2000, chapter I.

[43] Rawls develops his idea of overlapping consensus in the lecture "The idea of an overlapping consensus" which is part of his *Political Liberalism.* In its extended editions there is a valuable answer of Rawls to Habermas's critique of the concept. See, for example Rawls, John : *Political Liberalism*, pp. 133-172, 372-434.

believe that Islam should get the same protection and support from the state as Christianity does. But in the case of an urgent social conflict where different crucial interests vie against each other and where there is no solution which seems to satisfy both sides, it is either pointless or counterproductive to speak of an overlapping consensus on political morality. I agree with those critics of Rawls who say that his overlapping consensus makes liberal society look like "a society from which politics has been eliminated".[44]As Mouffe argues,

> What Rawls's view of the well-ordered society eliminates is the democratic struggle among 'adversaries' , that is, those who share the allegiance to the liberal-democratic principles, but while defending different interpretations of what liberty and equality should mean and to which kind of social relations and institutions they should apply.[45]

My critical point is thus that already in Rawls there is a tendency to free political morality from politics as a sphere of competitive interests and competitive ideologies. Looking for a moral consensus, Rawls and those who follow him underestimate an important feature of public life, that of social conflicts. Social conflicts shape our understanding of moral norms and especially of those within political morality to a great extent. Human rights are not an exception. No interpretation of human rights is free from politics and therefore it is impossible to make a sharp distinction between *the* universally legitimate concept of human rights and its diverse practical interpretations.

One already mentioned feature of the current human rights discourse exposes it to an even greater risk of disagreement than other norms of political morality. The large number of rights formally recognized as human rights makes any agreement on how to prioritize them in conflict situations very difficult to reach. The existing agreements are the result of political compromises when states with different understandings of human rights get "their" rights into documents as a repayment for their willingness to recognize

[44] Mouffe, Chantal: *The Democratic Paradox,* p. 29.
[45] Op. cit., p. 30.

rights promoted by others. There is however no agreement on how to relate all these rights to each other in cases of conflicts between the rights. I will soon come back to the argument stating that all rights are "an interdependent and indivisible whole". But I can say now that I believe this proclamation to be no solution at all.

Among those who, like myself, believe that there is an urgent need for mechanisms for an effective handling of conflicts between different rights there are two main parties. One claims that in order to secure prioritization among the rights, we need to restrict the number of rights recognized as human rights (Michael Ignatieff and David Miller used to argue in such a way) and the other maintains that we need a principle (or a concept) which clearly shows which of the conflicting rights is the stronger one (Ronald Dworkin and Martha Nussbaum can represent this standpoint). It is also possible to combine these two options and claim that we need to restrict the number of rights, as well as find a principle for conflict resolution. Unfortunately, there is no consensus on either a minimal list of rights or a principle of how to resolve conflicts. Even such fundamental principles as that of equality and non-discrimination lack consensus on what equality and non-discrimination mean. Every attempt to suggest a strategy of how human rights should be prioritized when they collide with each other shows disagreements about what human rights are supposed to protect in the first place.

Let me take an example in order to further clarify my uneasiness about the idea of an overlapping consensus on such "abstract" norms of political morality as human rights. If we follow the argument of the proponents of the idea of a consensus, we must be ready to claim that at least the concept of non-discrimination functions as such a norm that every one is agreed upon on an abstract level, while it is possible to implement it in different practical ways without devaluing its very concept. Donnelly uses Dworkin's thesis that the very essence of the consensus on human rights is the principle of equal concern and respect, which means that the states as parties to human rights agreements promise to treat all their citizens with equal concern and respect, i.e. without discrimination.

It is true that the principle of non-discrimination is stated in all of the human rights documents as well as in many constitutions. It is even common for the states to declare non-discrimination to be a constitutive and almost obvious part of their political morality and practice. But what happens to the norm of non-discrimination if we examine how it is interpreted in practical situations marked by social and political conflicts? Within the human rights discourse the norm of non-discrimination is articulated in contrast to different forms of racism. The well-known Article 1 of the *Convention on the Elimination of All Forms of Racial Discrimination* states that

> In this Convention, the term 'racial discrimination' shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

That is why it is rather common to indicate that the human rights protecting non-discrimination are involved by pointing at the persistence of racism. Is there a consensus on the substance of non-discrimination, then? My answer is no and I believe it is important to admit the lack of consensus precisely for the sake of a more effective struggle against discrimination. As the Durban Conference against Racism (2001) and the Durban Review Conference in Geneva (2009) have shown, discussions get extremely agitated every time the parties (states and international organisations) make attempts to use the language of non-discrimination in order to influence politics. Almost everyone is ready to state that non-discrimination is important and that discrimination should be condemned as a form of racism. But as soon as the states' own political interests are involved it becomes less obvious what discrimination actually means and how it is related to racism. How to face the persistence of the caste system in India? What about the Western tendency to see Islam as violent per se and Muslims as suspicious? How to deal with Israel's politics towards Palestinians? After many

long and inflamed debates the parties of the conferences could agree upon a number of rather abstract documents which, in most cases, don't even mention the disagreements revealed by the discussions. Many scholars and practicians believe that the very fact of agreement on final documents should be seen as a success of the human rights movement. There is, of course, an important point, namely that a continuing diplomatic process is better than a conflict and therefore we shall always celebrate international agreements. But have we reached an agreement if we can not demonstrate an ability to apply it? I suppose that we will be better off if we welcome the dialogue on disagreements instead of fighting for a document proclaiming a consensus which remains a mere declaration of intent.

It is of great importance for a long-term legitimacy of human rights that their proponents venture to face the fact of disagreements within the sphere of human rights, even the disagreements on such fundamental norms and concepts as equality and non-discrimination. By the way, even Dworkin, who strongly believed that the principle of equal concern and respect is the core of human rights, had continued to argue for its relevance for the United States' politics and law for more than three decades.[46] In Dworkin's case it is obvious that he addresses the issue of non-discrimination as the very essence of constitutional rights in polemic with his political and ideological opponents. As is well known, Dworkin's opponents recognize human rights but disagree with Dworkin on the values protected by them. Therefore I hold that the idea of an overlapping consensus veils the lack of sufficient agreement beyond the formal agreement rather than suggests a strategy for handling disagreements.

How then to evaluate the actual agreements on human rights? My suggestion is that it is very important to interpret all the agreements in a way which does not conceal the persisting disagreements. Amartya Sen approaches the issue of differences within political morality in such a way. In his famous monograph *Inequal-*

[46] Dworkin's study "Taking Rights Seriously" was first published in 1977 and his last publications still included argumentation in favour of the principle of equal concern and respect.

ity Reexamined, Sen argues that, while agreeing on equal distribution as a core concept of political morality, different political traditions disagree on what it is that should be distributed equally. He claims that

> Every plausibly defendable ethical theory of social arrangements tends to demand equality in *some* 'space', requiring equal treatment of individuals in some significant respect – in terms of some variable that is important in that theory. The 'space' that is invoked does differ from theory to theory. For example, 'libertarians' are concerned with equal liberties; 'economic egalitarians' argue for equal incomes or wealth; utilitarians insist on equal weight on everyone's utilities in a consequentialist maximand; and so on. But in each system a demand for equality – in its own form – is incorporated as a foundational feature of that system. What really distinguishes the different approaches is the variation in their respective answers to the question 'equality of what?'. […] Each approach has its own interpretation of what we have been calling 'basal equality' – equality in some individual feature that is taken to be basic in that particular conception of social justice and political ethics.[47]

Amartya Sen shows that different interpretations of "basal" equality imply different understandings of inequalities that it is justified to tolerate. The obvious advantage of Sen's position is therefore its ability to uncover important disagreements. Even within liberalism itself there are persisting differences on the issue of equality according to Sen. These differences and disagreements must be discussed but it is impossible to harmonise them all in one universal concept of equality. As is well known, Amartya Sen suggests a distinctive theory of justice. For the moment I will leave the discussion on how his theory is to be evaluated when compared with other approaches to conflicting political moralities. But I believe that one of the main challenges of the current situation is to continue to elaborate on models for articulating and handling differences within the discourses on political morality.

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[47] Sen, Amartya: *Inequality Reexamined.* Harvard University Press, Cambridge MA 1992, pp. 130-131.

Human rights discourse is not an exception. We need to resist the temptation of believing in an already existing consensus in order to reach practical, efficient agreements. Such agreements must be built upon a recognition of important and sufficient differences. Additionally, there is an obvious risk that the rhetoric of consensus can be used in order to marginalise those who oppose the dominant political culture. Therefore differences and disagreements on human rights must be addressed in a way that does not exclude traditions and groups by means of the oratory of existing consensus. At the end of this chapter I shall come back to the issue of actual and potential political misuse of the idea of overlapping consensus. But let us now investigate another conceptual argument of Donnelly's, the argument stating that some elements of the human rights discourse, as presented in the Universal Declaration, can be connected to different traditions and justified on different grounds and in that sense are universal.

Universal concept with liberal substance

Donnelly uses the concept of rights that he correctly describes as substantively empty or formal. Following other Western thinkers, such as for instance Isaiah Berlin and Alan Gewirth, Donnelly stipulates:

> 'A has a right to x (with respect to B)' specifies a right-holder (A), an object of right (x), and a duty-bearer (B). It also outlines the relationships in which they stand. A is entitled to x (with respect to B). B stands under correlative obligations to A (with respect to x). And, should it be necessary, A may make special claims upon B to discharge those obligations.[48]

Continuing his elaboration on the concept of human rights, Donnelly states that these rights have three special features, namely they are equal for all human beings, they are inalienable and they are universal.[49] Then Donnelly proceeds to a substantial model

[48]Donnelly, Jack: *International Human Rights,* p. 8.
[49] Op. cit., p. 10.

which understands human rights as protecting non-discrimination and an adequate standard of living, as individual, and as interdependent. Donnelly's own theoretical justification of these features is explicitly liberal and he does not recognize any problem with it. He seems to imply that liberal justification, although "if not the best, then at least a good"[50], is one among other possible justifications. I will argue that liberal justification, at least as presented in Donnelly, forms a special understanding of rights which marginalises a number of alternative reasonable political and moral interpretations.

For the sake of clarification, I find liberalism possibly the most attractive form of political morality and ideology. What I am opposed to is a special form of liberalism which can be described as self-sufficient or non-communicative. This kind of liberalism claims that its own justification of norms within political morality is sufficient and by doing so establishes a monopoly on interpretation of those norms. One sign of self-sufficiency is the transformation of the logic of justification into apologetics. While the former (that is justification) offers arguments which support one's position within a continuing dialogue with its opponents, the latter tends to complete the argumentation in order to disarm further criticism of it.

Let us make a closer examination of Donnelly's liberal interpretation of human rights. I agree that the concept of right is formal and therefore possible to connect with many, although not all, substantial theories and ideologies. I will even go further and claim that the very core of the concept of right is the restriction of power. But what about "the substantial features" defended by Donnelly? As presented and justified by Donnelly, they do not only articulate *a* suitable interpretation of human rights, but draw borderlines in order to stop criticism coming from non-Western and/or non-liberal perspectives.

According to Donnelly, one of the main features of human rights is that only individual human beings may be their holders. Donnelly's theoretical argument is built as a complement to the

[50] Donnelly, Jack, op. cit., p. 38.

statement that universal documents already see human rights as rights of individuals. Then Donnelly argues that, since human rights are the rights of human beings and since "only individual persons are human beings, it would seem that only individuals can have human rights. Collectivities of all sorts have many and varied rights. But there are not – cannot be – human rights, unless we substantially recast the concept".[51] There is a serious communicative danger connected to the statement. If Donnelly's aim was to develop arguments in support of human rights' individualism I would not regard it to be a problem. For instance, many Western and non-Western philosophers, economists, and political thinkers do it all the time. The problem with Donnelly's argumentation is that it claims that it is "by definition" impossible to construct human rights in any other way than by applying rights strictly to individuals. What the argument actually says is that it is by definition wrong to prescribe human rights to collectives. If this is true we don't need any discussion on the issue of collective human rights precisely at the time when such a discussion is desired by many minorities in both liberal and non-liberal cultures.

Somehow Donnelly recognizes the dominant tone of his position and presents some arguments in favour of his substantial claim. In one of the last parts of his monograph Donnelly mentions seven questions which are supposed to show the difficulties in applying human rights to groups. Among them are the issues of how to identify the groups, how to identify what particular right the group would have, who exercises group rights and how to handle conflicts of rights. These and other questions are really challenging and may be approached in many different ways. Immediately after presenting the list of questions Donnelly admits that "none of these problems is fatal".[52] He recognizes that it is not impossible to suggest reasonable answers to all these questions. In spite of that Donnelly concludes by saying that "nonetheless, the above discussion does caution *prima facie* scepticism toward most group human rights claims".[53] How then to evaluate Donnelly's position? When

[51] Donnelly, Jack, op. cit., p. 25.
[52] Op. cit., p. 211.
[53] Op. cit., p. 211.

examining his argumentation we need to take into consideration that in most cases there are groups with less power (different kinds of minorities) who aspire to have human rights as groups. Their aspiration is a clear challenge to the traditional liberal view of human rights.[54] In many different forms minority rights are supported by, among others, communitarians, Marxists, post-colonial thinkers and practitioners. If we continue to stipulate that no other rights than those of individuals can be recognized as human rights we play down an important discussion and exclude the traditions which can profoundly enrich and extend the current discourse on human rights.

Instead of a firm disqualification of group rights as human rights we should open for a re-evaluation of the traditional liberal interpretation of human rights as individual rights. The most important question to be answered is how to balance group rights against individual rights when there is a conflict of rights. Starting from within the liberal paradigm we can elaborate on at least two models of approaching the issue. One moderate proposal is that of Will Kymlicka who argues that group rights function as a protection of minorities from potential threat from dominant groups. That is why it is reasonable to protect group rights in this sense. In other cases where a group aspires to use collective rights in order to limit its members' individual freedom, the rights must be refused to the group.[55] What are we to do, then, if a collective right of a minority conflicts with the right of an individual belonging to a majority? As far as I know, Kymlicka does not approach this question. But there is actually a plausible answer to it which can be built upon Ronald Dworkin's defence of affirmative action or rather the very logic of that defence.[56] If a right of an individual conflicts with a

[54] By "traditional liberal view" I mean the most common understanding of rights within the UN. However, it can be argued that minority rights were accepted and even prioritized by the UN's predecessor, the League of Nations. See Mazower, Mark: *No Enchanted Palace. The End of Empire and the Ideological Origins of the United Nations.* Princeton University Press, Princeton 2008.

[55] Kymlicka, Will: *Multicultural Citizenship: A Liberal Theory of Minority Rights.* Oxford University Press, Oxford 1995.

[56] Dworkin, Ronald: *Taking Rights Seriously.* Harvard University Press, Cambridge MA 1977. Chapter 9.

right of a powerless (or weaker) group it can be justified to protect the group by restricting the individual right.

Dworkin's strategy, as well as that of Kymlicka, assumes readiness to include advanced analysis of power in decisions about conflicts of rights; but if the most important function of human rights is to restrict the use of power in order to protect human beings, we should not hesitate to approach conflicts by means of analysing power. For example in cases similar to the case of the Danish cartoons, the purpose of which was to test whether the law protects the freedom of expression even when it takes form of offensive ridiculing of the prophet Mohammed, it should be justified to restrict the right of expression in order to protect rights of the Muslim community. The reason is that this community is a minority which for the moment is oppressed in Denmark. If a "similar" situation appeared in a country where Islam has a strong political position it would be reasonable to protect the right of free expression of the artists who challenge the norms of the dominant group. However, I believe it is possible to find ways to use Kymlicka's model for the recognition of group rights in a liberal society so that conflicts between individual and collective rights are resolved justly and effectively.

I can even think of other and more radical models for approaching the issue of group rights. If we are ready to listen to voices from societies which for different reasons are disadvantaged or have been disadvantaged within the global economy and politics, we may be justified in considering the possibility of giving high priority to the collective goals if these goals are necessary conditions for promoting the value of non-discrimination or an adequate standard of living.

Let me emphasize that my argumentation here is not constructed to definitely prove that there must be collective human rights. What I suggest is that it is counterproductive and autocratic to disable critical voices the way Donnelly does. As many other liberal Western scholars, Donnelly leans towards generalisation of others and their arguments. Elaborating on cultural differences he writes: "Consider the common claim that Asian societies are communitarian and consensual and Western societies are individualistic and

competitive. What exactly is this supposed to explain, or even refer to, in any particular Asian or Western country?"[57] Why then not look closer at thinkers and practitioners who work with cultural differences and in fact do refer to various concrete social and political phenomena? Instead Donnelly constructs a "common claim" in order to show its weakness, and answers in a similar non-specified manner: "Dutch or Norwegian politics is at least as consensual as Thai politics".[58] Generalisation is thus one of Donnelly's problematic strategies. The already mentioned appeal to definitional level is another. One understanding of human rights cannot overrule any other on the basis of a definition. Like any other construction of political morality, human rights are defined by means of actual historical challenges. What seemed to be an obvious element of human rights definition in 1948 must not be its self-evident part in 2014. Liberal humanism appeared as the strongest guarantor of peace and human security after the Second World War but it does not mean that it will always be the case. Liberal values, such as for instance individualism, are still attractive to many today, but there is no sufficient proof for the belief that in order to build a universal system for the protection of human dignity we must wait until all cultures in the world agree on the superiority of individualism.

Now I turn to a discussion about Donnelly's claim that all human rights are an interdependent and indivisible whole. Those who are familiar with the development of the human rights movement could not avoid noticing Article 5 of the Vienna Declaration (which is the final document of the World Conference on Human Rights 1993) stipulating that "All human rights are universal, indivisible and interdependent and interrelated". Jack Donnelly starts his argumentation for the belief that all human rights are an interdependent whole by quoting this article. What then does the declaration say? In Article 5 the document responds to the participants of the conference who argued that under special conditions some human rights can be disregarded. "Asian values" with their strong emphasis on communitarian aspects of human dignity and development appeared at the time of the conference and some Muslim

[57] Donnelly, Jack: *Universal Human Rights in Theory and Practice*, p. 97.
[58] Op. cit., p. 97.

countries articulated their worries about the possibility of harmonizing traditional understandings of human rights with Islam. Many Western delegates were uneasy about the very issue which reminded them of the Cold War. At that time the West was promoting political liberties and democracy while the Soviet Union and its allies argued in favour of social and economic rights. The conflict was articulated in ideological terms and created great difficulties within the United Nations' system for protection of human rights.

The reaction to the political challenge from Asia and other parts of the world during the World Conference 1993 therefore took the form of efforts to keep the traditional concept intact. "Traditional" refers to the Universal Declaration, the time before ideological differences within the concept of human rights became clear. Many delegates of the conference were afraid that new ideological conflicts can split or even destroy the human rights movement. That is why they thought it was important to stipulate that all human rights are universal, indivisible, interdependent and interrelated. I have often heard people (including conference delegates) express their great satisfaction with Article 5. "It was a victory for the whole human rights movement!" said a female Western activist to me. Her feeling of "victory" is understandable but in this case we should question it. It is reasonable to recognize the unity of human rights *prima facie* but there is an urgent need for agreement on policies which can be applied in situations of conflicts.

The thesis that all human rights *are* interdependent and indivisible prevents the proponents of human rights from recognizing the fact that human rights may collide with each other as well as with other important values. If we are looking for a practical political agreement on human rights we need strategies for resolving conflicts rather than abstract declarations about the unity of all human rights. I totally agree with Leonard Wayne Sumner who states that besides "telling us which rights anyone has, who has them, and against whom they hold […] rights have a fourth dimension […], namely their strength. Clearly a right is not worth taking seriously

if it is incapable of resisting many, or any, rival considerations (whether rights or other factors)."[59]

Why then don't we confront the problem? I believe that the international community does not face the need for principles of handling conflicts of rights precisely because such a discussion would unveil disagreements about the very meaning of human rights. To argue that one right must go further than others demands a clarification of the grounds on which priorities are based and thus shows the lack of agreement about what human rights protect in the first place. If we look at the approaches which seek to articulate strengths of human rights we are faced with the fact that these approaches have different ideological, cultural and other grounds. When Ignatieff claims that the list of human rights must be reduced in order to clarify how to handle situations of conflicts, he immediately admits that only the rights protecting individual freedom of choice (human agency) are worth being called human rights. It does not take much to see that even Ignatieff's understanding of free choice is explicitly liberal and contrary to the communitarian understandings of human freedom.[60] Dworkin, although within the Western liberal discourse, argues in favour of the egalitarian principle as the very foundation of human rights, and strongly rejects the possibility of claiming liberty as a right on its own.[61] In addition, there are various communitarian understandings of human rights which often underline the importance of social dimension in human life and challenge liberal discourse by warning against strong individualism as it is an obstacle to human solidarity. Even post-colonial approaches to human rights stress the social dimension and enrich the discourse by paying attention to class differences which must be dealt with in order to treat human beings as equals.

These and many other examples show that "all human rights are interdependent and indivisible" only *prima facie.* But in most situations when people need protection in terms of human rights there is

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[59]Sumner, L. W.: *The Moral Foundation of Rights.* Clarendon Press, Oxford 1986, p. 12.
[60] Ignatieff, Michael: *Human Rights as Politics and Idolatry*, pp. 55-58.
[61] Dworkin, Ronald: *Taking Rights Seriously.* Chapter 12.

also a need for transparent priorities between different claims. Priorities can be made on different grounds and thus uncover sufficient differences within the very concept of human rights. Therefore, the current situation calls for more attention directed towards different understandings of the concept of human rights rather than for a continuing defence of the consensus on the list of rights.

Open universality and self-restriction of power

I have been arguing against the liberal defence of the universality of human rights. My critique has not been directed against liberalism as such. Instead it questions one specific form of liberal justification of human rights universality, the form I call non-communicative or self-sufficient liberalism. What are the consequences of the criticism suggested here? Does it mean that there are no universal human rights? Should we give up the very project of universality? My critique of self-sufficient liberal understanding of the universality of human rights does not imply a rejection of universality as such. Rather, it implies a challenge to propose a modified understanding of universality and its justification. This alternative universality can be described as an *open universality*.

Open universality is explicitly normative, which means that it is justified as a morally regulative idea rather than a factual, political or legal practice or agreement. Universal human rights are understood as a goal we can neither reach nor give up. The belief that all human beings have some inalienable rights is vitally important because it empowers people (both individuals and collectives) to try to get their legitimate claims respected. At the same time, any formulation and practice of human rights, including those of international treaties, can only be seen as an approximation of universal human rights. Open universality would protect every possible articulation or practice of human rights from perceiving itself as non-political and thus immune to corruption and misuse.

Open universality of human rights is similar to Jacques Derrida's understanding of the concept of justice. He suggests such a normative concept in his famous lecture "Force of Law: The 'Mys-

tical Foundation of Authority'".[62] Elaborating on the issue of what makes law just and justice possible, Derrida rightly claims that it is precisely the normative idea of justice as non-forced justice as well as justice which must work and therefore be en-forced, in other words justice which people long for but never can possess. Therefore the very aim of deconstruction within the discourse on justice would be to secure justice by deconstructing its "reach-ability". Derrida writes:

> […] deconstruction takes place in the interval that separates the undeconstructibility of justice from the deconstructibility of *droit* (authority, legitimacy, and so on). It is possible as an experience of the impossible, there where, even if it does not exist (or does not yet exist, or never does exist), *there is* justice.[63]

Derrida's examination of the concept of justice is applicable to human rights for several reasons. One is the context of the lecture on deconstruction and justice. It was delivered at a symposium devoted to critical legal studies at the Benjamin Cardozo School of Law, which is a school strongly emphasising the need for a critical evaluation of law theory and its methodological foundations. This approach is highly relevant for human rights which are positive rights built upon an explicitly moral foundation. Another reason is the very dialectics of Derrida's lecture. He seeks to deconstruct every assumption of an "already possession" of justice as a potentially corrupt justice. Justice *is* just as long as it uncovers injustice. Justice disappears at the very moment someone claims that his action, decision, policy, or interpretation *is* just. The same can be said about universal human rights. They are universal in the sense that their universality blocks every attempt to claim that any particular articulation or practice of human rights *is* universal. Human rights are universal because their universality guarantees that no politics, law, or morality of human rights is ever sufficiently universal.

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[62] Derrida, Jacques: "Force of Law", in Cornell, Rosenfeld, and Carlson (eds.): *Deconstruction and the Possibility of Justice.* Routledge, London and New York 1992, pp. 3-67.
[63] Op. cit., p. 15.

Derrida's elaboration on the relation between (political) force and justice shows similarities with the logic of the human rights discourse. In order to improve the human rights situation it is necessary to use political power as well as the force of law. At the same time it is obvious that the very use of power and force, the use we can never escape, makes every practice of human rights problematic. That is why it is of crucial importance to continue to discuss the universality of human rights in terms of political morality. Human rights are morality because their appeal lies in a moral vision of human equality and human dignity. Human rights are politics and therefore exposed to the risk of political abuse. As law, human rights include a moral dimension as well as political and ideological ones. It is impossible to escape this dialectics even if it is tempting to believe that human rights law genuinely operates the morality of human rights. In other words, the universality of human rights must be understood and used in order to prevent every attempt to de-politicise the discourse of human rights. Open universality means a clear recognition of the political and therefore a possibility of moral and legal critique of every politics as possession of or desire for power.

What are the practical implications of arguments in favour of an open universality of human rights? The most obvious one is the need for a re-evaluation of the value of self-restriction of power. The more human rights enter the common moral political language of legitimacy, the greater is the risk that those who posses political (and other forms of) power will try to use human rights in order to legitimize power-possession rather than to protect people. That is why we need mechanisms to reinforce the universality of human rights as an instrument for an effective control of power.

The open universality proposed here fits the human rights discourse because it has an important congeniality. As far as human rights remain the instruments for the protection of human beings in terms of the self-restriction of power, it is important to make the moral, political and legal culture of human rights self-immune to autocratic domination. The arguments of this chapter suggest that in order to prevent devaluation of human rights we need to recognize that even the liberal understanding of human rights is exposed

to the risk of autocracy and domination. It is not possible to free human rights from the risk of abuse and therefore it is important to keep their universality open and try to detect and disarm dominant tendencies even if they appear in such an attractive form as that of a liberal justification of the universal consensus on human rights.

Chapter III

Universal or Corporeal Reason?

On the Russian Critique of Western Rationalism and its Political Relevance

Reason and rationality are central concepts in Western philosophy, as well as important cultural markers. Describing something as "rational" implies acceptance, while the opposite of rationality is viewed as problematic. At the same time, Western philosophy, Western political thought, and sometimes even Western culture as a whole can be perceived as rationalistic. It is not unusual that people distance themselves from the West by dissociating themselves from rationalism. In the context of the so-called return of religion to the political sphere, the issue of rationalism and its limitations assumes a central role in the reaction against Western cultural imperialism. While this reaction takes many forms, it is often directed against a liberal culture that is perceived as simultaneously rationalistic and dominant.

Historically, the rationalism of Western culture has been bound up with the moral passion of an Enlightenment that proclaims free reasoning to be the main tool of human liberation (*Sapere aude!* Have the courage to use your own reason!). But what is free reasoning? How does reason liberate and when does it become dominant and thus oppressive? The latter question has particular urgency in the present moment when Western rationalism is being identified by many critics as part of an unjust colonial policy towards non-Western cultures. This critique is important and calls for a careful response. One way to formulate such a response is to heed

the criticism in order both to re-evaluate different forms of rationalism and to suggest alternatives in a dialogue with its critics. Alas, Western philosophy and Western political culture have traditionally been poor listeners. Indeed, it may well be that belief in the possibility of monological reasoning is itself an inherent characteristic of rationalism.[64]

This chapter will argue that the current Western discourse on rationalism is insufficient because it continues, even when trying to respond to this critique, to define rationalism exclusively within the boundaries of Western experience. In order to understand the shortcomings of rationalism as well as to acknowledge its strength we need to learn more about different forms of contextual critique, including the rejection of rationalism. It is not unusual for such criticism to be based upon non-liberal religious traditions. The aim of this chapter is therefore to explore one such criticism, namely Russian scepticism towards Western rationalism. What exactly is the basis of this critique, and to what extent is it justified? How can the Russian critique illuminate current discussions of the content and forms of Western rationalism?

As represented by its Russian critics, "Western rationalism" is of course a construction whose main function is as a tool for creating Russian political and cultural identity. As a result, Russian accounts of the Western philosophical tradition often lack historical and theoretical nuance. However, I believe it remains possible to draw on the Russian construction of Western rationalism in order to articulate and scrutinize some features of the rationalistic discourse.[65]

The starting point of this chapter is the critique of Western rationalism advanced by Gianni Vattimo. Vattimo views rationalism as a part of the European philosophical and cultural heritage.

[64] There are philosophers in the West who understand reasoning as connected to the notion of dialogue. Nevertheless, it is possible to argue that the notion listening to the other as a crucial feature of every effective dialogue has been marginalised in the Western philosophical tradition.

[65] In my monograph on the Russian critique of Western rationalism, I argue that the Russian critique creates different concepts of reason that are derivative of the criticism of rationalism. See Namli, Elena: *Kamp med förnuftet. Rysk kritik av västerländsk rationalism.* Artos, Skellefteå 2009.

Moreover, he believes that this rationalism goes a long way towards explaining the violent character of Western thought. In what follows Vattimo's will be related to the scepticism towards Western rationalism expressed in the writings of three well-known Russian thinkers: Fyodor Dostoevsky (1821-1881), Lev Shestov (1866-1938), and Mikhail Bakhtin (1895-1975). As will be seen, the Russian critique, though theological in nature**,** can make an important contribution to the ongoing theoretical and political debate over the issue of rationalism. This discussion is of vital importance for an international human rights politics that often disregards the substantial differences in moral reasoning. The chapter will offer a revised notion of practical reason that is capable of overcoming the domineering character of the rationalism inherent in the European cultural heritage, and thereby recovering the moral and political potential of the ideal of self-sacrifice.

Reason as liberating and universal

One of the most fundamental assumptions within Western rationalism is that reason is the greatest force of universal liberation. However, when we examine the historical roots of this common belief, we recognize that the link between human freedom and the universality of reason in fact came rather late and is clearly contextual. Additionally, we may note modern rationalism implies a culturally specific understanding of human freedom and well-being.

The thesis that human reason is universal may be easily found in the classical European philosophical tradition. In the works of Plato, St Augustine, and Thomas Aquinas there is a clearly articulated idea that when human beings exercise their capacity for reasoning properly, they do so in a universally valid way. This depends on how the world is structured. God, gods, or Nature "created" the universe in a reasonable way (described as natural order, or law) and what our reason does is neither more nor less than grasp this given order. When it comes to freedom, the picture becomes rather complicated. Christian thinkers such as St Augustine and Thomas Aquinas assert that human liberation is liberation from sin and

death (towards happiness and immortality) and that the only way to realise it is to seek unity with God. Understanding and believing are two different practices, but they have one and the same purpose: human salvation. Accordingly, Christian thinkers traditionally did not view God, God's revelation, and reason as opposites. Reason, as well as revelation and, with it, Church tradition, were understood to be a form of liberation to join with God.

By contrast, Plato believed that gods can think and act in ways that are counter to reason, something that required human beings to reason critically when dealing with gods and religious tradition. It should be emphasized that Plato did not expect reasoning to make people happy. Philosophical reasoning liberates only to a state that does not correspond to freedom in the modern sense of the term. As is well known, Plato maintained that philosophy is a practice of learning how to die.[66]

To retell the history of "universal and liberating" reason lies beyond the scope of this essay. What I would like to emphasize is, rather, the fact that the familiar components of the current Western understanding of reason came together at a precise historical moment and that their very combination is contextual. The Enlightenment is often viewed as a discourse which established the modern idea of liberating universal reason. Human beings are now viewed as seeking freedom by means of reason. This reason is universal and what it liberates from is, first and foremost, an external and potentially coercive authority (of the Church, tradition, and so on). Such liberation is, moreover, tied up with the increasing well-being of humanity.[67]

As a preliminary step, let us examine this combination – namely, the view that universal reason liberates people from coercive authorities to freedom and well-being – as a peculiarly Western definition of rationalism. There are obvious political advantages to this kind of rationalism, among the most important of which are the legitimization of the critique of tradition and the defence of the

[66] This idea is clearly articulated by Plato in *Phaedo.*

[67] This description of the Enlightenment can be questioned. However, fuller discussion of scholarly understandings of the Enlightenment lies beyond the scope of this article.

moral ideal of equality. However, this historical form of rationalism also presents a number of challenges. As already noted, one of the most serious of these is the monological and self-sufficient nature of "universal reason". Put baldly, it means that Enlightenment reason is the same for all people, regardless of their cultural and social background. In order to become free, human beings need to have access to *the* proper way of reasoning. It is not difficult to see the dangers inherent in this logic. One of the gravest of these is the risk of cultural domination that lends itself to the exercise of political power.

Gianni Vattimo, one of several European philosophers who are looking for alternatives to Western rationalism, describes this phenomenon as "violent reasoning". He claims that "violence is the fact of shutting down, silencing, breaking off the dialogue of questions and answers."[68] Vattimo believes that there is a connection between rationalism and what he describes as the metaphysics of ultimate foundations. He defines this metaphysics as "the violent imposition of an order that is declared objective and natural and therefore cannot be violated and is no longer an object of discussion."[69] For Vattimo, logical necessity reigns in the domain of foundationalist metaphysics. When he describes Derrida and Rorty as thinkers of postmetaphysical philosophy, Vattimo emphasizes that neither of them ever theorizes the "logical" necessity of the topics they raise for discussion.[70]

There is of course no single definition of rationalism, but what is special about Vattimo's understanding of it is his view of rationalism as connected to both ethical universalism and metaphysics. It is even possible to say that Vattimo often uses rationalism, metaphysics of foundations, and ethical universalism as synonyms. Since Vattimo accuses thinkers such as Habermas and Apel (as well as many other contractarian thinkers) of metaphysical founda-

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[68] Vattimo, Gianni: "A Prayer for Silence", in Caputo, John D. and Vattimo, Gianni: *After the Death of God.* Columbia University Press, New York 2007, p. 93.
[69] Ibid.
[70] Vattimo, Gianni: *Nihilism and Emancipation. Ethics, Politics, and Law.* Columbia University Press, New York 2004, p. 24.

tionalism,[71] it follows that he regards the very idea of universal reason as "metaphysical":

> It is not hard to see that the universality and ultimacy of principles are the same thing: an ultimate foundation is one for which no conditions can be adduced that in turn found it; it can only present itself as an absolute truth that no one should be able to refuse (*except* with an unfounded refusal, a pure irrational act).[72]

Vattimo is here using "irrational" as the cultural marker of an immoral act directed against principles understood as universally valid. It is not just metaphysics as thinking about the structure of being that troubles Vattimo. Fighting against "metaphysics", he rejects a universal ethics of first principles in any form. For him, both the natural law tradition and universalistic forms of contractarian ethics are philosophies of first principles and thus a form of foundationalistic rationalism.

It may be asked whether the contractarian ethics of, say, Jürgen Habermas can reasonably be interpreted as a form of foundationalism and metaphysics. Vattimo tends to overlook substantial dissimilarities between different forms of rationalism, an issue to which we will return. However, Vattimo's critique of rationalism, which he links to the metaphysics of first principles and its claim to universality, is interesting in that it questions a central normative assumption of modern Western culture, namely its belief in universal reason as liberating. What Kant and many other proponents of Enlightenment reason regarded as a liberating force is identified by Vattimo and other postmodern critics as an instrument of domination. How should we account for this?

The underlying nature of the controversy is easily appreciated when one examines the historical basis for each standpoint. Where Enlightenment philosophers sought liberation *from* the Church and tradition *to* acting freely as independent individuals, Vattimo views reason as a means for one culture to dominate others. Where Enlightenment philosophers tried to free themselves as rational indi-

[71] Vattimo, Gianni, op. cit., p. 27.
[72] Op. cit., p. 38.

viduals from their own authoritative tradition, their successors today believe that they can liberate other people from their traditions. It is for this reason that Vattimo is sceptical about the possibility of a non-contextual universal reason. On his view, tradition cannot be transcended; there is no such thing as a universally valid rational order that can justifiably be imposed on others.

This critique of Western universalism is attractive in the light of the post-colonial experience insofar as it helps to expose imperialistic policies beneath the rhetoric of universality.[73] But what are we left with if there is neither universal reason nor ultimate foundations? According to Vattimo, what "we are left with" is a cultural heritage that must be interpreted *responsibly*. The question that arises is what this responsibility means and how it relates to the discourse on rationalism. Vattimo rejects the universal reason of foundationalism but without advocating irrationalism or total relativism as an alternative. Discussing the issue of how it is possible to justify social norms, he writes:

> Seen for what they are, a cultural legacy and not nature or essence, such rules can still hold good for us, but with a different cogency – as rational norms (recognized through dis-*cursus, logos,* reason: through a reconstruction of how they came about), rid of the violence that characterizes ultimate principles (and the authorities who feel themselves entrusted with them). Whether or not they still hold good is something to be decided in light of the criterion that, with a responsible interpretation, we take to be characteristic of whatever 'really' forms part of the legacy to which we feel ourselves committed.[74]

In this passage Vattimo can be seen to replace universal reason with hermeneutical reason[75] as well as defining freedom as primarily freedom from violence. Precisely at this point in Vattimo's ar-

[73] Many postcolonial thinkers have argued that the "universality" of Western practices of human rights, democracy, and gender equality is often used to suppress the social and political activities of marginalised people around the world. See for example Mohanty, Chandra Talpade: *Feminism without Borders: Decolonizing Theory, Practicing Solidarity.* Duke University Press 2003.
[74] Vattimo, Gianni: *Nihilism and Emancipation. Ethics, Politics, and Law*, p. 46.
[75] Reason as a responsible interpretation of its own historical and cultural heritage.

gument I become suspicious of its content. Vattimo claims that "violence […] is the fact of no longer permitting the other to ask questions."[76] In the first place, is preventing someone from asking questions really a form of violence that warrants much attention when compared with other more immediate and real everyday forms of violence? This, I fear, is more a concern for philosophy professors than it is for the populations of the post-colonial world. Second, and more importantly, both the meaning and the very expression of Vattimo's thesis are connected to the self-image of a member of the dominant culture. Formulations such as "no longer *permitting* the other" derive from the analytical viewpoint of someone who already occupies a position of power.

My intention is not to reject Vattimo's critique of Western rationalism. Rather, I would like to suggest that it suffers from the weakness it rightly seeks to overcome. In order to transcend the view of Western reason as universally valid and thus potentially coercive, we need to complement the hermeneutics of this reason (insight into its *own* contextuality) with careful investigations of how this reason has been criticized from the standpoint of the oppressed and marginalised, who neither perceive themselves as having the power "to permit the other to ask" nor see preventing others from asking questions as the main form of violence.

Reason betrays suffering

The critique of rationalism has long been an important part of Russia's national project of independence from the West and "Western liberalism". It takes many forms, but for the purposes of this essay I will focus on that articulated in the writings of Dostoevsky, Shestov, and Bakhtin. These three thinkers remain very influential in Russia. More importantly, their insights into the character of Western rationalism have the potential to profoundly challenge and enrich the current philosophical and political debates over rationalism.

[76] Vattimo, Gianni: "A Prayer for Silence", p. 94.

Fyodor Dostoevsky is Russia's greatest writer and his criticism of the West has been extensively discussed. I will emphasize only two strands within this body of criticism. The first is the idea that Western rationalism reduces human freedom to the freedom to make rational choices. The second is the idea that this same rationalism serves as a means for offering an immoral justification for suffering. In *Notes from Underground* (1864), Dostoevsky clearly shows his dissatisfaction with the notion of freedom as freedom to make rational choices. My own view is that the essay can be read as a polemic against Immanuel Kant's (Enlightenment) view of freedom as autonomy. While Kant believes that human beings are free if their will is bound exclusively by reason (moral law), Dostoevsky's hero from the underground claims that free will must be unbound volition. In the following famous passage we are told:

> But I repeat to you for the hundredth time, there is only one case, one only, when man may purposely, consciously wish for himself even the harmful, the stupid, even what is stupidest of all: namely, so as *to have the right* to wish for himself even what is stupidest of all and not be bound by any obligation to wish for himself only what is intelligent. For this stupidest of all, this caprice of ours, gentlemen, may in fact be the most profitable of anything on earth for our sort, especially in certain cases.[77]

As I have argued elsewhere, Dostoevsky opposes Kant by claiming that morality requires freedom, and that all forms of conformity to law and necessity eliminate freedom and thus also morality. One side of this anti-Kantianism is voluntaristic in nature. The protagonist of *Notes from Underground* rejects freedom if it is merely the freedom to choose between pre-assigned alternatives. Genuinely free will must be independent of any external authority, inclusive that of reason. Another aspect of the critique connects the ideal of freedom as a will bound by reason alone to rationalism understood as a means for reducing the problem of suffering to a speculative issue. What the hero from underground revolts against is the very possibility of the calculation (making theory) of suffering, "the

[77] Dostoevsky, Fyodor: *Notes from Underground.* Translated by Richard Pevear and Larissa Volokhonsky. Vintage books, New York 1993, p. 28.

chaos and darkness and cursing" in Dostoevsky's own words. In his late novels, and most clearly in *The Brothers Karamazov*, Dostoevsky develops an advanced critique of rationalism as a practice of distancing oneself from the despair of meaningless suffering. In short, Dostoevsky's idea is that Kantian and Enlightenment reason liberates people from authoritative power but also from the responsibility for such suffering which can "reasonably" be described as unavoidable (that is, as suffering about which nothing can be done). One of Dostoevsky's favourite examples of this kind of suffering, and of the rationalists who avoid it, concerns a respectable physician talking reasonably to a dying child's parents, whom he tries to calm by proving that there is nothing more to be done:

> 'Doctor, doctor! But don't you see!' the captain again waved his hands, pointing in despair at the bare log walls of the entryway.
>
> 'Ah, that is not my business,' the doctor grinned, 'I have merely said what science can say to your question about last measures. As for the rest … to my regret …'[78]

Trying to understand the destiny of European culture, Thomas Mann often resorted to Dostoevsky's contrast between the calm of the reasonable physician and the compassion of the despairing relatives. One of the most famous examples is *Doctor Faustus* (1947), in which Adrian Leverkühn loses his mind while sharing the despair felt by the parents of a dying young boy. A Dostoevskian contrast to Leverkühn's madness is represented by the figure of a calm and rational physician.

But what is wrong with a doctor who does not despair when confronted by unavoidable death and suffering? Is it not right to use all of one's energy for doing good in the realm of the possible, rather than fighting against that which lies beyond one's power? Dostoevsky disagrees, and offers an explanation: our experience of suffering is far more extensive than our experience of controlled, safe life. The honest person therefore has a duty to remain within

[78] Dostoevsky, Fyodor: *The Brothers Karamazov.* Translated by Richard Pevear and Larissa Volokhonsky. Farrar, Straus and Giroux, New York 1990, p. 560.

the realm of suffering and not to flee to such issues that can be dealt with rationally. By "dealt with rationally" I have in mind practices which do not require any struggle against necessity (a given and imposed order). As is well known, Dostoevsky's protagonists usually do precisely this; they struggle against what rational people recognize as necessity. Dostoevsky's characters are neither calm nor rational. Instead, they always remain in the realm of suffering, fighting against what seems to lie beyond any control.[79]

It is not difficult to sympathize with the pathos of the Russian writer. To reject rationalism when it justifies escape from the despair of suffering is an important task. There is also a significant social aspect to Dostoevsky's dissatisfaction with rationalism. It is often in relation to the situation of the powerless and the oppressed that the impossibility of reducing suffering takes on the aspect of a rational insight. But what positive program can be built upon this rejection of rationalism? While looking for such a program within the heritage of Dostoevsky I realise that it is of an explicitly religious nature. For Doestoevsky, it would seem, the Enlightenment's universal reason can liberate but only within the parameters of that which can be controlled. In situations of powerlessness, suffering, and despair, other strategies are available. My reading of Dostoevsky posits that he offers his own answer to the challenge of rationalism in the idea that everyone should recognize his radical and primary responsibility for everything and before everyone. "[E]ach of us is guilty in everything before everyone, and I most of all"[80] is the famous chorus of *The Brothers Karamazov.* This tenet derives from Dostoevsky's interpretation of what he believed to be the main message of Christianity as practiced by ordinary Russians. As he saw it, the Russian people are capable of a self-sacrifice and a solidarity that transcend the rationalism of the West.

It should be noted that Dostoevsky's belief in the Russian people's exclusive role is a form of nationalism and thus problematic on several counts. Even so, the moral philosophical content of what

[79] It is important to highlight that this struggle was Dostoevsky's philosophical project; as a private person he neither disliked rational people nor hated well-ordered life.
[80] Dostoevsky, Fyodor: *The Brothers Karamazov*, p. 289.

Dostoevsky saw as a very special capacity for self-sacrifice is thought-provoking. Self-sacrifice is connected to liberation (or paradise, in the logic of *The Brothers Karamazov*) because the recognition of one's own radical responsibility transforms morality. From being a theoretical issue of the justification of suffering in Ivan's westernised logic, it becomes Alyosha's morality of action.

Alyosha's philosophy of responsibility contradicts rationalism (here understood as the refusal to engage with suffering, and its theoretical justification) in that it views responsibility as the starting-point of moral action rather than its consequence. Whenever I encounter suffering, I must act as if I were solely responsible for it. According to Dostoevsky, Western rationalism is guilty of transforming suffering into an object of theoretical discourse, mainly by explaining it and thereby attributing meaning to it. Dostoevsky's characters are fighting suffering by denying that it has meaning, and, in this way, moving from speculation to engaged practice. There *is* no meaning in suffering and therefore it is not possible to justify a morality that refuses to engage with suffering. By taking moral responsibility for a meaningless world of suffering, however, human beings can create meaning, morality, and freedom.

As already mentioned, Dostoevsky drew on the Christian tradition in order to articulate a theory of radical responsibility. In *The Brothers Karamazov*, the elder Zosima and Alyosha believe that as soon as we act as if we are responsible for the other we can experience the presence of God and therefore paradise. Neither the well-being of modernity nor future compensation of Ivan's critique of religion, this paradise is more precisely the ability to sacrifice oneself for the other. As I read Dostoevsky, self-sacrifice as a means of reaching paradise can be understood as genuine solidarity with God and other human beings. While rationalism, as understood and criticised by Dostoevsky, can always find reasons for shirking its responsibilities to the other, Christian ethics ("of the Russian people") permits itself no such excuses. The crucial difference lies in how they evaluate the self. The self ("I") that Western modernity regards as its most important value is seen as a derivative value in the Russian tradition described by Dostoevsky.

It is important to emphasize that this apologetics of self-sacrifice has been rightly criticised by a great many commentators. Its critics (not least Marx and Nietzsche) usually stress the risk of misuse of the ideal, a misuse that justifies the suffering of the oppressed instead of encouraging them to revolt against their oppressors. However, such critics miss an opportunity to understand and practice self-sacrifice as a liberating force and thus to differentiate it from the ideal of self-sacrifice as a tool of social and political domination. To remedy this oversight we need to adopt a different framework for morality and practical reasoning, one that can be found in the writings of Russian philosopher and literary scholar Mikhail Bakhtin.

Seeking an alternative to the rationalism of Kant's moral philosophy, and taking inspiration from Dostoevsky, Bakhtin proposes a sharp distinction between theoretical and practical reason.[81] While the former operates within the realm of general and even universal laws, the imperatives of the latter cannot be generalised. The reason why involves what Bakhtin calls the unique position of the "I" within the sphere of moral responsibility. According to Bakhtin, understanding the uniqueness of moral rationality demands an understanding of the phenomenology of the human act as an act of responsibility. Because theoretical reason operates according to general laws, it views universality as the most stable criteria; practical reason needs different tools in order to explain the human act of responsibility, something not yet performed but experienced as *ought* to be performed.[82]

This act can be understood only if we recognize the difference between three phenomenological positions: I-for-myself; the other-for-me; and I-for-the other. Only the I-for-myself is a position of responsibility. Bakhtin's explanation is that I-for-myself occupies a unique position by virtue of being a position that no*body* else can occupy at the same time. Responsibility is thus created through the

[81] In his early writings, Bakhtin states that he intends to complete the project which he believes was justly initiated, but unfortunately abandoned, by Kant, namely, to discriminate between practical and speculative reason. Bakhtin, Mikhail: *Toward a Philosophy of the Act.* Translated by Vadim Liapunov. University of Texas Press, Austin 1993, p. 28.
[82] Bakhtin, Mikhail: *Toward a Philosophy of the Act*, pp. 26-30.

recognition of this position and through the recognition that nobody else can act from this position. It is worth emphasising that Bakhtin does not believe in the Cartesian "I" whose existence is a precondition of all knowledge and all actions. Instead, Bakhtin thinks that I-for-myself is fundamentally incomplete and that the nature of moral duty (the "ought") can be understood as a form of this incompleteness. I-for-myself is not given (in contrast to I-for-the other and the other-for me), it exists as a task; it is a creation of its own responsible (and always future) acts. Bakhtin writes:

> I-for-myself constitute the center from which my performed act and my self-activity of affirming and acknowledging any value come forth or issue, for that is the only point where I participate answerably in once-occurrent Being; it is the center of operations, the head-quarters of the commander-in-chief directing my possibilities and my ought in the ongoing event of Being. It is only from my own unique place in Being that I *can* and *must* be active. My confirmed and acknowledged participation in Being is not just passive (the joy of being), but is first and foremost active (the *ought* to actualize my own unique place). This is not a supreme life-value that systematically grounds for me all other life-values as relative values, as values conditioned by that supreme value.[83]

Bakhtin claims that there is no I-for-myself existing in itself as a given value; rather, there is a possibility of being, an event of being (*sobytiie bytiia*) which can and must be performed by the I-for-myself from its unique place in the being (to come). The ethics which Bakhtin constructs is not a system of rules or values. Instead, it is a phenomenological description of the act of radical responsibility.

How does this ethics of responsibility, with its peculiar understanding of practical rationality, clarify the issue of self-sacrifice? My own view is that one defensible answer to the question of how to discriminate between a liberating and an oppressive ideal of self-sacrifice is to be found Bakhtin's prohibition of generalisation within the realm of the morality of radical responsibility. Because moral responsibility is connected to the unique position of I-for-

[83] Bakhtin, Mikhail, op. cit., p. 60.

myself in being, it is not possible to formulate the expectation of radical responsibility as directed to someone else (everybody, anybody). Only from the first person perspective is it possible to experience and articulate self-sacrifice as a moral duty. While the rationalistic ethics of Kant and the Enlightenment recognize only such moral norms as can be universally applied, the ethics of radical responsibility problematises the compatibility of moral positions and, with it, the formal and general description of moral norms.

Bakhtin believes that Christian ethics as presented in the narratives about Jesus Christ clearly discriminates between the three phenomenological positions and therefore does not allow generalisation of radical responsibility and of self-sacrifice. Bakhtin contends that in the Biblical image of Christ we find a unique "ethical solipsism", i.e. a radical moral demand directed at oneself on the one hand and, on the other, unending mercy towards the other. According to Bakhtin, the morality of the Gospel cannot be formalised because it discriminates between norms as applied to either "I" or the other.[84] Only in relation to "I" in the first person perspective does Christ formulate the norm of self-sacrifice. When asked about how to judge other people, he always encourages love and mercy. Whether Bakhtin's reading of the Gospel is tenable can be discussed. However, his interpretation of Christian ethics is very productive, thanks to his efforts to isolate the self-sacrifice as only applicable to the I-for-myself.

Let us summarize the discussion so far. The writings of Dostoevsky and Bakhtin offer a challenge to what they define as Western rationalism, which they describe as a means of distancing oneself from moral responsibility for suffering that lies beyond one's control. Such distancing implies recognition of the moral value of self-preservation; it also questions the ideal of self-sacrifice. Dostoevsky redefines human freedom and liberation as liberation towards solidarity with other people, thereby reclaiming the moral value of self-sacrifice. Dostoevsky's vision of radical responsibility is built

[84] Бахтин, Михаил: *Автор и герой в эстетической деятельности.* По изданию Бахтин: *Собрание сочинений.* Издательство русские словари, Москва 2003, том. 1, p. 133.

upon another kind of rationality than that of Enlightenment rationalism. While the latter presupposes that all moral norms can be equally applied to everyone, viewing universality as a basic criterion of practical reason, the former discriminates between the phenomenological positions of "I" and the other, and questions the meaning of formal ethics.

How to choose, then, between these two kinds of ethical discourse? I believe that one and the same type of rationality takes on a different appearance when applied to different kinds of experience. The formal Kantian ethics functions properly if it is applied in circumstances which are controlled and experienced as meaningful. In times of great crisis, despair, and loss of meaning, there might be a need for another kind of rationality. This rationality does not presuppose a given meaning (law, necessity). Instead, it demands of human beings that they act as if responsibility for suffering rests solely with them. As I have argued, this rationality can function properly only if applied from a strictly first-person perspective.

Is contextual reason solipsistic?

As we have seen, Dostoevsky's ethics of radical responsibility is explicitly religious. While rationalistic Enlightenment ethics aspires to be universally applicable, the ethics of radical responsibility is constructed by means of an interpretation of Christian heritage. This used to be seen as a reason for preferring the universalistic ethics. In theoretical discourse and politics alike, universal norms are regarded as stronger than contextual norms. In those cases where universally formulated norms (such as human rights) are in conflict with contextual values it is warranted to overrule contextual norms in order to secure universal norms. The rationales for such an approach will vary. I have already mentioned Kantian formalism; other strategies include denying contextual values any reasonable meaning by seeing them as a means for those in power to dominate ordinary people (such a strategy is often used when it comes to Asian values, Islamic moral teachings, and so on).

Let me point out that I am not questioning the urge to identify universal norms. These are an undeniably powerful tool for critiquing conventional morality and politics. What I find problematic is the attempt to articulate these norms without any recognition of the fact that every attempt to find universal norms necessarily proceeds from a historical context. Contextuality can take many forms, and while it may be minimized by means of self-critique, it cannot be entirely eliminated. As Vattimo and others argue, human reason cannot transcend its own heritage without destroying itself. Western rationalism is in search of universality, and this very fact is historically specific and bears witness to Western experiences of liberation as well as domination. Enlightenment reason does liberate individuals from oppression by traditions and authorities, but it, too, is guilty of the rationalism that justifies suffering and suppresses other historical forms of liberation.

What are the alternatives? I believe that there is at least one tenable meaning of the universalism of practical reason: Bakhtin was right to strongly emphasize the practical character of morality and moral reasoning. Theoretical reason operates with criteria of general and even universal claims that in some way relate to existing states of affairs. Practical reason must function within the domain of moral imperatives for human actions and therefore treat universality as an operative ideal which no one has ever attained in reality. Practical universality is meaningful as a tool for critiquing one's own tradition. It inspires people to articulate their own traditional beliefs in such a way that others can understand them and relate to them. But just when we believe we have found a universal language for morality, universalism reveals its dark side.

For historical reasons, it is a secular ideology – liberalism – that today announces its possession of universal norms. Potentially there are both secular and religious traditions that can regard themselves as having universal value, and, more to the point, can behave as such. My own view is that holding political, social, or economic power often encourages violent universalism. Indeed, there is an understandable temptation to experience one's dominant position as proof of a kind of "cultural success" and to see it as grounds

for imposing one's own norms and mode of reasoning on others. Accordingly, I would argue that the more power a tradition possesses, the more cautious it must be when making universalistic claims. It may even be the case that the most powerful actors should only use universalism as a vehicle for self-critique.

So far I have been arguing that for those looking for universal practical reason it is important not to make the mistake of thinking that it has already been found. It is equally important that we not remain satisfied with moral traditions as they are. Because the ritual aspects of religion make it more amenable to conservatives, it is essential that we examine religious traditions in order to identify their moral potential as well as their shortcomings. While this work can be only pursued from within traditions, it does not mean that those traditions should thereby isolate themselves. On the contrary, the constructive potential of a tradition requires trans-contextual examination and should inspire dialogue. When looking for an example of a religious critique of rationality and rationalism that both recognizes its traditional heritage and seeks to communicate across contextual borders, I think of Lev Shestov, a Russian-Jewish philosopher and one of the most famous personalities of the Russian émigré community in the twentieth century.

Shestov's philosophical project was devoted to the critique of a rationalism which he regarded as surrender to the power of necessity. Shestov describes Western philosophy as rationalistic and contrasts it to different forms of religious (Biblical) non-rationalism. What is interesting about Shestov's passionate critique of rationalism is that he, in contrast to Vattimo, does not seem to believe that different religious traditions are grounded on different types of philosophical rationality. Rather, he suggested that academic – I would say *institutionalised* – philosophy as such tends to seek stability and control, and thereby become rationalistic. If a philosopher wishes to resist the temptation of rationalism, he should not look for stable foundations (universal knowledge, binding moral reason, and so on) but remain within the realm of human suffering and seek that truth which calls for resistance rather than calm. As is well known, Shestov believed that Dostoevsky, Kierkegaard, and

Nietzsche managed to philosophise in precisely this liberating and non-rationalistic fashion.

Of greatest significance for the purposes of this chapter is Shestov's idea that religion has at its disposal powerful tools for resisting rationalism (here defined as the acceptance and justification of suffering). This would seem to run contrary to the Enlightenment view that secular reason liberates people from a religious heritage that enslaves human beings and justifies the suffering of the oppressed. Shestov does not deny that religion can be (and has been) used to make people accept an unjust world. But he seems to think that this misuse is in itself a kind of rationalization and therefore a misinterpretation of faith. Shestov claims that religious traditions contain an enormous liberatory potential that should be tapped.

Shestov uses Christian theology as well as Jewish thought in order to support this thesis. In both traditions Shestov looks for narratives that communicate the particularity of suffering and thus acknowledge the impossibility of understanding it. He claims that "the only true critique of reason that has ever been formulated" are to be found in the passage of Genesis in which God addresses Adam: "As for the tree of knowledge of good and of evil, you shall not eat of it, for on the day that you eat thereof you shall surely die."[85] Shestov believes that *knowledge* of good and evil takes away the genuine human freedom to do good and to fight evil.

I disagree with Shestov's contention that the only alternative to rationalism is fideism and a kind of moral revolt directed at an almighty God who alone is responsible for suffering. In particular, Dostoevsky's Alyosha (whom Shestov rejects outright) shows that human freedom can be understood as a capacity for the co-creation of good rather than a purely negative revolt. However, even if his vision of responsible human freedom can be questioned, Shestov delivers a very powerful critique of rationalism and of rationalistic interpretations of human freedom. Of particular value in the present context is the way in which Shestov constructs his arguments by using narratives from different religious and philosophical tradi-

[85] Шестов, Лев: *Афины и Ерусалим.* Москва 2001, p. 201.

tions. For many of his readers, Shestov can seem to be a philosopher of just one idea of anti-rationalism: a master of monotone.[86] Even as he fights against rationalism, he looks for weapons to use against it, drawing from different cultural narratives and languages.

I believe that although Enlightenment universal reason increases the risk that rationalism is used to marginalize suffering, the very urge for trans-contextual moral reasoning is productive. What it requires is a thorough knowledge of the traditions with which it seeks to engage in dialogue. Above all, the potential of one's own tradition becomes clearer when encountering questions from the other. Such encounters do not transform one's contextual language into a philosophical Esperanto, but offer possibilities for thinking in new languages and ways.[87]

How does the Russian critique challenge the current discourse on rationalism?

How does the Russian critique of Western rationalism challenge and enrich the current discourse on rationalism? Russian critics claim that what they experience as rationalism involves the human urge to distance oneself from the suffering of others. The most comfortable position for such self-distancing is, of course, one of power and domination. Those who cannot escape suffering, like those who choose to stay within the realm of suffering, cannot accept the reasoning of universal and thus binding laws which transform meaningless suffering into something theoretically understandable. When I compare this critique of rationalism with Vattimo's critique of rationalism as foundationalism, I find similarities as well as an important difference. Dostoevsky, Shestov, and Bakhtin question the rationalism of universal principles, which they, like Vattimo, interrogate by problematizing its moral consequences. The most important difference between Vattimo and the

[86] See, for example the foreword by Bernard Martin to his English translation of *Athens and Jerusalem.* Ohio University Press, Ohio 1966.

[87] I think of Michael Walzer as a philosopher who manages to reason in both Western liberal and traditional Jewish paradigms.

Russian thinkers, as I understand it, lies in how they regard the relationship between rationalism and metaphysics. Vattimo seems to believe that foundationalism is the basis of every kind of metaphysics, and that every form of ethics of universal principle is connected to metaphysics. Vattimo describes liberation as the weakening of reason (and of being), and contends that if we abandon universal foundations we will reduce violence.

The Russian critics do not view the reduction of rationalistic violence as a matter of great concern. While Vattimo connects every form of rationalism to metaphysics (often of the Western tradition of natural law), the Russians regard rationalism (metaphysical as well as non-metaphysical) as being based upon our unwillingness (or incapacity) to realise that the other's suffering is our radical responsibility. In the Russian philosophical tradition the critique of rationalism does not imply a rejection of metaphysics. On the contrary, some Russian critics of rationalism have exerted themselves to construct impressive ontologies. One reason for the special character of the Russian critique of rationalism lies in the fact that Russian philosophy is unburdened by a view of itself as a universally valid paradigm. Another is that Russia's historical experiences make reflection on suffering a central imperative. Yet another is that Russian metaphysics does not fit Heidegger's description of metaphysics as thinking of presence. Rather, death and non-being (often expressed in Christian terminology) lie at the heart of its philosophical speculations.

Whatever the case, the Russian critique enriches the scholarly discourse on rationalism by shifting its focus from well-known and widely discussed forms to other significant manifestations. The Russian critique is directed against rationalism within practical reasoning; it is explicitly ethical in character. It states that practical reason, when compared with theoretical reason, has its own very special subject: unique personal responsibility. While Western rationalism views ethics as a domain of general and even universal norms, Russian critics reclaim the value of the uniqueness of responsibility. Responsibility is declared to be a main ethical category. Responsibility is also present in modern Western ethics, but what makes "Russian responsibility" special is the fact that it can-

not be generalised. Such responsibility can only be experienced from a first-person perspective – in Bakhtin's formulation, from the unique place in being occupied by one's body.

At the beginning of this chapter I stated that Gianni Vattimo's understanding of violent reasoning as not permitting the other to ask questions is justified but insufficient. By constructing his criticism of rationalism as a reflection upon the Western philosophical and cultural legacy, Vattimo tends to overemphasize the centrality of the "metaphysical character" of universalism. As I read him, Vattimo defines metaphysics and foundationalism too widely, something that leaves him insensitive to forms of rationalism other than that of violent reasoning from first principles. Vattimo starts by claiming the importance of political experiences of domination but ends by reducing the task of overcoming ethical rationalism to mere rejection of theoretical rationalism of first principles. The Russian critique challenges this position by clearly articulating the unique character of practical reasoning. This reasoning should be exercised as reasoning about the human act rather than as a subcategory of theoretical reason.

Recognizing the distinctiveness of the practical rationality of responsibility can explain a number of phenomena within political and social morality. For example, it helps us to understand some forms of Russian cultural scepticism towards Western human rights discourse. Like "Asian values" and other similar phenomena, Russian scepticism towards the political language of rights has hitherto been understood as unwillingness on the part of those in power to recognize the justified moral claims of individuals (human rights). While obviously true, this only applies to some forms of rejection of the discourse of rights. When studying the Russian critique of Western rationalism, as articulated in the writings of Dostoevsky, Shestov, and Bakhtin, we encounter a significant dissimilarity between, on the one hand, the widely recognized but in places imposed rationality of rights discourse and, on the other, the rationality of responsibility. While the most characteristic feature of rights is their general applicability, the most important feature of genuine responsibility is particularity. I believe that it is possible to further develop the reasoning of responsibility in order to construct

culturally sustainable strategies for social morality and politics for the protection of human dignity. The language and policies of human rights can be complemented and sometimes even replaced by the language and policies of responsibility.

In order to do this we need to apply the rationality of responsibility consistently and avoid confusing it with the generalist reasoning of liberal rights. Responsibility as articulated within the Russian tradition should be applied exclusively from the position of "I" and from the position of power to act. Discussion of responsibility in social and political terms will therefore require a power analysis of another kind than that of liberal equality within the discourse on human rights. This discourse aims to establish equal protection of rights for all individuals, which, as some contemporary critics argue, thereby masks the fact that such universal rights can only be realised if their potential possessor is already included as a member (citizen) of a state and a society.[88] Many structural forms of social, economic, and cultural exclusion transform human rights regulations into powerless rhetoric. As I see it, a focus on responsibility can serve as a platform for the kind of power analysis that is needed for effective protection of human rights. The morality of responsibility will not produce a different list of rights or norms; rather, it can shape the social value of the recognition of duties connected to power.[89]

The rationality of responsibility is not unique to the Russian context. Similar lines of reasoning are to be found in many other traditions. For example, as Robert M. Cover has argued, Jewish jurisprudence on social order is grounded in a recognition of obligations rather than rights.[90] As he carefully demonstrates, both the logic of rights and the logic of obligations have their own advantages and shortcomings. Comparing "the myth of social con-

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[88]Капустин, Борис: *Гражданство и гражданское общество.* Высшая школа экономики, Москва 2011, p. 68.

[89] In fact, there have been some attempts to articulate responsibility connected to the possession of power. Islamic declarations of human rights used to include such responsibility.

[90] Cover, Rober M.: "Obligation: A Jewish Jurisprudence of the Social Order", in Walzer, Michael (ed.): *Law, Politics and Morality in Judaism.* Princeton University Press, Princeton and Oxford 2006, pp. 3-11.

tract" with "the contract of Sinai", Cover notes that the ethics of obligation can secure the protection of human dignity because it has better tools to evoke a sense of obligation. This sense must be distinctly experienced by those with power to influence the other's situation. The myth of the social contract is suitable for the justification of equal rights but has obvious shortcomings when one tries to answer the question of who is responsible for their implementation. Cover concludes his illuminating analysis of the Jewish social morality of obligation: "I do believe and affirm the social contract that grounds […] rights. But more to the point, I also believe that I am commanded – that we are obligated – to realize those rights." [91]

I strongly agree with the statement that religious traditions can provide efficient tools for evoking responsibility on behalf of those in power. Some of these tools are related to the way that practical rationality is viewed and practiced in different traditions. One explicit example of a constructive religious interpretation of the meaning of responsibility as connected to tenable protection of rights is Article 23 of *The Cairo Declaration on Human Rights in Islam*,[92] which stipulates: "Authority is a trust; and abuse or malicious exploitation thereof is absolutely prohibited, so that fundamental human rights may be guaranteed." As I will argue in Chapter Seven of this volume, even the Russian tradition offers considerable potential for articulating responsibility of those in power, a potential that is lamentably underdeveloped in the human-rights-related documents of the Russian Orthodox Church. The present challenge is to find creative and responsible uses for the tradition of critiquing Western rationalism in order to develop its moral and political strength.

As I see it, one of the most important outcomes of the Russian critique of Western rationalism is its insight into the connection between Western rationalism and belief in the ultimate value of an independent "I". Somewhat symbolically, the leading rationalist of European philosophy, René Descartes, also held that self-consciousness was the very basis of reliable knowledge. Using the

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[91] Cover, Robert M., op. cit., p. 11.

[92] *The Cairo Declaration on Human Rights in Islam.* Adopted by the 19th Islamic Conference of Foreign Ministers. 5 August 1990.

metaphor of corporeal reason, Bakhtin argues that *self*-consciousness is not a ground for all kinds of knowledge. On the contrary, the "I" appears for itself only as a future event of moral obligation towards the other. Therefore the morality of self-sacrifice is connected to a metaphysics of non-being of the (self-sufficient) self. It must be emphasized that Bakhtin's self-sacrifice is phenomenological in nature and does not include any normative program for moral action. Such a program would contradict the rationality of responsibility, which instead radicalises pre-existing moral norms and redirects them towards the answerable position of the "I".

Alternative evaluations of the ethics of self-sacrifice have considerable political relevance. Russian resistance to rationalism can function as an apology for freedom as solidarity rather than exclusively individual autonomy. There are three advantages of a freedom defined in terms of social solidarity that deserve emphasising here. The first is its capacity to mobilise social energy in situations where people cannot rely on functioning institutions. This is crucial in societies exposed to serious crises. A colleague from a Muslim country once said to me, "Poor people cannot afford individualism". Thinking about his words, and comparing their message to the Russian critique of "Western rationalism", I came to see that such rationalism may in fact reduce the human capacity to act precisely because it views responsible acts as necessarily linked to the agency of independent individuals. However, the lack of functioning institutional protection makes people extremely dependent on each other and demands different strategies for social protection.

Second, the notion of freedom as social solidarity runs contrary to several troublesome consequences of current neo-liberal capitalism. This capitalism frames human rights as a discourse of negative freedoms. As is well known, such freedoms cannot be distributed equally among both strong and vulnerable people and groups. In Chapter Five of this study I will show how traditional liberal understandings of freedom of speech as a negative freedom contribute to the continued marginalization and discrimination of socially and politically weak minorities. Additionally, both collective and personal vulnerability are very often perceived as shameful.

Independence becomes an ideal that legitimizes invisibility or even condemnation of most natural forms of human dependency. Phenomena such as ageism seem to be spreading in traditionally liberal societies, resulting in human tragedies that lie beyond the terminological reach of traditional human rights discourse. Michael Haneke's brilliant film *Amour* (2012) depicts the despair and loneliness of ageing in a society whose most celebrated value is independence.

Third, freedom as solidarity offers a way of reasoning that can encourage practices of global political and economic responsibility. The rationalism of the independent "I" which excludes self-sacrifice from the content of morality is a form of distancing from global responsibility. Not least, the international credibility of human rights is related to the issue of whether the West is ready to act for the sake of the other. As long as our defence of human rights remains subordinate to the value of preserving our own prosperity, it seems unlikely that international protective policies will function properly.

To sum up, I am convinced that the rationalism of Western culture has great potential but also causes problems. In order to minimise the risk of its misuse, Western rationalism must be recognized as one tradition among others, and its claim to universality identified as a normative ideal rather than a real possibility of possessing universally valued practical reason. This will not be possible if other traditions (both within and outside the West) are just "permitted to ask questions". Human rights protection as well as other practices of trans-contextual cooperation should be based on ideals of openness towards different ways of reasoning and value-construction. What we need is a practical recognition of the fact that even if the process of learning from the other may be time-consuming and laborious, there is no alternative way to learn how practical rationality functions and how it can be enhanced.

Chapter IV

Human Rights versus Sharia?
Reflections on the Moral and Legal Dimensions of Human Rights Law and Sharia

The ideological features of human rights that, despite being presented or even enforced as universal, arguably have Western origins include Cartesian individualism, modernistic rationalism, and the liberal conception of freedom as individual autonomy. I have previously proposed a criticism of the liberal understanding of human rights that monopolizes the discourse by using exclusively Western, liberal concepts of human beings as independent individuals, rational reasoning as the opposite term of traditional reasoning, and freedom as autonomy. In this chapter I will develop a critique of the monopoly of liberal ideology in the field of human rights by considering how law, morality, and politics are related to each other, or, rather, how these relations should be understood. The constructive potential of international human rights law, I will argue, does not lie in its being understood and practiced as a positive law. On the contrary, to focus on human rights law as positive law is to conceal the political nature of human rights and to prevent effective development of its moral and political potential. Human rights law, I contend, should be understood in terms of political morality and, as such, be open to different contextual interpretations as well as to trans-contextual evaluation and criticism. I will also consider the case of Sharia law in similar fashion, and argue that Sharia, for it to be implemented concretely in the social, political, and legal spheres, should be understood as a moral and reli-

gious "way". These interpretations of human rights law and Sharia will be used as the basis for a critique of the idea that human rights law and Sharia contradict each other.

Universal rights and "contextual" Sharia

An important presupposition underlying my argument is the notion of the universality of human rights. Although a product of Western political experiences and thought, human rights aspire to universal applicability, and most proponents of human rights believe that human rights can be implemented without violence in different cultures. Some people think that human rights are compatible with different cultures; others claim that in order to implement human rights universally we must replace traditional morality and legal systems with Western liberal morality and law. The first position is reasonable if we can show how human rights are compatible with different cultures. It is important to note that we are not warranted in using force to achieve such compatibility. The second approach must be rejected as morally wrong; indeed, it has already caused a lot of damage. Since the concept of freedom as autonomy lies at the moral core of liberalism any violent enforcement of liberalism must be seen as a self-contradiction.

There are many examples of people losing confidence in human rights when confronted by dominant and even aggressive Western proponents of human rights. In order to promote a human rights culture around the world we must abandon the colonial practice of seeking to persuade the other of the truth that we already possess. In order to become universal without violence, human rights discourse should become open to different cultural traditions, including non-liberal traditions. Universal human rights, I believe, can be practiced through an equitable political dialogue between traditions. In such a dialogue we are looking for sustainable interpretations of different cultures as well as for new approaches to human rights.

Another and similarly normative presupposition of this chapter's argument is the belief that religion neither can nor should be

excluded from politics. As an important part in the lives of many individuals and societies, it is a causal factor in politics and must therefore be involved in a transparent fashion in political discourse.[93] The politics of human rights are no exception and cannot be sustainable if religious actors and arguments are not granted legitimacy within its discourse. While there is an obvious need for institutional regulation here, such regulation must apply equally to all political actors.

In the West, Islam and Sharia in particular are often viewed as an obstacle to effective implementation of human rights law. Almost every time I ask my students to give an example of a religious or cultural tradition that they regard as incompatible with human rights law, someone mentions Sharia in their answer. Interestingly, these students lack any knowledge of Islamic law, relying instead on Islamophobic images in European mass media and popular culture. Sharia is imagined to be a set of (cruel) legal rules that justify various violations of human rights. This unfairly reductionist view of Sharia creates difficulties and conflicts. If we want to work with human rights in different settings, and if we want to avoid the fallacy of cultural imperialism, we need more reliable knowledge of and greater sensitivity towards Islamic traditions.

What most often concerns Western politicians, scholars, and lawyers is that some Muslim countries use Sharia as the basis for making reservations in relation to human rights treaties. The issue of women's rights is most often cited, and the danger of a traditional Sharia view of women being used to implement international human rights norms selectively is broadly recognized.[94] There are good grounds for scrutinizing some Sharia-related reservations and practices. However, it is equally important that this be done in a way that does not discriminate against Islam in comparison with other traditions that currently influence human rights politics in

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[93] I share Jürgen Habermas's view on the relation between religion and politics. This view is expressed in the volume Habermas, Jürgen: *Zwischen Naturalismus und Religion. Philosophische Aufsätze.* Suhrkamp Verlag, Frankfurt am Main 2005.

[94] Mayer, Ann Elisabeth: *Islam and Human Rights.* Westview Press, Colorado 2007, 4th edition, chapter 5.

different countries. There are moral as well as pragmatic reasons for treating Islam as justly as possible. The moral reasons are obvious; when discussing and criticizing selectivity in human rights policies, everyone needs to be aware that every tradition (liberal as well as non-liberal) uses culture as an instrument for the interpretation and implementation of human rights. For example, when Sweden refuses to follow the recommendation made by the UN Committee on the Elimination of Racial Discrimination (CERD) to prohibit racist organizations, it invokes the Swedish tradition of strong protections for political freedom. This tradition justifies Sweden's prioritizing of freedom of expression and of assembly above the prohibition of all forms of racism. There are many similar examples of Western countries using their traditions as a reason for giving priority to one right or value over another. Cultural arguments are often used in such cases when there is a need to make choices between legitimate but conflicting norms and values. The fact that some "traditional values" are democratic does not change the nature of the argument.[95] There is thus no justification for singling out Sharia as a unique case of cultural norms conflicting with some human rights.

The main pragmatic reason for treating Islam as justly as possible has to do with the way in which we choose to communicate on the subject of human rights. If our aim is to spread human rights to "traditional societies", we should communicate as respectfully as possible. The fact is that popular support for the most rigid and fundamentalist forms of Islam is strengthened when Western policies towards Islam are perceived as unjust or colonialist. The West's self-image as a proponent of universal norms, rather than of culture and interests, simply does not correspond to it is experienced by other cultures.

In what way do Western liberal proponents of human rights treat Sharia differently? I believe that there is a twofold reduction in the

[95] Jeffry Stout has rightly argued that it is important to realize that democracy is as much a tradition as any other culture. This recognition does not prevent us from believing in trans-contextual value of democracy, but it transforms our way of relating to people with different traditions. See Stout, Jeffry: *Democracy and Tradition.* Princeton University Press, Princeton 2004.

case of Sharia and human rights. The first one is a very strong tendency to present Sharia as a traditional and inflexible legal system. The second is to understand human rights as non-contextual (or purely rational) laws. Both beliefs are problematic *per se*, but together they constitute one of the main forms of contemporary Western colonialism. By presenting Sharia as a legal system, we make Islam into "the Other", i.e. contracted to our culture, using it to present our own ideology as trans-contextual and universally valid.

Sharia is a complex phenomenon that takes many forms. The term "Sharia" as most often used by Muslims in arguments over human rights discourse does not denote a set of concrete and written rules (positive law). Rather, it is a notion of divine law that requires an advanced interpretative apparatus before it can be used in a social and legal setting. Muslim scholars who have argued for this understanding of Sharia include Abdullahi Ahmed An-Na'im, who claims that rational reasoning and responsible interpretation (*ijtihad*) is crucial in order for Sharia to function as religious law. He writes: "Any understanding of Sharia is always the product of *ijtihad,* in the general sense that reasoning and reflection by human beings are ways of understanding the meaning of the Qur'an and Sunna of the Prophet".[96] An-Na'im is well aware that many of his Muslim critics believe that the gate of *ijtihad* is closed because of the prevailing consensus about the meaning of Sharia. Nevertheless, argues An-Na'im, "there is nothing […] to prevent the emergence of a new consensus that *ijtihad* should be freely exercised to meet the new needs and aspirations of Islamic societies".[97] An-Na'im's argument is theological in nature: he claims that Islam itself expects everyone to take personal responsibility for the religious law and its interpretation. While theologians such as Seyyed Hossein Nasr claim that there is no need for new interpretations of the meaning of Sharia, and that Islam should not endorse social

[96] An-Na'im, Abdullahi Ahmed: *Islam and the Secular State. Negotiating the Future of Sharia.* Harvard University Press, Cambridge 2008, p. 13.
[97] Op. cit., p. 15.

change,[98] An-Na'im recognizes the need for creative interpretations of the principles of Islamic law under new social conditions. Like An-Na'im, Tariq Ramadan invites European Muslims to differentiate between the principles of religious law expressed in the heritage of the Prophet, and contextual interpretations that can and must be revised.[99] I will return to the question of the meaning of Sharia as religious law. For now, let me stress that the distinction between, on the one hand, religious law as universally valid principles, and, on the other, concrete norms and contextual implementations of it, is well-recognized within Islam.

At the same time, human rights are as much a tradition as any political morality is. The fact that human rights seek universal recognition does not detach them from their roots in the Western liberal tradition. While human rights, Islam, and Christianity all make claims to universality, there is, for historical reasons, greater self-criticism with regard to this claim within the Christian and Muslim traditions than within human rights discourse. Whereas most Christians and Muslims are aware of the long history of political and social misuse of their traditions, most human rights activists view human rights as a policy exclusively of liberation.

On the relation between moral, legal, and political dimensions of human rights law

Human rights law is a political project. The fact that this project is built upon an attractive moral vision does not eliminate its political dimension. When Michael Ignatieff argues in his famous lecture on "Human Rights as Politics"[100] that "human rights is nothing other than a politics", he acknowledges that human rights are used selectively and often as a way of promoting particular interests. Ignatieff rightly recognizes that human rights are political not only

[98] Nasr, Seyyed Hossein: *Ideals and Realities of Islam.* The Islamic Texts Society, Cambridge 2001, pp. 89, 92.
[99] Ramadan, Tariq: *Radical Reform. Islamic Ethics and Liberation.* Oxford University Press, Oxford 2009.
[100] Ignatieff, Michael: *Human Rights as Politics and Idolatry.*

when selectively invoked by governments but even when broadly invoked by non-governmental activists. He writes:

> In practice, impartiality and neutrality are just as impossible as universal and equal concern for everyone's human rights. Human rights activism means taking sides, mobilizing constituencies powerful enough to force abusers to stop. As a consequence, effective human rights activism is bound to be partial and political.[101]

Ignatieff proceeds to claim that moral universalism is vital in order to discipline human rights politics. Although agreeing fully with Ignatieff's view of human rights as politics, I do not share his understanding of moral universalism. Human rights is a political project for many reasons and there is a complex relation between this political aspect of rights and the claim of universality. One obvious sign of this complexity is the fact that international human rights treaties, while stipulating many rights as universal human rights, do not suggest a clear strategy as to how these rights should be prioritized in situations of conflicting rights and values. It is for this reason that different agents make different priorities, often on political grounds. Ignatieff argues that liberal individualism, in order to practice human rights properly, must be recognized as universal morality, and that it should be used to make reliable prioritizations within the area of human rights. He also believes that the very recognition of the value of individual freedom (of choice) makes human rights a universally valid project.[102] I disagree with Ignatieff on this. At the start of this chapter, I claimed that the attempts to present traditional liberal morality as universal are connected to the history of colonialism, and that they must be replaced by another, more open understanding of universality. Even Ignatieff's view of freedom of choice as the universal moral value and the core of the human rights law must therefore be rejected.

In my opinion, universal morality is not a matter of formulating a single universal norm akin to that of individual freedom. Universal morality functions as a means of deconstructing claims to uni-

[101] Ignatieff, Michael, op. cit., p. 9.
[102] Op. cit., pp.74-75.

versality by any particular norm, such as that of liberal freedom of choice. Universal morality is about the very possibility of liberation from unjust traditional conventions of every kind. In order to be critical of our moral conventions (as well as politics) we need to believe in universal morality, yet we never possess universal morality. The dialectic between traditional morality and universalism is an ongoing process of liberation *from* and *within* tradition.

There is no way to replace traditional morality by universal one because universal morality is a completely different kind of entity to traditional morality. Traditional morality exists, can be possessed, and must be interpreted and developed. Universal morality is a moral vision which inspires us to remain critical of every particular moral or legal judgment. Applied to human rights, this means that human rights are a universal moral and political vision even while remaining concrete political and moral norms in need of criticism based upon that same universal vision.

When Jacques Derrida explains the meaning of deconstruction in relation to law and justice, he offers one of the best formulations of this special character of moral universalism. Derrida writes:

> (1) The deconstructibility of law (*droit*), of legality, legitimacy or legitimation (for example) makes deconstruction possible. (2) The undeconstructibility of justice also makes deconstruction possible, indeed is inseparable from it. (3) The result: deconstruction takes place in the interval that separates the undeconstructibility of justice from the deconstructibility of *droit* (authority, legitimacy, and so on). It is possible as an experience of the impossible, there where, even if it does not exist (or does not yet exist, or never does exist), *there is* justice.[103]

Here, justice is understood as a pure normativity that allows us to strive for a just law yet without authorizing us to pronounce any practical legal decision as morally just. Derrida's deconstruction is very productive when applied to the question of human rights. Human rights are universal in that they recognize an absolute value

[103] Derrida, Jacques:"Force of Law: The 'Mystical Foundation of Authority'", in D. Cornell et al (eds.): *Deconstruction and the Possibility of Justice.* Routledge, London and New York 1992, p. 15.

inherent in every human being, and call for practices confirming it. Within the discourse of human rights the notion of human dignity can be pointed out as the equivalent to Derrida's justice. This notion is open and in a sense "undeconstructable". It is impossible to define human dignity in a generally binding manner. To say, as the United Nations documents often do, that human dignity is synonymous to the protected human rights does not give us a definition of human dignity. In practice, however, this formulation means that the undeconstructable and undefined notion of human dignity stays for the very possibility (or at least the belief in such possibility) to recognize violations of human dignity in each and every context. This recognition is absolutely necessary for every effective protection of human rights. As many philosophers in different contexts have argued we do not agree on any universal vision of a good human life but we do recognize (or can recognize) those situations when human beings are treated inhumanly.[104]

In order to realize human rights, we interpret them in conventional moral, legal, and, political terms, and from that very moment human rights become an issue of power; they are necessarily an object for ethical deconstruction. It is thus not possible to identify one single norm embodying the human dignity that is to be protected. As his critics have shown, when Ignatieff claims that Western individualism is universal and can be used in order to make priorities between values and norms, he mistakenly presents a Western notion of (negative) freedom as a universal one.[105] Individualism is not a universal moral content of human rights. But what is equally important is that every articulated norm is historical, contextual, and political, and for this reason cannot be universal. The dialectic of universality demands that even as we seek sustainable norms, we desire universality in a way that prevents us from declaring any concrete norm to be universal.

In my opinion, to say that human rights are universal is to claim that they can deconstruct any concrete political programme and

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[104] Perry, Michal J.: *Towards a Theory of Human Rights. Religion, Law, Courts.* Cambridge University Press, Cambridge 2007, p. 7.

[105] Gutmann, Amy: "Introduction", in Ignatieff: *Human Rights as Politics and Idolatry*, pp. vii-xxvii.

any law. To protect human dignity is a universal task which cannot be formulated non-contextually. While the undefined moral notion of human dignity and thus the ethical level of human rights are universal, every conventional morality, every politics of human rights, and every legislation on human rights is contextual and thus in need of critique and development.

This becomes crucial when we discuss human rights in terms of international law. Western proponents of human rights used to celebrate the fact that global society has reached agreement on so many issues relating to human rights as a sign of moral and political progress. Without disputing this claim, I submit that the meaning of human rights law and its functions needs to be articulated more closely. To begin with, there are some significant differences between human rights law and legislation in traditional sense. Where the legal system of a country is connected to its more or less legitimate government and to the state's monopoly on the use of violence, international human rights law consists of agreements between states. No legitimate international body exists to enforce human rights law. Rather, the general expectation is that national governments should take their responsibilities seriously and implement international agreements by means of national policies and legislation.[106] In the current discourse on human rights there is a near-consensus that the main challenge to the sustainability of the human rights law lies in the need to find ways of stronger implementation. At the same time, there are different understandings as to what proper implementation of human rights should be. In my view, these differences have to do with how we view the nature and function of international human rights law. Some commentators interpret international agreements as ordinary legislation (positive law) while others regard them primarily as principles of political morality. This controversy is reflected in the different ways in which countries incorporate international agreements into their national legal systems. Some use these agreements directly in legal sphere; others prefer to transform international law into traditional political and legal instruments.

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[106] Donnelly, Jack: *International Human Rights*, p. 44.

The main argument in favour of viewing international human rights law as positive law is that national governments could then use their power in order to enforce human rights norms. If international norms are seen as "normal" laws, individuals can utilize state legal systems in order to promote human rights as formulated in international treaties. Another argument is that such an understanding would minimize the risk of selectivity in implementations of human rights. If the same documents and formulations were to be applied world-wide, any selectivity would become visible. Scholars and practitioners of international law as well as Western human rights activists have lent their weight to this argument. They desire a stronger system for enforcing human rights, and one of the most important trends within this paradigm are the ongoing attempts to create international courts of human rights. These courts are expected to enforce human rights law where national governments have failed. From my perspective, the main weakness of this view of international human rights law as positive law is the fact that neither international bodies nor international politics can guarantee that law's judicial legitimacy. Because of the unequal distribution of political and economic power globally, international human rights law is handled selectively and unjustly.[107] It is unrealistic to expect that international politics of human rights will produce legislation secure and just to the degree needed for formal legal justice.

Therefore I will be arguing for another interpretation of the meaning and function of international law. In my opinion, we should view international human rights law as political agreements about fundamental principles of social morality. This position has two main advantages. The first is the recognition of the political nature of human rights agreements and human rights protection. The second is the recognition of the fact that effective human rights policies demand far more than merely judicial legislation in conformity with the liberal understanding of human rights.

[107] I will only mention here that the highly politicized structure and functioning of the UN causes many problems when it comes to the creation of sustainable international legal norms.

My first point has a negative as well as a positive aspect. As already mentioned, international human rights law is the result of international politics and not a product of legitimate democratic deliberation. Governments of the UN member-states may ratify international human rights conventions but the ratification process is often clearly marked by an unequal distribution of power and followed by a variety of reinterpretations (e.g. transformation, reservations, and so on). Furthermore, neglecting the political dimensions of human rights law is, or, at least, can be, a political act in itself. The Western democracies that often initiate and actively observe international legislation present their own traditional political morality as an unpolitical and universally valid legal norm. In the context of the West's dominance of global politics and the world market, this claim to universality would seem counterproductive insofar as it creates hostility towards the very language of human rights.[108]

Additionally, it is a contradiction to claim that human rights law is simultaneously universal and positive. If human rights treaties are thought of as a set of 'ordinary' legislation, they cannot be said to be universal. The more precise the formulation of human rights, the less their claim to universality is justified. And, vice versa, abstract norms of morality that make claims to universality are difficult to use in legal spaces. Let me give an example from European practice. Human rights law states that no-one should be discriminated against. If we view this prohibition as a norm of political morality, it can conceivably be called universal. Its purpose would be to uncover and counteract various kinds of discrimination. When we transform the norm into a legal norm, we interpret its content in a way that makes the norm directly applicable in legal sphere. Such interpretations are contextual and cannot apply to every aspect of the fundamental norm of non-discrimination. Many observers have noted that European legislation on discrimination is inadequate. *The European Convention for the Protection of Human Rights and Fundamental Freedoms* connects the prohibition of discrimination to the articles of the Convention, which narrows the

[108] Jack Donnelly calls such universalism "arrogant and abusive". See Donnelly: *International Human Rights*, p. 52.

meaning of discrimination to those forms covered by an article of the Convention. Obviously, there are many forms of discrimination that fall outside this definition, i.e. do not correspond to an article of the Convention. For this reason, an attempt to introduce a general prohibition of discrimination was made in 2000. *Protocol No.12* to the *Convention for the Protection of Human Rights and Fundamental Freedoms* contains a general prohibition of discrimination. The idea is that every form of discrimination could be addressed in legal terms and thus considered by a court, including the European Court of Human Rights. As of 6 January 2012, most national signatories to the Convention with efficient legal systems have yet to ratify *Protocol No. 12*.[109] The main reason is precisely the abstract and general formulation of the prohibition. As the Swedish government, for example, has argued, such prohibition is too abstract for use in a legal sphere.[110] Some would say that the Protocol is a failure, but I believe that the prohibition's abstract form means that it can be used as an effective moral and political instrument for critiquing the shortcomings of European human rights protection.

The positive dimension of my first point is thus the belief that recognition of the political nature of social norms such as human rights does not prevent those norms from being trans-contextually attractive. Quite the opposite, this recognition can facilitate communicative openness and create further discussions of how political visions can be transformed and adopted in a sustainable manner. For example, it is unnecessary to claim that the liberal understanding of freedom is a universally valid norm. Instead, we can discuss it as a norm that promotes the interests of many individuals and groups under specific political, economic, and social conditions. Recognition of alternative notions of freedom does not mean abandonment of the human rights project. Instead, we invite opponents of liberal ideology to suggest alternatives that are compatible with the vision of protected human dignity. Such an approach would encourage less violent practices of human rights. Moreover, human

[109] Council of Europe, www.conventions.coe.int [Accessed 2012-06-01].
[110] Regeringens skrivelse 2005/06:95 April 2010. www.humanrights.gov.se [Accessed 2012-07-01].

rights and democracy become complementary and strengthen each other when human rights are understood as norms of political morality and as therefore inviting people to discuss how to practice them in concrete political settings.

My second point concerns the fact that viewing human rights as positive law is problematic in that it often causes a reduction of human rights protection to the protection by law and thus by professionals. Legal justice is an important and sometimes even crucial element of sustainable societies. But in order to protect human dignity effectively we need political action (by governments as well as by different groups in society). Legal justice is both time-consuming and expensive, and most of those who are in need of human rights protection have neither the time nor the resources to resort to litigation. Political efforts to protect human rights are often more effective, and engage people as agents rather than inviting them to approach the authorities. Some critics of human rights point out, rightly, that human rights today are often seen as an issue for bureaucrats. People expect governments to guarantee human rights to all individuals and groups. Citizens do not engage in politics, partly because they think that human rights can be guaranteed by governmental initiatives rather than by politics as a sphere of public concern. Russian political philosopher Boris Kapustin argues that belief in human rights as universal rights guaranteed by legal instruments prevents people from engaging in politics and leads to a weakening of civil society and democracy. Kapustin uses the term "judicial citizenship" to describe the tendency to view rights as legal guaranties rather than to focus on ongoing political activity.[111] I agree with Kapustin. For human rights to be protected effectively, it is crucial that their political dimension be publicly recognized. It is important to stress that this is not a cynical view of politics such as Carl Schmitt's conception of politics as a non-moral realm of aggression. Politics are the practice of power and conflicting interests, but also an interaction between individuals and groups searching for peaceful, morally justified solutions.

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[111] Капустин, Борис: *Гражданство и гражданское общество*, p. 119.

To summarize my argument so far, human rights law should be seen as founded on norms of political morality. These norms are inspired by a universal moral vision of protected human dignity, but they are always formulated within the political. Different interests and power relations are involved, and it is impossible to create a non-political way of articulating human rights. By explicitly viewing human rights as political norms, we invite more balanced international communication and engage people in a political discourse on the content and policies of human rights. The protection of human dignity is a universal moral vision that is stipulated in international treaties. At the same time, there is no universally recognized norm which uniformly guides the interpretation and implementation of human rights. Liberal individualism is just one contextual morality among others which can be justified within human rights discourse, but it becomes violent when presented as universal and non-political. Human rights law includes a universal moral and political vision, but every formulation of it is contextual and unjustified in its claim to be simultaneously universal and legally binding. This means that human rights law, in order to sustain in its universal character, must not be enforced internationally as positive law but, rather, seen and practiced as universal declarations of political morality.

Sharia as the way, or Sharia as the law

Let me turn now to the debate over Sharia, particularly its character and relation to human rights law. Commentators usually stress the differences between Sharia and human rights law. The most important of these relates to historical origins. Sharia is a religious law of pre-modern origin, whereas human rights law is a modern secular law. Many Muslims as well as non-Muslims stress that Sharia is the product of a different time, and that Sharia and human rights are for that reason incompatible. Some Muslims argue that Sharia need not be adapted to new historical realities, while some proponents of human rights suggest that in every situation of con-

flict between norms human rights law should take priority. [112] Although these opinions seem contradictory, they follow the same logic of pointing out one context (historical period) as genuine. Sharia is seen here as a pre-modern law that dates from the time of the Prophet Mohammed, the founding era of the Islamic tradition. Explaining why Sharia has remained unchanged since the middle of the third century of the Hegira (circa A.D. 900), Ahmed Safwat claims: "The reason why its further development was arrested is partly due to the fact that about that time Mohammedan civilization reached its zenith […]".[113] Human rights law is frequently understood by its proponents as a law of the modern era, the period of true universal liberation. The logic of both models seems to me rather doubtful. A law's value is here being connected to the value of the civilization which promotes it. It follows that there is a clear risk of ascribing its authority and force to the political power of the subject of the law, rather than to moral and legal norms (the content of the law).

Of course, a proponent of human rights might claim that laws of more recent provenance should be seen as more adequate. However, this argument is valid only if we speak of a law within the same legislative system. If one and the same legislative authority creates a new law, then it can be reasonable to abandon (or restrict) the older law. But in the cases of both Sharia and human rights, we are dealing with different sources of norms (at least, of articulated norms), and it is therefore wrong to claim that the later norm is always stronger than the earlier.

Another important aspect of the approach to human rights law and Sharia which stresses their differences is the fact that the former is seen as secular and the latter as religious. This is correct, not least because the proponents of those discourses often choose to describe them in terms of secular versus religious. Thus Ahmed Safwat, in the article already quoted, presents the main reason for Sharia not having changed: "[…] it is due to the conception of

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[112] Seyyed Hossein Nasr and Ann Elizabeth Mayer, mentioned above, exemplify these two points of view.

[113] Safwat, Ahmed: "The Theory of Mohammedan Law", in *Journal of Comparative Legislation and International Law* Vol. 2, No. 3, 1920, p. 310.

Mohammedan Law as revealing absolute justice, and as such binding on all Mohammedans, for ever".[114] I will return to the moral implications of this notion of revealed truth, but what is important here is the belief that Sharia is a revealed religious law. Human rights are normally seen as a secular law, i.e. legal norms resulting from human deliberations, agreements, and the exercise of power. Despite this, I believe that we often overestimate our confidence in the meaning of secular and religious law. It is a fact that Sharia describes itself as religious law and human rights describes itself as secular law. But the meaning of these descriptions is unclear. The familiar modern notion of religious as traditional, and secular as rational does not stand for serious criticism. A product of Western culture, human rights law is connected in many ways to the region's Christian heritage. At the same time the role of reason within Sharia is one of the most important issues for Islamic ethics and legal theory. I therefore believe that the most constructive approach to the counterposing of Sharia as a religious law and human rights law as a secular law lies in seeking to account these two kinds of law in a specific historical context. This will uncover differences as well as similarities in a more dynamic way, and will avoid, or at least reduce, the risk of discriminating against one tradition while uncritically promoting another.

Overall, I think that excessive emphasis on the differences between Sharia and human rights creates difficulties both for the further development of Sharia and for the improvement of human rights law. Rather than challenging each other, these two traditions in fact use "the other" as an excuse for disregarding criticism. This reflex often stems from a fear of criticism on the part of those in power within both traditions. The logic of differences creates an expectation that we must make a choice between the traditions rather than recognizing the need to develop and change both. A far more productive approach to the issue of Sharia's relation to human rights law would be to stress an important feature which they share. By this I mean the fact that both Sharia and human rights law are moral visions intended to transcend conventional norms in

[114] Ibid.

favour of universal morality. It is difficult to sustainably transform Sharia, as well as human rights, into legal norms without losing the connection to universalistic moral claims. Both function in the political sphere and therefore face similar challenges.

In order to develop my argument, I will now discuss how the legal, moral, and political dimensions of Sharia can be understood. *Sharia* (literally, the path to the watering-place) is recognized by all Muslims as a religious law governing human life. Two revealed sources of Sharia are acknowledged by the Islamic tradition as a whole: the Quran and the Sunna. There are a number of other sources such as for example *ijma* (consensus of the Islamic community) and *qiyas* (inferential tools that include reasoning). The Quran and the Sunna have greatest authority; the Islamic traditions differ as to how to understand, use, and balance the other two sources.[115]

There are, of course, various interpretations of Sharia, its context, and praxis. However, I will here argue that there are two principal positions on the issue of how Sharia's legal and moral dimensions relate to each other. These opposed positions are also connected to different ways of understanding the relation between Sharia and politics. The first position views Sharia as simultaneously a divine moral law and a positive law, one that can and should be practiced by communities. This law can and must be protected by political instruments (including legitimate violence) but the content of the law should not be subject to political deliberations. The other position holds that Sharia is a religious moral law (or way) possessing its own special character, which means that Sharia needs to be adopted creatively and responsibly in order to provide guidance for policies and legislation. Within this paradigm, it can be argued that there exist absolute Islamic principles which transcend politics. At the same time, Sharia cannot be practiced without taking into account the political dimensions of social and legal life.

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[115] For introduction to Islamic law see, for example, Khadduri, Majid: "Nature and Sources of Islamic Law", in *The George Washington Law Review* Vol. 22, 1953, pp. 3-23; and Kamali, Mohammad Hashim: *Sharia Law. An Introduction*. One World, Oxford 2008.

One of the most outspoken advocates of the first position is Seyyed Hossein Nasr, a scholar who has written a number of books now included on the curricula of many Western universities. In *Ideas and Realities of Islam* Nasr claims that there is such a thing as "Semitic notion of law" (in Islam and Judaism) which contradicts "the prevalent Western conception of law". Nasr continues:

> In fact religion to a Muslim is essentially the Divine Law which includes not only universal moral principles but also details of how human should conduct his life and deal with neighbor and with God; how he should eat, procreate and sleep; how he should buy and sell at the market place; and of course above else how he should pray and perform other acts of worship.[116]

As already mentioned, Nasr believes that Sharia is timeless, and he notes of the implementation of Sharia by different historical generations: "The creative process in each generation is not to remake the Law but to reform men and human society to conform to the Law".[117] Nasr invokes descriptive as well as normative arguments in support of his position. He emphasizes traditional views of the understanding and practice of Sharia, including the prerogative of the *ulama* (scholars of Islamic law) to interpret and practice Sharia,[118] Sharia's importance for preserving the unity of the Islamic community,[119] and Sharia's crucial role in identity formation.[120] Nasr realizes that Sharia "contains both specific instructions and general principles",[121] but he believes that both should be applied directly and as divine law. One consequence of this understanding is the belief that political governments can and should enforce Sharia while restraining from creativity in legislative practices.[122]

In *Islam: Beliefs and Teachings*, Ghulam Sarwar also asserts that

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[116] Nasr, Seyyed Hossein: *Ideals and Realities of Islam*, p. 88.
[117] Ibid.
[118] Op. cit., p. 93.
[119] Op. cit., p. 101.
[120] Op. cit., p. 102.
[121] Ibid.
[122] Op. cit., p. 100.

> Sharia prescribes a complete set of laws for the guidance of mankind so that Good is established and Evil is removed from society […] Islamic law is complete and perfect, and covers all aspects of human life […] Sharia is permanent for all people all the time. It does not change with time and conditions. For example, drinking wine and gambling are not allowed under Islamic law. No one can change this; it is law that is valid for all time and for all places.[123]

Sarwar clearly believes that concrete regulations which the state can and should enforce are a matter of divine law (Sharia). For Mohammad Hashim Kamali, "identifying Sharia in the sense of a legal code as the defining element of an Islamic society and state became commonplace in subsequent juristic writing".[124] Kamali mentions Syed Qutb, Abu'l-A'la Mawdudi, Muhammad al-Ghazali, and Yusuf al-Qaradawi as those influential Muslims who in modern time saw "the Islamic state essentially as a Sharia state committed to the enforcement of Sharia".[125] Mawdudi, who sometimes is perceived as one of the most influential Muslim theologian of the twentieth century, views Sharia as a complete set of norms that "denies in the clearest terms the right of humans to exercise any discretion in such matters as have been decided by God and His Prophet".[126]

Let us turn to another perspective on the moral and legal dimensions of Sharia. Many Islamic scholars and activists advocate the idea that Sharia must be seen as an absolute religious law, and, as such, cannot be fully articulated in terms of positive law. Proponents of this position usually ascribe special importance to the practice of *ijtihad,* i.e. independent rational reasoning. In Abdullahi Ahmed An-Na'im's formulation, quoted above, "[a]ny understanding of Sharia is always the product of *ijtihad*, in the general sense that reasoning and reflection by human beings are ways of under-

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[123] Sarwar, Ghulam: *Islam. Beliefs and Teachings.* The Muslim Educational Trust, London 2006, p. 153.
[124] Kamali, Mohammad Hashim: *Shariah Law. An Introduction*, p. 5.
[125] Op. cit., p. 7.
[126] Griffel, Frank: "The Harmony of Natural Law and Sharia in Islamic Theology", in A. Amanat and F. Griffel (eds.): *Sharia. Islamic Law in the Contemporary Context.* Stanford University Press, Stanford 2007, p. 58.

standing the meaning of the Quran and Sunna of the Prophet".[127] Another aspect of the Islamic tradition which used to be emphasized by those advocating Sharia as divine, rather than positive, law is the fact that Sharia was traditionally not codified in Muslim societies. Such codification first appeared in the wake of Western colonialism.[128]

Muhammad Sa'id Al-Ashmawi, a prominent Egyptian lawyer, confirms that the Egyptian constitution regards Sharia as "the principle source of legislation", and thereby clearly differentiates between Sharia (Islamic law) and *fiqh* (jurisprudence, legal opinions, and judgments). Al-Ashmawi calls for the need to separate Sharia ("principles, values, and laws found on the Quran and the sound sunna") from fallible judgments:

> Moreover, as the way or method of God, sharia involves something more flexible than *fiqh*. It is a way or a method much more than it is a body of concrete legislation […] Sharia is distinguished not by particular judgments but by a 'firm dynamic method which can remake society and man so as to be just, virtuous and pious' […] 'Applying the sharia', then, properly should mean adopting its method for the greatest progress of individuals and humanity.[129]

What is important in the above description is Al-Ashmawi's conviction that Sharia as divine law is not identical with human practices of legislation and legal enforcement. At the same time, divine law should guide and inspire such legislation, and it must do it by means of social morality.

Commenting on the belief that Sharia is a revealed law, Tariq Ramadan argues that it is for this very reason crucial to exercise human reasoning in order to understand the meaning of law and its political and judicial consequences. Like many other modern Mus-

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[127] An-Na'im, Abdullahi Ahmed: *Islam and the Secular State*, p. 13.

[128] Op. cit., p. 18. See also Malik, Saira: "'Enjoin the Good, Prevent the harmful' – the Intersection of Theory and Practice in the Implementation of Sharia for Muslims in Western Societies: the Case of Medical Ethics in Britain", in *Journal of Islamic Law and Culture* Vol. 12, No. 3, 2010, p. 253.

[129] Shepard, William E: "Muhammad Sa'id Al-Ashmawi and the Application of the Sharia in Egypt", in *International Journal of Middle East Studies* Vol. 28, No. 1, 1996, pp. 43-44.

lim scholars, Ramadan discriminates between the text and the context, arguing that God reveals his truth through both the Quran (text) and the (created) Universe (context). Following prominent Muslim philosophers such as al-Ghazali (1058–1084), Ramadan insists that the Universe must be "read" by human reason, and that a proper understanding of the Universe does not contradict textual revelation. In this regard he agrees with Maijid Khadduri who was a member of the first Iraqi delegation to the United Nations and contributed to the draft of the organization's charter. Also for Khadduri there is no contradiction between the law of Nature and Sharia.[130]

Ramadan argues that a deeper understanding of changing context (the Universe) is crucial for an adequate articulation of Islamic law.[131] Furthermore, he claims that the *ulama* for this reason must be broadened to include experts in fields other than Islamic law and jurisprudence.[132] Ramadan explicitly points out a distinctly ethical dimension of the revealed texts, contending that some universal Islamic ethical principles belong to the Sharia, and that they therefore can and must be used as guidance for the practical interpretation of Islamic law.

Both An-Na'im and Ramadan are aware of the political dimension of law. They agree that the theory and practice of Sharia has stagnated in the modern period because of the legacy of colonialism. To realize the political as a dimension of human existence means also to admit that no positive law can be identical with Sharia as an absolute divine law. Therefore some Muslims thinkers use the Sunna of the Prophet Mohammed to articulate political and hence context-related and changeable aspects of Islamic law. They point out that there are differences between those teachings of the Prophet that are connected to his roles as a strictly religious leader (in Mecca), and as a jointly religious and political leader (in Medina). In his capacity as a political leader, the Prophet adapted the moral and religious principles of Islam (as revealed in the Quran) to the social and political context of Medina. By analogy, any par-

[130] Khadduri, Majid: "Nature and Sources of Islamic Law", p. 8.
[131] Ramadan, Tariq: *Radical Reform*, pp. 85-100.
[132] Op. cit., p. 316.

ticular regulation in the present time should also be a creative and responsible adaptation of the universal principles of Sharia to current social and cultural circumstances. The same moral norm of the divine Law provides the basis for different policies and variations in positive law in different contexts.

Mashood A. Baderin, a prominent scholar of Islamic law, argues that Sharia must be seen as the source from which different kinds of positive legislation are derived. He confirms that "in the strict sense Sharia refers to the corpus of the revealed law as contained in the Quran and in the authentic Traditions (*Sunnah*) of the Prophet Muhammed".[133] Only in this strict sense is Sharia divine law. How then to realize the meaning of Sharia? Baderin believes that it is possible and desirable to point out some basic principles of Sharia and he agrees with al-Shatibi who in fourteenth century developed the notion of *Magasid al-Sharia* (overall objective of the Sharia) that was originally introduced by Imam Malik. Baderin confirms that the principle of human welfare (*Maslahah*) must be regarded as the most important norm. Although Baderin does not call this principle ethical, it is obvious that he supports ethical interpretations of the universality of Sharia.

Baderin states that *Maslahah* should be used in order to interpret and implement Sharia in different times and contexts:

> The fourteenth century Maliki jurist, Abu Ishaq al-Shatibi further developed the concept as a 'basis of rationality and extendibility of Islamic law to changing circumstances (and also) as a fundamental principle for the universality and certainty of Islamic law'. It is an expedient doctrine of Islamic law acknowledged today by Islamic legalists as containing the seeds of the future of the Shariah and its viability as a living force in society.[134]

It is beyond the scope of this chapter to analyse all the advantages and shortcomings of the understandings of Sharia outlined above. However, I would like to highlight the existence of a controversy over how divine law, ethics, and positive law should be reconciled

[133] Baderin, Mashood A: *International Human Rights and Islamic Law*. Oxford University Press, Oxford 2003, p. 33.
[134] Op. cit., p. 42.

in Islam. I believe that this controversy is very similar to that which relates to how we understand human rights law. Both Sharia and human rights law can be regarded either as universal principles (moral visions) needing to be transformed in order to be applied as positive law, or as positive law in itself. As stated above, I believe that only law understood as moral vision can aspire to universality, and that both Sharia and human rights law describe themselves as universal law.[135] Another argument in support of the view of Sharia and human rights law as moral rather than positive law relates to the advantage of a better potential for compatibility. If Sharia and human rights law are universal laws of social morality, we should articulate them at a higher abstract level and then seek practical legal and political solutions in conformity with them. In the case of conflict between norms, we can analyze it by means of equilibrium between the meaning of context and the meaning of general principles. None of them are pre-given and stable.

For example, as Saira Malik shows in an illuminating article about the implementation of Sharia in the United Kingdom, the traditional system of Islamic law is flexible in at least two ways. The first that an Islamic religious-legal authority (*mufti*) "is *personal* and *unmediated*. […] It is not mediated by any political or other social force. The *mufti*'s authority is based on his learning, character and piety, and his relationship with any individual".[136] Every individual can choose which *mufti* (if any) to approach for advice on Sharia-related issues. In addition, the traditional system of Islamic law differentiates between interpreters of Sharia (*mufti*), judges (*gadi*), legal theorists (*faqih*), and professors. As Malik notes: " [t]he *mufti* would issue a *fatwa* if a question was put forward, the *gadi* would decide whether and to what extent the *fatwa* should be implemented within the social order of the community in which he served, while the *faqih* would expound on the legal rea-

[135] There are some exceptions. For example Joseph Schacht argues that 'Islamic law does not claim universal validity'. See Schacht, Joseph: *An Introduction to Islamic Law.* Oxford University Press, Oxford 1964, p. 199.
[136] Malik, Saira: "Enjoin the Good, Prevent the harmful", p. 258.

soning behind the *fatwa*, and the professor would use it for teaching/learning purposes."[137]

Even if this separation of functions is not identical in all traditional Islamic societies, it is representative in that it prevents Sharia from becoming a firmly codified legal system. It allows Muslims to suggest legal and social interpretations of Sharia that do not corrupt its moral and religious meaning. To codify Sharia and thereby transforming it into positive law removes this flexibility, prevents the well-established praxis of equilibrium, and creates non-resolvable conflicts between norms.

Let me take the issue of equality between women and men as an example. For those who view Sharia and human rights as norms of universal morality, differences in how gender relations have been traditionally interpreted within these two traditions do not create an unresolvable conflict. Many Muslims claim that the Islamic view of woman and her human dignity must be interpreted differently under new conditions and that following the Quran and the Sunna of the Prophet does not mean copying the Prophet's actions in Medina. Rather, it calls for us to act according to the principles that guided his actions in Medina. Like many other Muslims, Tariq Ramadan argues that the Prophet's view of women represented a radical advance on the cultural practices of his time. Compared to the contemporary prescriptions of conventional morality and law, the Prophet's teachings on the status of women were a call for respect and social justice. Temporally and geographically specific injustices provided the background for the legislation enacted by the Prophet Mohammed.

When we apply Sharia we should be informed by an understanding of modern inequality, which we can fight using universal norms interpreted creatively.[138] Islamic feminists are particularly involved in efforts to draw a line between the moral-religious aspects of the Islamic heritage, and the patriarchal contexts which have strongly influenced its historical articulation and practice. For example, as Sa'diyya Shaikh argues, condemnation of violence against women must be seen as a universal Islamic norm and there-

[137] Malik, Saira, op. cit., p. 257.
[138] Ramadan: *Radical Reform,* pp. 207-232.

fore used as a basis for reliable interpretation of the Quran and Sharia.[139]

If human rights are interpreted in a similar way, i.e. as basic principles of social morality and thus of justice, occasional conflicts between human rights and Islamic law can be resolved constructively. In cases of conflict, what is needed is an interpretation of the situation as well as of Sharia and human rights. Concrete norms in actual situations are never identical with universal human rights law. Nor are there any concrete norms that *are* the Sharia. To protect the human rights of women and to respect their human dignity is not about giving priority to either human rights or Sharia. Rather, it is an ongoing attempt to understand what the humanism of human rights and the humanism of Sharia demands of us in a particular situation. The Prophet Mohammed was promoting justice by giving every woman half the vote of a man; human rights activists now demand full equality on the same basis. Today we find ourselves in a situation where neither strategy is sufficient for those who desire gender equality. Giving women half the vote of a man will not strengthening the position of women today. Yet the formal equality of modern legislation is not enough, either. There are situations in which a woman's vote should be counted twice as much as a man's. Affirmative action is just one example of how the moral vision of human rights can be promoted by practices that discriminate between different groups in a way that formally contradicts human rights.

If we view Sharia and human rights law as two sets of positive law, we have to decide which should be given priority in all cases of conflicting norms. This decision must then be made generally, and it will not allow discussion, legal or moral, of particular cases. Clearly, there is a risk that the dominant tradition will be prioritized. Unfortunately, this is what often happens. Either we say that human rights law must be seen as stronger in every case of conflict, or we claim that Sharia is the most important and should be used as the basis for general reservations about human rights in-

[139] Shaikh, Sa'diyya: "The *Tafsir* of Praxis", in D. C. Maquirel and S. Shaikh (eds.): *Violence Against Women in Contemporary World Religion.* The Pilgrim Press, Cleveland 2007, pp. 66-89.

struments. This creates and deepens conflicts between cultures, making us less receptive towards the advantages of alternative traditions.

Western traditions of human rights actually have a lot to learn from Islamic policies and traditions. However, by focusing on a few problematic conventional norms, as if these were Sharia itself, we overlook Sharia's potential as an ethic of solidarity and liberation. Let me mention a few examples. The same texts that we criticize for infringing women's human rights offer a challenging vision of a society free of inhuman exploitation of people. Islamic human rights documents make use of Sharia in order to claim a very strong responsibility for refugees. Above all, the prohibition of the abuse of power is an important part of human rights in the Sharia tradition.[140] This tradition challenges universal human rights law when it comes to the issue of citizenship. An effective protection of human rights is often frustrated by Western notions of citizenship, predicated as these are upon the notion of national boundaries. A traditional Western state does not admit responsibility for protecting the rights of non-citizens, a policy which affects highly vulnerable groups such as refugees or the victims of trafficking. As Mohammad Hashim Kamali has shown, the "absence" of the concept of citizenship in traditional Islamic thought enables the problematizing of unjust and restrictive laws relating to immigration and citizenship.[141]

Another important and challenging feature of the traditional Islamic understanding of rights, which in many regards is similar to the Jewish discourse on rights, is recognition of the fact that an effective protection of rights must be connected to control and limitation of the power possession. According to Quran and Sharia, political as well as economic power must be restricted and, with the words of Joseph Schacht, "[t]he qualified interpreters of Islamic law […] have never hesitated to blame the rulers for their ne-

[140] See, for example, *The Cairo Declaration on Human Rights in Islam*, Arts. 11, 12, 23.
[141] Kamali, Mohammad Hashim: "Citizenship: an Islamic Perspective", in *Journal of Islamic Law and Culture* Vol. 11, No. 2, 2009, pp. 121-153.

glect of the sacred law".[142] According to Mashood Baderin, freedom from worship of any other beings except God must be interpreted as a prohibition for a man to subdue himself to other.[143] In another context Baderin states that "[u]nder Islamic law the political authority owes a duty not only to the people but to God not to violate the freedom and liberties of the ruled without justification".[144]

Universal morality and contextual norms

There are a number of similar challenges that human rights law and Sharia must confront. One is how to handle the tension between the claim of universality and the recognition of contextuality. Another challenge is that of finding strategies for a just co-existence with other traditions with similar approaches. I believe that in order to respond fully to these challenges both human rights law and Sharia must be understood and practiced primarily as universal visions of political morality. As such, they are abstract and dynamic, and thus cannot be adequately formulated in terms of positive law. What is both possible and desirable is promotion of legislation and policies that conform to the basic moral principles of these two traditions. Whenever someone declares that a particular legal (or other conventional) norm *is* identical with human rights or Sharia, the universal dimension of the tradition is in danger. The fact that Sharia is a religious law and human rights law is secular does not alter the logic of my argument. The religious foundations of norms prescribed by Sharia, or, rather, the belief in their divine origin, function in a similar way to the belief that human rights are "natural rights" of all human beings. The strength of the religious claims of

[142] Schacht, Joseph: "Islamic Law in Contemporary States", in *American Journal of Comparative Law* Vol. 8, 1958, p. 133.
[143] Baderin, Mashood A: "Establishing Areas of Common Ground Between Islamic Law and International Human Rights", in *International Journal of Human Rights* Vol. 5, No. 2, 2001, p. 91.
[144] Baderin, Mashod A.: *International Human Rights and Islamic Law*, p. 45.

Sharia and of the universalistic claims of human rights should be countered by sensitive interpretations of both traditions.

This sensitivity should be directed towards the unavoidable contextuality of every articulation of universal (religious) law as well as towards its political aspects. Forgetting one's own heritage causes a great deal of damage. One example is the negative reaction of many people to the enforcement of international human rights norms. In presenting these norms as universal and non-contextual, the West ensures that people will experience human rights as yet another Western colonial project. Promoting the universal dimension of human rights does not mean rejection of the contextuality of human rights law and human rights politics. Moreover, it is impossible to avoid politics when promoting either Sharia or human rights. Human relations (individual as well as social) are marked by specific (and typically material) conflicts, and thus by power and politics. While neither human rights nor Sharia can escape politics, both have tools for its critical evaluation. This becomes obvious in those cases when legitimate norms and values conflict with each other, requiring us to prioritize them.

Let me address a serious objection to my view of human rights and Sharia, namely, the issue of the status of the international conventions of human rights. If human rights law is not a positive law, are we not denying its efficiency? If human rights conventions are not legally binding, why bother at all? I recognize the value of the argument. But my comparison between Sharia and international human rights law questions the universality of the traditional Western view of law as necessarily connected to the official power of the state. It may be possible to revitalize the traditional vision of "divine" law and use it in order to relativize every positive law and policy. This will not allow us to treat international human rights law as ordinary legislation. On the other hand, it may strengthen the positive potential of the moral and political aspects of human rights law. No longer a consumer of human rights law, the individual (as citizen) becomes an active political actor possessed of a moral vision of dignified human life.

What is more, many instances of conflicting rights would seem to be cases of genuine moral dilemmas, i.e. situations where we

really must choose and where none of the available choices can be seen as a logical necessity or simple legal obligation. Choosing between legitimate conflicting norms has a moral as well as a political dimension. In many situations, such choices are made on a traditional basis. Of course, this is not good enough. But it is even worse to deny that one of the competing traditions is even a tradition. In this regard, universal human rights law and Sharia face different challenges. While human rights law needs a clear recognition of its own contextuality, Sharia needs to revitalize its traditional self-image as a universal law. If those who attribute the stagnation in Sharia's development to colonialism are right, then Sharia functions properly when it is used as a universal divine law. A concrete norm can never come closer to the Sharia than by claiming to be a Sharia-*based* norm. Such a norm needs a justification which can demonstrate that the norm, under prevailing conditions, serves the universal principles of Sharia (for example, to prevent harm). These principles can be experienced as absolute but they are always conceptualized by means of a hermeneutical effort.

Neither God nor the United Nations can provide human beings with legislation that is simultaneously a universal morality and a positive law. Theologically, humans are called to respond to the will of God, the very understanding of which forms a part of such a response. Philosophically, there is a dialectical relation between morality, politics, and law, in which morality needs politics in order to become an act, and politics need morality in order to counteract the abuse of power. Finding itself "between" morality and politics, the law must be interpreted and practiced with a clear recognition of its moral and political aspects.

Chapter V

Freedom of Speech – a Colonial Saint in the Catalogue of Rights

Earlier in this study it was argued that one of the most serious challenges to the lasting legitimacy of the international agreements on human rights is the lack of transparent principles for prioritizing among broadly recognized rights as well as among rights and other fundamental values, such as democracy or social stability. There is evidence that most participants in international human rights discourse (governments, non-governmental actors, and scholars) tend to demand transparency of priorities on behalf of others even as they take for granted their own traditions of value hierarchy. In many situations, moreover, economically and politically stronger actors try to impose their traditional priorities onto weaker actors, with the effect of destabilizing peaceful cooperation and further undermining the credibility of human rights.

It is thus of crucial importance that we identify principles that can transparently and non-violently guide concrete prioritizing among rights. In order to identify such principles we need to critically evaluate ideas and practices that illegitimately aspire to become universally valued norms. One such practice is the elevation of traditionally strong rights to the level of unlimited or even absolute rights. By absolute I mean a right that is viewed as non-derogable. International human rights law recognizes as such non-derogable rights: the right to life; the right to be free from torture and other inhumane or degrading treatment or punishment; the right to be free from slavery or servitude; and the right to be free

from retroactive application of penal laws.[145] However, there are also rights that, in various cultures, are treated as near-absolute. In order to guarantee protection of these rights governments are prepared to violate other rights, something they often (although not always) indicate by rejecting or ignoring clauses in human rights treaties that allow reasonable and legally approved limitations of human rights.

This chapter focuses on the common liberal view that freedom of speech is an inviolable human right. I will use Sweden as an example. My choice of Sweden is deliberate. When the issue of culture-related priorities is discussed in human rights literature it is almost always the case that non-liberal cultures are cited as examples of attempts to avoid transparent and trans-contextual argumentation. The use of "traditional values" as a trump for prioritizing among rights is often questioned in regard to Islam, Asian values, and other non-Western cultures. In what follows I will show how several Swedish human rights agents use non-transparent and culture-related arguments when defending traditional priorities at the same time as they deny other countries the right to use tradition as a legitimate ground for priorities.

I will discuss a number of cases that demonstrate how freedom of speech,[146] which is rightly regarded as a core value of Swedish society, is deemed worthy of strong protection even at the expense of severe violations of other fundamental rights and freedoms. While this anomaly is problematic in itself, it poses particular problems in the current context of growing racism in Europe. Additionally, this chapter proposes a four-stage program for reclaiming the meaning of freedom of speech: first, to view freedom of speech as one right among other and *prima facie* equally important rights; second to harmonize national and international human rights policies; third, to acknowledge the fact that existing liberal democracies should not be viewed as models of democracy as such; and

[145]For a description of the meaning of non-derogable freedom from torture, see UN Resolution 57/200; A/RES/57/200. 16 January 2003.

[146] I will use the terms "freedom of speech" and "freedom of expression" interchangeably.

lastly, to articulate clearly the dialectical relationship between the political, moral, and legal dimensions of freedom of speech.

In order to scrutinize the view of freedom of speech as a nearly unlimited human right I will draw on Ronald Dworkin's notion that the principle of equal concern and respect should be used as a guiding principle for prioritizing among conflicting rights and values. I will compare Dworkin's own understanding of the freedom of speech with that of Jeremy Waldron's, and demonstrate that Dworkin's firm rejection of the legal limitations of the freedom of speech contradicts the principle of equal concern and respect. Lastly, I will argue that the principle of equal concern and respect should be complemented by a set of communicative norms guiding trans-cultural discussions of human rights issues.

Sweden versus the United Nations

Freedom of speech is protected by Article 19 of the *International Covenant on Civil and Political Rights*, which stipulates:

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
   a) For respect of the rights or reputations of others;
   b) For the protection of national security or of public order, or of public health or morals.[147]

[147] *International Covenant on Civil and Political Rights*. UN resolution 2200A (XXI) of 16 December 1966.

Of special importance for my analysis is the third paragraph of the article that regulates how and when the freedom of speech may be restricted. Freedom of speech is not absolute since it can be restricted in order to protect the rights of others as well as national security and public order. Hate speech is one of the most important and broadly, albeit not universally, recognized exclusion from the protection of freedom of speech. Behind this recognition lie historical experiences of genocide and the acknowledgment of populism's role in the genesis of racial violence and genocide.

As a state party to the UN human rights conventions and of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, Sweden has established a political and legal practice that tends to view freedom of speech as an almost absolute freedom. Freedom of speech is firmly protected in Swedish law, and is seen by judges in the vast majority of legal cases as the most important value deserving of protection. Even racist, homophobic, and xenophobic statements are excused or officially allowed by laws that do not criminalize racist websites, newspapers, and production of "white power" music. Sweden's position is not approved by the United Nations. In its "Concluding Observations" (2013) the United Nations' Committee on the Elimination of Racial Discrimination "expresses its concern about the increase in reports of racially motivated hate speech against minorities, including Muslims, Afro-Swedes, Roma and Jews, in particular by some far-right politicians. The Committee is also concerned about the reported increase of hate speech in the media and on the Internet, including by certain professionals."[148]

Racist organizations such as the national-socialist *Svenska Motståndsrörelsen* (Swedish Resistance Movement) are legal in Sweden and operate in public as well as on Internet. Although hate speech is criminalized, the courts are very restrictive in applying the legislation against hate speech. During 2011 only seven percent of reported cases of hate speech led to a charge, according to the

[148] "Concluding Observations on the Reports of Sweden, Adopted by the Committee at its Eighty-third Session" (12-30 August 2013), p. 4. www.un.org [Accessed 2013-12-12].

Swedish government.[149] Further, Sweden has argued, and still argues, that its practice of not banning racist organizations is compatible with the country's obligations under the UN's various conventions. The United Nations' Committee on the Elimination of Racial Discrimination has repeatedly voiced its disagreement with Sweden's position.

How should we interpret and evaluate this disagreement between Sweden as a state party of the conventions and the UN? It could be argued that Sweden has a right to form a human rights policy in accordance with its own political culture and traditions. This is common praxis in the United Nations as well as in Europe, where the specific term – "margin of appreciation" – has been coined as a way of describing a legal space for the recognition of cultural differences and their importance for human rights policies. In what follows I will demonstrate that this logic, while in itself tenable, cannot be applied to Sweden without contradiction because Sweden denies other, mostly non-Western, states an equivalent right to invoke culture as a criterion for prioritizing rights. This becomes especially visible when Sweden protects Islamophobic utterance as a natural part of its democratic culture while simultaneously condemning Islamic countries when they assert their right to use culture as the basis for human rights policies.

Mohammed cartoons and Christian homophobia

My thesis is that freedom of speech as it is understood and practiced in contemporary Sweden is heavily anchored in the colonial heritage of this rich and stable Northern European country. On the one hand, Swedish public discourse is generally reluctant to acknowledge the existence of self-censorship in its mass-media and politics; on the other hand, the need to protect freedom of expression is invoked every time marginalized minorities demand stronger safeguards against racism in the public sphere.

[149] *Nineteenth to twenty-first periodic reports of State paries due in 2013 Sweden*, p. 9. www.un.org, accessed 2013-12-12.

The kind of colonialism I am discussing here is not the colonialism of a former empire such as the United Kingdom or Spain. Sweden had no substantial colonial possessions and its part in direct colonial exploitation was insignificant. However, Sweden has a colonial heritage insofar as it is part of a Western culture that sees itself as culturally superior with regard to democracy and human rights. Sweden's cultural and political identity is constructed around this image of being a largely successful actor in a benevolent and democratic Western World. Admitting the very existence of human rights violations and a democratic deficit is difficult because it challenges what the majority view as a central feature of contemporary Swedish identity. As a number of researchers have observed, Sweden's self-image as a kind of "moral great power" directly accounts for why many obvious violations are not discussed in terms of human rights.[150] I share this view, and in what follows I will seek to demonstrate how this colonialist logic functions. I will take a closer look at three cases: Swedish reaction to the publication of the so-called Mohammed cartoons in Denmark; anti-Islamic images created by the Swedish artist Lars Vilks; and the case of Åke Green, an evangelical minister who was tried in the Supreme Court of Sweden for discriminating against homosexuals in a sermon. My aim is not to offer a nuanced analysis of the legal aspects of these cases. Rather, I will use them to highlight how the meaning of freedom of speech is constructed in public discourse in contemporary Sweden.

In September 2005, Danish newspaper *Jyllands-posten* published twelve cartoons that portrayed the prophet Mohammed and Muslims in a manner calculated to invite ridicule. The cartoons were sent to the newspaper after its editors had invited images that would assert the right to free expression and the right to criticize Islam. For anyone who has seen the cartoons it is obvious that they depict Islam in a manner that insults, but fails to critique in any substantive fashion, the traditions of Islam. One of the most widely circulated and discussed of these images depicts a man in whose turban a bomb has been placed and inscribed with the line of the

[150] *Det blågula glashuset – strukturell diskriminering i Sverige. SOU 2005:56.* Stockholm 2005, p. 109.

Islamic creed in Arabic. In the context of 2005 this image drew an unambiguous connection between Islam and terrorism. It also evokes anti-Semitic images from the first half of the twentieth century when depictions abounded in the European media of Jews as ugly, greedy, and dirty. The experience of the Holocaust makes it impossible to publicly reproduce such images in Europe today.

Despite this striking similarity with European anti-Semitism, the case of Danish cartoons has been discussed in Sweden not in terms of condemning harassment of a Muslim minority, but rather in terms of the need to maintain a robust freedom of speech. With some exceptions[151] public discourse focused on the importance of protecting freedom of speech. Protests against the Danish images in Europe as well as in Islamic countries – some of which turned violent – were interpreted as some broader Islamic disrespect for freedom of speech. This perception of Islamic cultures as hostile to freedom of speech has continued to grow in Sweden. Writing in *Svenska Dagbladet*, Swedish lawyer and human rights advocate Krister Thelin points out that the current majority in the UN Human Rights Committee consists of experts from Muslim countries, and he warns that this may lead to a significant weakening of the international protection of freedom of speech.[152] As I see it, this unfortunate construction of a link between efficient protection of freedom of speech and a presumed prohibition of public critique within Islam renders Swedish discourse on freedom of speech fundamentally Islamophobic.

After the publication of the Danish cartoons the invocation of freedom of speech has become a badge of identity for several anti-Islamic organizations in both Denmark and Sweden. The rhetorical slogan "Isn't criticism of Islam permitted?!" is frequently used by

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[151] Distinguished Swedish journalist Göran Rosenberg published an illuminating essay entitled "Freedom of expression and its limits" in which he declared: "[a]nti-Semitic caricatures of the kind once published in *Der stürmer* are not possible to publish today. If *Jyllands-Posten* in Denmark had done that, very few would have accepted the argument that the newspaper only wanted to manifest its freedom of speech." Eurozine. www.eurozine.com/articles/2006-03-03-rosenberg-en.html, accessed 2014-01-26.

[152] Thelin, Krister: "Yttrandefriheten måste ständigt debatteras", in *Svenska Dagbladet*, January 23, 2014.

Islamophobic actors such as the Sweden Democrats party (*Sverigedemokraterna*).[153] What is even more troublesome is that this view of Islam, as hostile to freedom of speech, is increasingly finding a foothold outside of openly racist organizations.

The issue that needs to be discussed is why Sweden's human rights culture does not prevent freedom of speech from being used as a way to legitimize xenophobia. This culture seems to turn a blind eye to recent developments in which broad acceptance of vocal hostility towards minorities is poised to change the climate of public debate dramatically. Straightforward harassment is mistaken for criticism deserving of protection in a manner that further weakens social sensitivities towards new forms of racism. As recently as December 2013 one famous Swedish journalist could profess to see no connection between the framing of Danish discourse on freedom of speech and the ongoing normalization of racism in Denmark. In a spirit of empathy, *Dagens Nyheter* columnist Björn Wiman declared that his Danish colleagues should be as proud of the climate for public debate in which the *Jyllands-posten* cartoons were published as they should be ashamed of Denmark's indecent policies towards immigrants.[154] To deliberately interpret offensive images of vulnerable minorities as a necessary feature of democracy in itself constitutes a normalization of racism, one that in turn provides the very basis for "indecent politics towards the immigrants".

In order better to understand the position taken by Björn Wiman and others like him, not infrequently intellectuals and public officials, it is helpful to compare the Swedish reaction to the publication of the cartoons with the public's reaction to Swedish artist Lars Vilks's provocation of Muslims. For many years Lars Vilks has acted as a self-appointed defender of freedom of speech. He believes that this freedom is threatened by the Islamic prohibition upon depicting the Prophet Mohammed. In 2007 Vilks exhibited

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[153] This xenophobic party's strategy is to construct its own self-image as that of a defender of "Swedish democracy" against supposedly anti-democratic non-European cultures.

[154] Wiman, Björn: "Den 18-årige poeten blir hatad och hotad – och älskad," in *Dagens Nyheter,* December 15, 2013.

and published a drawing of the face of Prophet Mohammed transposed onto a sculpture of a dog, specifically a so-called "roundabout dog" (Sw. *rondellhund*) which had enjoyed popularity as a kind of spontaneous street art in recent years. Lars Vilks's art is generally provocative in character and the idea behind the dog drawing was to challenge religious prohibitions by lodging an artistic protest against an Islamic taboo. In Vilks's project the humorous canine sculpture that had sprung up on many Swedish traffic roundabouts was transformed into a statement that many Muslims reasonably experienced as offensive.

Lars Vilks's views of Islam, democracy, and human rights are well-known, not least because he is keen to spread them through his website. In December 2013, Vilks commented on a huge anti-racist demonstration that had taken place in Stockholm. The demonstration had been a response to an incident of racist violence in a Stockholm suburb which the police had failed to stop. Unsurprisingly, Vilks was critical of the demonstration because its participants promoted what he regarded as a conformist discourse on respect for human dignity. Vilks distrusts the seriousness of the demonstrators' slogans, with which they demanded that human dignity be accorded respect equally. In a post titled "Human dignity" (Sw. "*Människovärde*") Vilks mocked the very idea of demonstrating in support of the principle of equal human dignity. He showed similar scepticism towards the protestors' anxieties about rising racism, commenting facetiously: "Well, the art is growing too".[155]

I find it both significant and alarming that Vilks disregards the principle of equal human dignity at the same time as he himself claims to be defending the freedom of speech. Vilks's attitude towards Muslims is part of his perverted interpretation of freedom of speech that is expected to be granted not as part of the human rights protection but as part of the superior European culture of freedom. In my opinion, Vilks articulates a regrettably common Western attitude that unlimited freedom of speech somehow guarantees strong democracy and robust protection of human rights.

[155] www.vilks.net [Accessed 2013-12-30].

This belief is only true if one is prepared to redefine the scope of democracy and human rights, and, like Vilks, equate democracy and human rights with Western liberal culture.

Dominant public discourse in Sweden excuses the publication of the Danish cartoons as well as the exhibition and republication of Vilks's Islamophobic art. It is obvious that neither offers a substantial critique (of Islam) that legitimately warrants protection as a part of a democratic culture of open critique and tolerance. Instead, the marginalized group, i.e. European Muslims, is identified as a potential threat to freedom of speech. When several leaders of Islamic countries approached the Swedish government to express their concerns about the situation of Swedish Muslims, Prime Minister Fredrik Reinfeldt replied that, while Sweden respects its Muslim citizens, the publication of insulting images is protected by freedom of speech.[156] Reinfeldt saw no contradiction between respecting a minority and tolerating its public harassment. The law in a democracy should indeed offer firm protection to freedom of speech. But such protection does not require that political and moral support be extended to xenophobic ploys. Yet precisely such support is being provided every time public discourse identifies straightforwardly xenophobic statements as measures to defend freedom of speech.

Let us consider another Swedish case in which freedom of speech was represented as practically unlimited in scope. On 20 June 2003, evangelical pastor Åke Green held a sermon in the small Swedish town of Borgholm. Before a congregation of approximately fifty people, he declared that "sexual anomalies [performed by homosexuals] are a cancerous tumor deep within the body of society". He also asserted the existence of a connection between homosexuality and pedophilia.[157] Since his intention was to reach as many people as possible, Green invited the local media to publish his sermon.

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[156] Lönnaeus, Olle: "Reinfeldt bröt tystnaden om Vilks Muhammedhund", in *Sydsvenskan*, March 9, 2010.

[157] Högsta Domstolens Dom B 1050-02 meddelad i Stockholm den 29 november 2005, pp. 2-3.

Green was convicted of incitement to racial hatred under the Swedish Criminal Code but the Supreme Court of Sweden overturned the conviction, arguing that freedom of religion, as protected by Article 9 of the European Convention and interpreted in the light of the European Court's praxis, does not allow limitation of freedom of expression in the context of religious sermon unless it is a case of hate speech. The Supreme Court judges stated that in the case of Åke Green it is clearly not the matter of such utterances that are called hate speech.[158] This ruling was delivered by judges who were evidently aware of the fact that "homosexuals in Sweden are frequent victims of racist crimes".[159]

Comparison of Lars Vilks's case with that of Åke Green is interesting because it shows that although anti-Islamic utterances are not seen as illegally infringing the rights of Muslims to freedom of religion, a Christian minister's right to insult another vulnerable minority is protected by how the Swedish legal system interprets freedom of religion. It makes clear that freedom of expression is regarded as the most important component of freedom of religion,[160] even as the vulnerability of minorities (including religious minorities) is downplayed.

In all three cases under consideration here, the most vulnerable groups have been described as somehow threatening the status of freedom of speech. While elaborating on freedom of speech and freedom of religion (here interpreted primarily as the right to express an opinion), many Swedish lawyers, politicians, and journalists reveal a striking ignorance of the meaning of these basic human rights. It would appear that they are seen as either traditional core values of a superior democracy (i.e. Sweden) or commodities which the majority is eager to maintain. What is missing is the insight that human rights, including freedom of speech, can come into conflict with other human rights and therefore have limits. It is not self-evident that freedom of speech can be excluded from rea-

[158] Högsta Domstolens Dom B 1050-02, p. 14.
[159] Op. cit., p. 4.
[160] It may be noted that Sweden is a traditionally Lutheran country, which explains why verbal expressions of individual faith are viewed as central to religious practice. This cannot be generalized and applied uncritically to other religious traditions.

sonable limitations, and there is a persistent challenge to find effective and non-violent practices for protection of different rights. Islamophobia unquestionably represents one of the most acute challenges facing human rights and democracy in Europe today. It makes people vulnerable to severe violations and therefore dependent of legal and political protection.

Reclaiming the meaning of freedom of speech

When freedom of speech is discussed in the West it is often described as an important, even the most important, element of democratic liberal culture. This is true, but only to some extent. The freedom that is crucial for democracy is an equally distributed freedom to be critical and level criticism at power structures and those in power. Harassment of the powerless is an essentially anti-democratic phenomenon insofar as it can deny minorities the very possibility of democratic participation. Legitimate critique may be delivered in provocative ways but provocation (and especially that of vulnerable groups) that lacks any reasonably comprehensible substance should be rejected.

The main argument of this chapter is thus not that freedom of speech itself needs reevaluation but that it is time to reconsider its content, meaning, and mode of implementation. Reclaiming freedom of speech involves four steps. First, it requires that we treat freedom of speech as a central but neither self-sufficient nor unlimited human right. In other words, freedom of speech should be explicitly related to a vision of and general policy for the protection of human rights. What we have seen in the cases of the Danish cartoons and Lars Vilks's anti-Islamic images is that xenophobic actors tend to efface the link between freedom of speech and the broader moral basis for legal and political protection of human rights. Freedom of speech is wrongly proclaimed to be a self-evident guarantor of human rights and democracy as such. In many colonialist and xenophobic discourses democracy and human rights are evaluated by measuring the degree to which people are afforded the freedom to publicly harass vulnerable minorities. What is

lost, then, is the insight that freedom of speech should be interpreted and implemented in relation to fundamental democratic and rights-related values, such as broad political participation and the protection of equal human dignity. Of course, these principles can be criticized and transformed. Yet such criticisms or transformations should be open and take place by means of democratic deliberation. It is thus my firm conviction that in order to protect freedom of speech, it must be connected to a transparent discussion of the moral and political underpinnings of human rights and democracy.

As stated earlier, I believe that the principle of equal concern and respect is a good candidate for a grounding norm that is efficient when it becomes necessary to prioritize among different rights and norms. Reasonable application of this principle in hard cases presupposes using power analysis that, although not guarantees, but enables legal and political practice that does not exclude weaker social groups from human rights protection and democratic participation. In the context of contemporary Sweden it will require greater political effort to protect freedom of speech on behalf of Muslims and other minorities. This protection should include restricting freedom of speech when it is used by aggressively xenophobic actors. Protection of a vulnerable minority from straightforward harassment is an important aspect of freedom of speech because it secures equal respect of dignity and makes it possible for all citizens to participate in public life without fear of violence or hatred.

I agree with Jeremy Waldron, who in a deeply insightful analysis of the meaning of the constitutional prohibition of hate speech, argues that limitations of freedom of speech involve the very basis for legitimacy of a democracy. He writes:

> I shall argue that hate speech regulation can be understood as the protection of a certain sort of precious public good: a visible assurance offered by society to all its members that they will not be subject to abuse, defamation, humiliation, discrimination, and violence on grounds of race, ethnicity, religion, gender, and in some cases sexual orientation. […] The aim is simply to diminish the presence of visible hatred in society and thus benefit members of

> vulnerable minorities by protecting the public commitment to their equal standing in society against public denigration.[161]

What is productive in this approach to hate speech and what makes it relevant for the discourse on freedom of speech as a whole is its clearly articulated insight that legitimate democracy demands, in addition to legitimate protection of human rights, firm recognition of the social vulnerability of minorities. To exclude minorities from the equal protection of human dignity, or to prevent them from democratic participation, risks provoking a serious crisis in democratic legitimacy. At the present moment, contemporary Europe, Sweden included, is confronting just such a crisis, one that is expressing itself *inter alia* through low political participation by minorities and periodical rioting in ghettos.

As regards human rights, the efficient protection of vulnerable minorities, including the prohibition of public harassment, offers a reliable strategy for sustaining the principle of equal concern and respect. Members of minorities will in this way be reassured that the government takes seriously its promise to treat all citizens as equals, that is to say, as entitled to the same level of respect and security. To identify minorities in need of protection is not difficult: both legal theory and political philosophy have proposed reliable sets of criteria for such identification. In the context of freedom of speech these criteria should always be complemented by the criterion that legitimate limitation of freedom of speech is directed against harassments, even as substantive critique may continue to be articulated in provocative forms.

Second, legitimate national protection of freedom of speech should be harmonized with the principles governing a state's international policies with regard to human rights. To claim special status and interpretative conditions for a right undermines the West's credibility as a promoter of universal values. Let us look again at the Swedish example in this context. On the international stage Sweden claims that culture and tradition should not be used as arguments for elevating some rights over other rights. In its offi-

[161] Waldron, Jeremy: "Dignity and defamation: the visibility of hate", in *Harvard Law Review*, Vol. 123, No. 1596, 2010, pp. 1599-1600.

cial foreign policy statement on human rights the Swedish government states that the principles adopted by the World Conference on Human Rights (1993, Vienna) "form the basis of human rights work in Sweden".[162] Those principles include universality and the precept that "[h]uman rights are indivisible – they are equally important, interdependent and mutually reinforcing".[163] Just one paragraph later, the government notes that Sweden gives *special* priority to "building democracy and strengthening freedom of expression".[164] Only someone who fails to recognize his tradition as a tradition can miss the inherent contradiction. For a rational observer it is clear that the Swedish interpretation of the importance and content of freedom of speech is a part of its liberal *culture*. This culture can and should be defended, but it is wrong to present the traditional values of a Western democracy as transcultural and universally binding.

As I see matters, it is a lamentable artifact of colonial thinking to declare that a Western state may not restrict freedom of speech because it is a central and highly prioritized right, while simultaneously condemning other countries when they use different kinds of traditions in arguing in favour of concrete priorities and interpretations of human rights. The following text is taken from Sweden's response to reservations made by Saudi Arabia during the process of ratifying the *Convention on the Elimination of All Forms of Discrimination against* W*omen*:

> *With regard to the reservations made by Saudi Arabia upon ratification:*
> The Government of Sweden has examined the reservation made by the Government of the Kingdom of Saudi Arabia at the time of its ratification of the Convention on the Elimination of All Forms of Discrimination against Women, as to any interpretation of the provisions of the Convention that is incompatible with the norms of Islamic law.
> The Government of Sweden is of the view that this general reservation, which does not clearly specify the provisions of the con-

[162] "Human Rights in Swedish Foreign Policy" (2003/04:20). Presented by the Government to the Riksdag on 5 November 2003.
[163] Ibid.
[164] Ibid.

> vention to which it applies and the extent of the derogation therefrom, raises doubts as to the commitment of the Kingdom of Saudi Arabia to the object and purpose of the Convention.[165]

If it is not legitimate for Saudi Arabia to invoke unspecified norms of Sharia in order to interpret and implement a human rights convention, it should be equally illegitimate for Sweden to use the unspecified norm of liberal democracy while refusing to ban racist discourse and organizations. I imagine that some readers will be made uncomfortable by this comparison and think, "well, it cannot be fair to compare the human rights policies of Saudi Arabia and Sweden". This is precisely what I mean by human rights-related colonialism. If we want to preserve the international credibility of the human rights project we should try to think of states as equally bound by the need to argue transparently for their respective human rights priorities. The legitimacy of Swedish protection of the right to insult a vulnerable group is no more evident than the legitimacy of the protection of traditional values of Islam.

To strengthen the credibility in regard to a liberal reasoning about freedom of speech takes to argue in a way that at least potentially is possible to explain to the outsider. I believe that this criterion is crucial if we want to reclaim freedom of speech as a human right and a democratic value. What I have in mind here is the aforementioned principles of public communication as formulated by Jürgen Habermas. To claim the "prior possession" of the true meaning of human rights, democracy, and freedom of speech breaks communication which is almost always a starting point of violence. This violence takes two main forms: the violent imposition of one's own view upon others; the violent rejection of a dialogue that is experienced as meaningless by those who are to be educated in universal truths of liberalism.

Open and constructive discussion of the content and meaning of freedom of speech as well as of other rights is important, but it is not possible if the discussion begins with the insulting of its potential participants. I believe that this explains why Vilks's so-called "defense" of freedom of speech causes communicative breakdown

[165] Sweden's objections received by the Secretary-General 21 July 2005.

and violence rather than inclusive democratic deliberation on the issue of freedom of speech. It is understandable that most targets of the harassment (of the "roundabout dog" image) do not view the cartoon as an invitation to a discussion about public values. When a group of young Muslims violently prevented Lars Vilks from delivering a lecture at Uppsala University in May 2010, it was both a violation of freedom of speech and a reaction against the symbolic violence against Muslims represented by the university's invitation of Vilks. Democratic deliberation intended at peaceful resolution of the social and political tensions that are always present in societies cannot be initiated by insulting an opponent. For this reason the most prominent theorists of deliberative democracy often highlight the importance of the precise starting-point for constructive deliberation. To confirm reciprocity and respect by means of a thoroughly greeting is something Iris Marion Young points at in her *Inclusion and Democracy*. Following Jürgen Habermas, who grounds a theory of communicative ethics in a philosophical analysis of everyday communication, Young argues that

> [g]reeting, which I shall also call public acknowledgment, names communicative political gestures through which those who have conflicts aim to solve problems, *recognize* others as included in the discussion, especially those with whom they differ in opinion, interest, or social location. By such Sayings discussion participants acknowledge that the others they address are part of the process, and that we who address them must be accountable to them, as they to us.[166]

I disagree with Young's view that practices such as greeting and storytelling can resolve substantial social conflicts. However, I believe that she is right in suggesting that a lack of greeting or, as in the case of Danish and Swedish disdain for Muslims offended by the cartoons, an open disrespect for the other is a sign of a substantial democratic deficit. Domestically as well as internationally, it is crucial to respectfully acknowledge the other and his equal right to present a different vision of rights and democracy.

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[166] Young, Iris Marion: *Inclusion and Democracy*. Oxford University Press, Oxford 2000, p. 61.

A third step towards the reclaiming of the content of freedom of speech involves acknowledgement of the differences between existing democracies and practices of human rights on the one hand and, on the other, ideals of democratic participation and human rights. Stable democratic states such as Sweden can be tempted to identify the ideal of democracy with their own institutions and practices. In fact, it can be harder to recognize a democratic deficit in a democratic country than in a country with a weak democratic tradition. The same applies to the ideal of human rights and human rights cultures. In the case of Sweden it would seem as though most public officials as well as many activists and journalists readily identify human rights violations only when these occur in non-Western societies. Though rightly condemned, such violations also used to demonstrate Sweden's superiority in the field of human rights. The ambiguity is well-known and relatively easy to explain. For a political actor who is structurally dependent of the preferences of the majority, it is much harder to admit domestic human rights problems than it is to continue loudly defending a traditionally strong right that enjoys broad recognition and firmly institutional protection. It is politically sensitive to raise the issue of rights that pose a challenge to the preferences and privileges of the domestic majority. In Sweden's case, freedom of speech is a far less politically sensitive than the human rights of refugees and minorities.

However, if we want to know whether a government takes human rights seriously we need to examine how it deals with reasonable and human rights-related claims that to some degree challenge the political and/or economic status quo. Otherwise human rights protection runs the risk of becoming an empty rhetoric of ideological superiority that is unlikely to promote positive social development. Reviewing numerous current examples of the discrepancy between international and domestic practices of human rights, I am reminded of the Soviet-era story about two men, one American, the other Russian, who meet in Red Square and begin discussing their countries' respective policies. The American asserts the superiority of the USA by saying that everyone in America is allowed to openly criticize the President of the USA. The Russian replies by saying

that, well, even in Russia it is absolutely fine to openly criticize the President of the United States.

For Sweden the great challenge in the field of human rights today is to protect weak minorities. This protection does not automatically increase a political party's popularity with the electorate. Rather, it dramatically challenges the view of democracy as simply a tool for securing the interests of the majority. How should we behave politically if human rights protection implies restrictions of the preferences of the majority? How should we address the challenge of a contemporary political landscape in which racist parties are growing in popularity by appealing to European citizens who disapprove of the ideal of equal rights for all?

My own view is that successful combination of human rights and democracy requires that a political actor present a broadly attractive political vision of a *just society*. For this very reason, the technocratic turn in the latest phase of capitalism poses as serious a threat to the future of human rights as do traditional anti-liberal ideologies. In order to be able to preserve democracy and human rights as ideals and practices we must continue to discuss and practice politics in a way that relates it to the issue of social justice. To claim that human rights and democracy are completely incarnated in the Western democracies represents a danger to the future of European democracy.

Lastly, as the fourth step in my attempt to reclaim the tenable meaning of freedom of speech, I propose that this freedom, together with other basic human rights, should be articulated in a way that makes transparent the relations between the legal, political, and moral dimensions of human rights protection. In the preceding examples concerning images offensive to Islam, the legal systems of Denmark and Sweden found these images to be legal. As already noted, I remain sceptical about these interpretations of the law. However, even the absence of a legal prohibition does not imply that the production and publication of anti-Islamic images is morally and politically defensible. Alas, this insight is not apparent to many active proponents of human rights. As I see it, the dominant position of human rights law within the current human rights discourse has contributed to the widespread view that legal ap-

proval of a practice makes it compatible with human rights. This trend obscures the fundamental complexity of international human rights law, a law that is constructed as a set of political agreements about basic norms of social morality that are meant to be implemented through different national politics and legislation. There is a temptation, then, to reduce this complexity to a narrowly legal matter of human rights law. As I have argued in previous chapters, such a reduction of scope presents serious problems for the international system of human rights protection. These problems are seldom recognized in Swedish public discourse. On the one hand, Swedish courts are sceptical towards moral reasoning; on the other hand, judicial rulings are often seen as the final word in the public's discussion of the meaning of human rights.

In order to preserve legitimacy of human rights we need to strengthen the moral and political mechanisms that exist for their protection as well as to counteract extreme forms of legal positivism. Restriction of freedom of speech is primarily a moral and political issue. To reasonably define the content of freedom of speech implies moral considerations and political involvement. There are many situations in which people naturally reason in this fashion. Many legally permitted utterances are socially unacceptable for moral and/or political reasons. What is important, then, is to discriminate between properly moral and merely conventional prohibitions. Xenophobic actors in Sweden, very much like their European allies, tend to dismiss moral defenses of the limiting of freedom of speech as merely conventional (conformist). When Lars Vilks describes a Stockholm demonstration for the recognition of equal human dignity as "politically correct", he implies that the moral norm of equality is just a conventional, conformist position. An accurate contextual ethical analysis reveals the opposite: for an established Swedish artist to style himself as a defender of freedom of speech under threat from a discriminated minority is nothing more than a populist ploy.

There is no formal technique for reliably discriminating between morally legitimate and immoral limitations of freedom of speech. Moral arguments should be articulated and deliberated upon in the political space. But for such moral and political deliberation to take

place it is crucial to ensure that minorities are welcome as members of Swedish society. For this reason the Stockholm demonstration in support of the ideal of equal dignity that was ridiculed by Lars Vilks constitutes a tremendously important example of the enduring political potential of a moral ideal of human rights. By involving citizens in political matters, human rights ideals can sustain their democratic legitimacy and contribute to the further development of human rights law and its practical implementation.

Dworkin versus Dworkin

It may seem contradictory for me to invoke the principle of equal concern and respect as interpreted by Ronald Dworkin at the same time as arguing against his position on the issue of freedom of speech, a position he, famously, maintained until his death in 2013. In numerous publications and speeches he defended the idea that European legislation against hate speech should be abandoned in the name of a genuine protection of basic human rights, democracy, and liberalism. Dworkin was also sceptical of British and American news outlets that did not publish the Danish cartoons:

> There is a real danger, however, that the decision of the British and American press not to publish, though wise, will be wrongly taken as an endorsement of the widely held opinion that freedom of speech has limits, that it must be balanced against the virtues of 'multiculturalism', and that the Blair government was right after all to propose that it be made a crime to publish anything 'abusive or insulting' to a religious group.[167]

Arguing in favour of freedom of speech as a right without limitations, Dworkin differentiated between instrumental justification of this right and constitutive justification of it. The former protects freedom of speech as a means for other central values, for example, the quality of democratic decision-making; the latter protects freedom of speech "because we are a liberal society committed to indi-

[167] Dworkin, Ronald: "The Right to Ridicule", in *New York Review of Books* on March 23, 2006.

vidual moral responsibility, and *any* censorship on grounds of content is inconsistent with that commitment".[168] As an advocate of the idea of constitutive justification, Dworkin was critical of European legislation, drafted in the early 1990s, that forbade racially inflammatory speech, a position he held until his death.

I have argued above that legitimate restriction of freedom of speech should be formulated in the political and moral discourses, not only by means of legal prohibition. At the same time I see a strong need for legally stipulated limitations. Dworkin is wrong in defending a kind of legislation on freedom of speech that does not include a limitation clause. My thesis is that Dworkin's interpretation of unlimited freedom of speech contradicts the principle of equal concern and respect that he himself identified as central to human rights.

Dworkin believes that for a liberal democratic society to function properly, it is constitutive (his own terminology) to reject any restrictions of negative freedom of citizens. He understands this negative freedom in terms of what he takes to be Isaiah Berlin's position, namely, an interpretation of freedom as the freedom to "not [be] obstructed by others in doing whatever one might wish to do".[169] Dworkin rightly emphasizes that Berlin was critical of the concrete historical corruption of the idea of positive freedom. This corruption includes the idea that the government may restrict the will of people because it somehow has knowledge of "their true, metaphysical will".[170] Dworkin proceeds to argue against positive freedom and rejects any limitation of negative freedom even when the justification of such limitations does not require any metaphysical or anti-democratic ideas. Prohibition of Nazi propaganda is similarly dismissed by Dworkin in the name of the constitutive value of the negative freedom of speech.[171]

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[168] Dworkin, Ronald: "Why must speech be free?", in Dworkin: *Freedom's Law. The Moral Reading of the American Constitution.* Harvard University Press, Cambridge 1996, p. 205.
[169] Dworkin, Ronald: "Pornography and hate", in Dworkin: *Freedom's Law*, p. 215.
[170] Ibid.
[171] Dworkin, Ronald: *Freedom's Law*, p. 204.

I see three serious objections to Dworkin's reasoning. First, he underestimates the argument that unlimited freedom of speech may exclude some groups from democratic participation. Dworkin has been confronted by Frank Michelman and others, who implicitly argue that marginalized groups, such as women in a patriarchy or foreigners in a racist society, may be effectively silenced by certain types of speech. Dworkin answers this objection by agreeing that some types of speech may prevent vulnerable people from speaking in public. However, he claims, this is an insufficient for restricting freedom of speech. Strikingly, at this point Dworkin does not introduce additional arguments but instead quotes Berlin's view that negative freedom *is* freedom and may not be overruled by any other value: "Everything is what it is: liberty is liberty, not equality or fairness or culture, or human happiness or a quit conscience."[172]

The fact is that even the minimalistic freedom envisaged by Berlin cannot be guaranteed exclusively by formally granting every individual an equal right to freedom of speech. As late as in 2012 when attended a conference in Oslo on the issue of multiculturalism, Dworkin admitted that neither contemporary racism nor memories of Holocaust are sufficient grounds for endorsing legal prohibitions of hate speech. Clearly, Dworkin does not recognize that individuals may be deprived of freedom to speak and/or to participate by virtue of belonging to a real or forced group identity. As many researchers have showed, patriarchy and racism are complex social phenomena and individuals who belong to oppressed groups have no chance of attaining freedom simply by acting as "free individuals".

In this example it is obvious that even he accuses his ideological opponents (i.e. defenders of positive freedom) of invoking metaphysical arguments (about what people "really" want), Dworkin himself views the negative freedom of liberal ideology as *the* freedom beyond any further discussion. This connects with my second objection to his view of freedom of speech. In defending freedom of speech, Dworkin is guilty of imperialistic admiration of what he

[172] Dworkin, Ronald: *Freedom's Law*, p. 223.

regards as the exceptional nature of American democracy and liberalism. While Dworkin is understandably proud of the Constitution of the United States, he lacks any reliable knowledge of the cultures that he often describes as opposed to American liberal and democratic tradition:

> The United States stands alone, even among democracies, in the extraordinary degree to which its Constitution protects freedom of speech and of the press, and the Supreme Court's great 1964 decision in *New York Times v. Sullivan* is a central element in that constitutional scheme of protection.[173]

The Supreme Court's case that Dworkin is discussing here is interesting in that it explicitly protects the press's freedom to examine public officials critically. Such critique is protected even if there is a risk that published material turns out to be false. I agree with Dworkin that *New York Times v. Sullivan* is an important guideline for the legal protection of democratic critiques of government in the United States. What I am critical of is the opening line in the quoted passage, which is strongly reminiscent of Dworkin's rhetoric more generally, namely his insensitiveness towards political history and global political structures. To claim that the American solution is the right one and should therefore be adopted by others requires extensive knowledge of the similarities and differences between states, knowledge that Dworkin does not possess.

Thirdly and most importantly in the context of this study, by defending freedom of speech as *the* fundamental freedom of the liberal democratic society Dworkin abandons the discourse on human rights. He does it by playing down the principle of equal human dignity that he himself used to articulate in terms of equal concern and respect. In his programmatic defense of human rights as protected in the United States constitution Dworkin rightly argues that the principle of equal concern and respect lies at the very heart of human rights. A government that takes human rights seriously is obligated to treat everyone as equally important. Dworkin has many times demonstrated that tenable applications of this principle

[173] Dworkin, Ronald: *Freedom's Law*, p. 195.

include power analysis that is helpful when priorities between conflicting rights must be done. The most famous example of this is Dworkin's defense of the praxis of affirmative action.[174] When it become necessary to prioritize among conflicting rights the principle of equal concern and respect stipulates that "treatment as an equal is fundamental and the right to equal treatment derivative".[175] Arguing in support of affirmative action, Dworkin additionally, and correctly, claimed that affirmative practices can and should be justified by means of a theory of justice rather than utilitarian theory: "The ideal arguments [in favour of affirmative action] do not rely upon preferences at all, but on the independent argument that a more equal society is a better society even if its citizens prefer inequality. That argument does not deny anyone's right to be treated as an equal himself."[176] If the same logic is to be applied to freedom of speech it should be admitted that offensive speech which threatens members of weaker groups is a violation of their fundamental right to be treated as equals. This principle is not contradicted by the need to protect freedom of speech as a means of critiquing power.

A possible explanation for the crucial inconsistency I have identified in Dworkin's interpretation of human rights may well lie in his uncritical reading and acceptance of John Rawls's view of liberal equality. As is well known, Rawls was firmly of the opinion that negative political freedoms should never be subject to limitation. However, this does not excuse the fact that Dworkin applies the principle of equal concern inconsistently. Moreover, in being familiar with feminist and post-colonial criticism of Rawls, Dworkin was in a better position to revise the Rawlsian view of negative freedom.

To sum up this discussion of Dworkin's interpretation of freedom of speech as an unlimited liberal freedom, I would like to emphasize that Dworkin gravely devalues the central principle behind his own justification for human rights. By abandoning it

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[174] Dworkin, Ronald: "Reverse discrimination," in Dworkin: *Taking Rights Seriously,* pp. 223-239.
[175] Op. cit., p. 227.
[176] Op. cit., p. 239.

Dworkin demonstrates that excessive confidence in traditional liberal values can lead to conclusions that betray the most powerful principle of liberalism, namely the ideal of justice as every human being's equal right to liberty.

Back to Europe

The current definition of freedom of speech in the United Nations *Covenant on Civil and Political Rights* offers clear criteria for the legitimate protection of freedom of speech. According to 2§ of Article 20, state parties are obligated to guarantee that "[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law".[177] As is well known, the United States entered a reservation against this provision. The reservation stipulates that "Article 20 does not authorize or require legislation or other action by the United States that would restrict the right of free speech and association protected by the Constitution and laws of the United States".[178] Sweden did not object to this reservation, although it did object to reservations made by the USA to Articles 2, 4, 6, 7, 15, and 24.[179]

Article 10 of the *European Convention* states that the exercise of freedom of expression

> since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for

[177] *International Covenant on Civil and Political Rights*. UN resolution 2200A (XXI) of 16 December 1966.
[178] United States of America. Reservations upon ratification of *International Covenant on Civil and Political Rights.*
[179] Ibid.

> preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.[180]

These formulations are reasonable, anchored in the ideal of equal human dignity, and deserving to be applied by every state that views human rights protection as a constitutive part of its policies and legislation. It is possible to implement the articles differently in different conditions, of course, but to view freedom of speech as an unlimited freedom runs contrary to European human rights law.

I have already cited Islamophobia as an important factor in the recent Swedish trend of viewing freedom of speech as a near-absolute right. In Sweden, as in the rest of Europe, Islamophobia has been regrettably connected with the unreasonably elevated status of freedom of speech. By uncovering this connection we can reclaim the genuine meaning of the freedom of speech.

It is not the religious prohibition against portraying the Prophet Mohammed that threatens Swedish democracy and devalues Swedish commitment to human rights. It is Islamophobia itself that has this effect and, in so doing, damages the image of Sweden and Europe in Muslim countries around the world. Coming to terms with Islamophobia requires that we recover the core meaning of human rights morality, namely, the ideal of equal human dignity. It also requires that we formulate human rights policies in a way that prevents them from becoming a colonialist project.

An analysis of power as well as contextual sensibility will be needed if we are to address the issue of legitimate limitations to freedom of speech. Both are often lacking in the Swedish debate, in which various representatives for the majority population discuss Islam and Muslims. As Mohammad Fazlhashemi and others have shown, an array of actors – from Christian-Democrats' local politicians to openly Islamophobic groups – regularly invoke tradition as grounds for forbidding Muslim communities in Sweden from practising the public call to Friday prayers (Friday Muez-

[180] *Convention for the Protection of Human Rights and Fundamental Freedoms. Rome 4.XI. 1950.*

zin).[181] Islam is viewed as a foreign tradition and therefore denied an equal claim to public expression. Very often those who deny Muslims the right to express their faith in a traditional fashion are the same people who vocally defend their right to be critical of Islam as freedom of expression. It is beyond the scope of this chapter to offer a more detailed analysis of this profoundly colonial mentality. My thesis is that it undermines the very core of the ideal of human rights and devalues human rights as a potentially universal project.

In Sweden, as in most other strong European democracies, there is no acute need to adopt desperate measures to defend freedom of speech, which is already well protected, by tolerating aggressive public expressions of Islamophobia. As already noted, I share the view of Jeremy Waldron, who discusses the prohibition of hate speech in relation to public assurances that no member of a decent society need fear racist violence and harassment. Public, and therefore symbolically tolerated, insults of a racist character serve to jeopardize the legitimacy of the fundamental social contract for which human rights are expected to provide protection.[182] There is no reason to fear that freedom of speech will be endangered if a society like Sweden decisively disassociates itself from racism and public expressions of racist hostility.

[181] Fazlhashemi, Mohammad: "Skrämmande debatt om muslimska böneutrop", in *Dagens Seglora*, December 3, 2012.
[182] Waldron, Jeremy: "Dignity and defamation: the visibility of hate", in *Harvard Law Review* Vol. 123, No. 1596, 2010, pp.1617-1634.

Chapter VI

Identity and the Stranger
A Christological Critique of Refugee Politics

> He entered the praetorium again and said to Jesus, 'Where are you from?' But Jesus gave no answer. Pilate therefore said to him, 'You will not speak to me? Do you not know that I have power to release you, and power to crucify you?'
>
> The Gospel According to John 19:9-10.

Pilate's meeting with Jesus is a piece of our history. Not so much for what it actually was, but for all the reflection the stories awaken. In different ages and in different places the meeting is recreated by thinkers and artists. Michail Bulgakov's novel *The Master and Margarita* is my personal favourite among the stories of Pilate, the man of power, and his confrontation with Yeshua, the Jew. In the novel their meeting proves to be decisive for Pilate's hard won insight that the truth possesses another kind of power than any political power he can win and retain. It all begins with Yeshua not being able to explain his identity, explain it in such a way that the Roman procurator can accept:

> 'Name?' 'Mine?' enquired the prisoner hurriedly, his whole being expressing readiness to answer sensibly and to forestall any further anger. The Procurator said quietly: 'I know my own name. Don't pretend to be stupider than you are. Your name.' 'Yeshua', replied the prisoner hastily. 'Surname?' 'Ha-Notsri.' 'Where are you from?' 'From the town Gamala,' replied the prisoner, nodding his head to show that far over there to his right, in the north, was the town Gamala. 'Who are you by birth?' 'I don't know exactly,'

> promptly answered the prisoner, 'I don't remember my parents. I was told that my father was a Syrian. …' 'Where is your fixed abode?' 'I have no home,' said the prisoner shamefacedly, 'I move from town to town.' 'There is a shorter way of saying that – in a word you are a vagrant,' said the Procurator […].[183]

In Bulgakov's narrative, Yeshua is unable to account for his origins at the same time as he is astoundingly lucid when it comes to explaining his misunderstood message to Pilate. Yeshua, who at the beginning of the dialogue cannot say who his parents are, eventually philosophises with Pilate in several languages, of which Aramaic, Greek, and Latin are explicitly mentioned in the story. Bulgakov emphasizes the identity problematic by letting a fictive Russian author, the hero of his novel, retell the biblical story about Yeshua. Yeshua's identity is obscured in the extreme while the language of truth in his message remains. Bulgakov's story of Pilate and Yeshua ends with Pilate the politician authorizing the crucifixion of Yeshua the vagrant. Pilate the man has to live with the burden of guilt for authorizing the death of the truth-loving philosopher and healer:

> Have pity on me, philosopher! Do you, a man of your intelligence, imagine that the Procurator of Judaea would ruin his career for the sake of a man who had committed a crime against Caesar?
>
> 'Yes, yes…' Pilate groaned and sobbed in his sleep. Of course he would risk ruining his career. This morning he had not been ready to, but now at night, having thoroughly weighed the matter, he was prepared to ruin himself if need be. He would do anything to save this crazy, innocent dreamer, this miraculous healer, from execution.[184]

In the footsteps of the evangelists Bulgakov seems to be problematizing the connection between the credibility in a person's words and the certainty of their identity. What is the meaning behind the problematisation?

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[183] Bulgakov, Mikhail: *The Master and Margarita.* Translated by Michael Glenny. Fontana, Glasgow 1979, pp. 26-27.
[184] Op. cit., p. 337.

Even today identification is one of the most obvious markers of the safe and reliable. Current politics in the EU and Sweden is imbued with identity discussions and the question "Where are you from?" is among the questions we are continually asking one another in the political and legal discourse. Not being able to verify one's identity leads to serious legal complications, as refugees who make their way to Europe can attest. To have an identity that is considered deviant makes life difficult for many European minorities, at the same time as the insistence of the majority to continue stipulating the norm seems to have been strengthened instead of toned down in the age of globalization. If you happen to have a "deviant identity" you can expect to have to explain yourself thoroughly in order to gain acceptance. In the most serious cases it does not matter in the least what the stranger (foreigner) says or does, as the majority appears to lack the trust required for human communication to work.

Even considering the obvious, albeit short-term, security guarantee afforded by police identification checks there is, in my opinion, a need for further examination of the European political culture's view of the meaning and significance of identity. In this chapter I intend to approach this issue from an ethical perspective. I begin by suggesting that there is a connection between the common security–based view of identity and the Cartesian belief that every individual possesses an identity by virtue of self-consciousness and, therefore, independently of relations to other people. I contrast this understanding to another view of identity, namely the traditional relational approach, which articulates identity as a result of human relations, in terms of a gift from another person. Identity of the other is seen as the individual's personal responsibility, rather than an issue of political security. My claim is that such an alternative view of identity can be found in traditional ethics of Judaism and Islam which challenge the kind of refugee politics most often practiced in terms of political security in Europe. I maintain that tools for a moral critique of the current European view of refugees and strangers exist within Christian theology. Drawing on the writings of Dostoevsky and Bakhtin, I argue in favour of a Christology of radical uncertainty which allows us to

reclaim the genuine Christian view of God as revealing religious and moral truth without securing his identity.

Meeting a stranger: two ways of seeking identity

The view of identity expressed in political discourse emphasizes a particular dimension of every human communication. In order to relate to someone's message we want to know the identity of its author. Several political philosophers use this experience in their theories. In our own time Jürgen Habermas's analyses of communicative ethics can be mentioned. Habermas rightly argues that the subject behind a message must emerge in order for communication to proceed. Anonymous messages indicate a flight from responsibility and in the global situation this can lead to large disturbances, including different forms of terrorism. [185] That is why the new political rhetoric was appreciated by many when president Obama began his speech in Cairo on 4 June 2009 by clearly identifying the relevant parties in the anticipated political dialogue, and by thoroughly describing his own origins.[186]

Identity, or rather the possibility to establish it, is therefore an important marker for secure political and other communication. It is, however, just as important to reflect on the not at all unusual situations where such security is absent. Above all I am thinking of two forms of absence of security. The one is in situations where somebody cannot verify their identity, and the other is where the recipient of the identity narrative is not capable of assimilating it. Both forms of uncertainty have, in many cases, to do with powerlessness of those whose identity is in question. Refugees often have problems in verifying their identity as they are afraid that their genuine story does not meet the criteria imposed by refugee politics. It is interesting to note that the importance of the personal story is recognized in programmatic human rights documents to be

[185] Habermas, Jürgen: "Fundamentalism and Terror", in Borradori, Giovanna: *Philosophy in a Time of Terror.* Chicago University Press, Chicago 2003, pp. 34-36.
[186] "Obama's Address in Cairo", in *The New York Times*, June 4, 2009.

later toned down to give way, finally and completely, to police control methods.[187]

As far as the other form of difficulty in establishing a person's identity is concerned the situation of European Muslims can be representative. In practically all of Europe the growing trend is to treat all Muslims as a unified group whose cultural characteristics are presumed to be known and considered a threat to European values. Among these European values it is primarily democracy and gender equality that are usually seen as being at risk. With few exceptions it is almost impossible for a Muslim to convey the nuances in his/her own identity. The preconceived picture of Muslims is always in the way.

Those who defend our way of demanding reliable proof of identity from people point to the risk of various crimes that might be committed behind concealed identities which make identity checks necessary and therefore legitimate. I have no objections to that if by identification check we mean an activity the purpose of which is to establish how the physical body which, in an identification document is referred to as A is the same as the physical body that was earlier linked to a document issued to A. The matter is complicated, however, when we fill the identity idea with more content than a pure ascertainment of which body we are dealing with. To the degree that identity is an answer to the question "Who are you?" the security-led political way of dealing with identity is problematic. From a philosophical point of view the difficulty lies in the per-

[187] In March 2010 the United Nations High Commissioner for Refugees published a research report on asylum procedures in Europe. The results of the report confirm that the issue of identity is often given priority at the cost of investigations of refugees' reasons for application. Commenting on the procedure of interviews, the report states that "approximately two-third of interview time was dedicated to gathering bio-data and information on the travel route, and only one third of the interview time was dedicated to exploring the reasons for the application. UNHCR was concerned to note that in some of the interviews observed in these Member States, questioning with regard to the reasons for the application tended to be superficial, formalistic or insufficient to elicit all the facts which are relevant to qualification for international protection. Questioning was often more extended and more probing with regard to the identity of and travel route taken by the applicant." "Improving Asylum Procedures. Comparative Analysis and Recommendations for Law and Practice", UNHCR March 2010, p. 39.

vasiveness of an unexamined assumption, built into modern European culture, that individuals possess sufficient solid identity to be able to communicate it to others. Descartes' idea of a subject that has access to its own self awareness and by that to its own self seems to form the basis for this philosophy of identity. As is known, the French philosopher considered that self-awareness alone constitutes the platform we need to obtain reliable knowledge of the world. With his strong emphasis on the significance of *self*-awareness Descartes abandoned the older culture that considered identity to be something necessarily relational.

To the extent that it is possible to contrast the Cartesian view of the self with the more traditional view, where the relation to the other is decisive for a person's identity, we should distinguish between two levels within this contrast. The one is of a more descriptive nature and leads us into a complex philosophical and psychological discussion of the meaning of self-awareness and its role in the process of knowledge, including knowledge of the other's self. The other level is of a normative character and concerns the moral supposition that are contained in these two different ways of understanding the self in its relation to the other. It is this normativeness that is of interest here. Within the framework of our individualistic culture it is taken for granted that the individual's immediate and unmediated access to his/her own self is liberating. Regardless of how you answer the question of whether such access is possible or to what extent it is possible you think, on the normative level, that it is desirable. The relational model is seen as more problematic when the individual within the framework for this model has no free access to his/her self, but is presumed to acquire it in his/her relations with others. The question I should now like to ask is what happens with this assessment if we compare the individualistic model's normative assumptions with the relational model's normative assumptions in a situation where the focus is not on a free self that wants to own its identity, but on the one, who, in a position of power, confronts a stranger.

In a situation, such as that of refugees, where someone is dependent on the other, regarding him/her as reliable, the responsibility of the stronger party can be described in two different ways.

The stronger part can either expect the asylum seeker to prove his/her identity, or welcome the stranger and thus approve of his/her existence as a fellow human being. The legal and political culture in the West is characterized by the first way, which stands in clear contrast to an old religious and moral norm that says that God tests us in our meeting with strangers. Within the framework for the existing Western model the one seeking asylum must try to attenuate his/her foreignness by, as clearly as possible, showing his/her identity. The traditional norm marks instead a relationship between morality and the willingness to receive a stranger simply as a stranger.

It is important to point out that the traditional norm is explicitly directed towards the host. It says nothing about the one seeking asylum being weak in him- or herself at the time. It is rather the opposite, as the Torah, the Christian Bible, and the Quran describe such a vulnerable stranger as either God himself or an instrument of God. The moral challenge is directed towards the master of the house and amounts to being able to meet the one who in the present situation is in his power as if it were God himself. Within both Judaism and Islam Abraham (Ibrahim) is seen as a pattern of hospitality. The Quran's (51:25-26) account of how Ibrahim welcomes strangers to his home, offering them his best food, emphasizes that he greets *the unknown persons* with peace. It is in the name of the love of God that the Quran encourages the believer to take care of those who need his help (76:8-9).

But are not the old stories about people who welcome a stranger to their home to find that God blesses them with his presence just fairy tales which may be beautiful but can no longer inspire political action? I would like to argue that, in our global world, it is both possible and necessary to revive the old norm that says that the stranger's identity in the highest degree is the responsibility of the recipient.

Unconditional hospitality and monotheism

In an interview that took place directly after 9/11, Jacques Derrida reflected on those features of our modern culture that in the light of those dramatic events demanded a deeper cultural self-criticism. The French philosopher brought to the fore particularly the problematic European view of the stranger. Derrida thought that this view among other things was reflected in the inbuilt ambivalence of the tolerant culture:

> Indeed, and so a limited tolerance is clearly preferable to an absolute intolerance. But tolerance remains a scrutinized hospitality, always under surveillance, parsimonious and protective of its sovereignty. […] We offer hospitality only on the condition that the other follows our rules, our ways of life, even language, our culture, our political system, and so on.[188]

In connection with his critique of the concept of tolerance Derrida introduces another, both familiar and "impossible" norm, namely that of unconditional hospitality. He continues:

> No state can write it into its law. But without at least the thought of this pure and unconditional hospitality, of hospitality *itself*, we would have no concept of hospitality in general and would not even be able to determine any rules for conditional hospitality […] Unconditional hospitality, which is neither juridical nor political, is nonetheless the condition of the political and the juridical.[189]

In unconditional hospitality Derrida sees a necessary correction to the culture of tolerance. While tolerance, as Derrida views it, indicates the will of the stronger party to permit the presence of the stranger, unconditional hospitality indicates a kind of abdication from the position of power itself (*ce qui arrive arrive)*. Derrida believes the roots of the ambivalence of tolerance can be found in the historical and, by that, reversible power relationships between religions when Christians tolerate Jews, Catholics tolerate

[188] Derrida, Jacques: "Autoimmunity: Real and Symbolic Suicides", in Borradori, Giovanna (ed.): *Philosophy in a Time of Terror*, p. 128.
[189] Op. cit., p. 129.

Protestants, Muslims tolerate Christians and Jews, etc. What I would like to point out is that the same religious traditions also embodied the norm that Derrida is looking for, namely the norm of unconditional hospitality, the demand to receive the stranger with all the uncertainty that every estrangement bears within itself.

The Jewish tradition embodies the norm of unconditional hospitality.[190] The forms and interpretations are many. Let me take an example that lies relatively near in time. Hermann Cohen, who is one of the most established Jewish philosophers and theologians of the twentieth century, argues in his book *Religion der Vernunft aus den Quellen des Judentums* that monotheism has a very special significance for ethics. Cohen begins by making clear what he means by monotheism. According to him it is important to point out that genuine Jewish monotheism is not about the acknowledgement of the thesis that God is one (i.e. not two, three,etc.). What is central, instead, is acknowledgement of the thesis that God is unique. ”It is God’s uniqueness, rather than his oneness, that we posit as the essential content of monotheism”.[191] Further, Cohen believes that it is thanks to our understanding that God is unique, i.e. radically different from and unlike human, that the norm about respect for and responsibility for the stranger originated. Cohen claims that the belief in God as unique transforms the stranger into a fellow human being. He writes: ”Out of the unique God, the creator of man, originated also the stranger as fellowman.”[192] Cohen argues exhaustively for a connection between monotheism and the norm that links the just treatment of the stranger with the innermost nature of justice:

> ‘Ye shall have one manner of law, as well for the stranger as for the homeborn; for I am the Eternal your God’ (Lev. 24:22). This

[190] There are different interpretations of the Jewish tradition’s view of the stranger, some of which contradict the interpretation I describe in terms of unconditional hospitality. On the issue of Jewish law and the stranger see, for example, Last Stone, Suzanne: “Judaism and Civil society”, in Walzer, Michael (ed.): *Law, Politics and Morality in Judaism*. Princeton University Press, Princeton, NJ 2006, pp. 17-19.

[191] Cohen, Hermann: *Religion of Reason out of the Sources of Judaism.* English translation by Simon Kaplan. Scholars Press, Atlanta 1995, p. 35.

[192] Op. cit., p. 124.

> reasoning is quite instructive: it deduces the law pertaining to the stranger from monotheism. And it is particularly instructive that monotheism is expressed here through an appeal to 'your God'. Because the Eternal is your God, you must make one law for the stranger as well as for yourselves.[193]

While the Christian tradition underlines the significance of the likeness between God and man the Jewish tradition cultivates the difference between them, and this difference has far-reaching ethical consequences when people and cultures confront a stranger. Cohen believes he is following Maimonides when it comes to explaining the meaning of God's ultimate otherness. Cohen distinguishes between the negation of something existing and the negation of absence when God's attributes are mentioned. He writes:

> Maimonides becomes a classic of rationalism in the monotheistic tradition most decisively, perhaps, through his interpretation of the crucial problem of negative attributes. He elucidates the traditional problem of negative attributes through the *connection of negation and privation*. It is not the positive attributes that are negated but those of privation. God is not inert.[194]

That God is active (*negation of privation*) at the same time as he is holy, which means apart, constitutes, according to Cohen, the religious dimension of morality. Cohen refers to Lev. 19:2 ("Be holy because I, the Lord your God, am holy") and thinks that the distance, the difference between God and man indicates the form of morality; that which *is* with God can only be *ought* where man is concerned. What then is this *is* with God? In his famous interpretation of the relation between God and man as a correlation, Cohen maintains that God is just and loving towards man, which makes precisely justice and love towards a stranger a moral and religious norm.

Of particular interest here is Cohen's idea that the self (idea of myself as an individual) comes only with a relation to the other that replaces a relation to (abstract) humankind. Accordingly it is not so

[193] Cohen, Hermann, op. cit., p. 125.
[194] Op. cit., p. 63.

that self-insight is the basis for morality. On the contrary, morality is the only possible way to self-insight. The moral responsibility for the other, a responsibility perceived as mine, which is caught in the experience of guilt, gives birth to a self.[195] In such a perspective the demand that a stranger shall prove his identity appears problematic whereas the norm of unconditional hospitality is regarded as a condition for the experience of morality and identity. Both morality and identity are linked to the experience of one's own guilt. Even if Cohen himself associates experience of guilt as the religious dimension of morality with the well-known Socratic demon, the difference between the Greek and the Jewish heritage becomes explicit. While the first points out self-insight as decisive for morality, the second means that the moral relation to the stranger leads to self-insight.

Emmanuel Levinas follows Cohen in his exposition of the Jewish ethic and writes:

> Self-consciousness inevitably surprises itself at the heart of a moral consciousness. The latter cannot be added to the former, but it provides its basic mode. To be oneself [*pour soi*] is already to know the fault I have committed with regard to the Other. But the fact that I do not quiz myself on the Other's rights paradoxically indicates that the Other is not a *new edition of myself*; in its Otherness it is situated in a dimension of height, in the ideal, the Divine, and through my relation to the Other, I am in touch with God.[196]

Like Cohen, Levinas also refers to Maimonides when God's otherness is understood through a peculiar interpretation of God's negative attributes (negation of absence) and, like Cohen, Levinas thinks that it is forgiveness that characterizes God's relation to man and therefore constitutes a fundamental norm for religious morality. [197] As is known, Levinas further refined and radicalised Cohen's thesis on the relation to the stranger as the main feature of both morality and identity. In every situation where moral choices are

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[195] Cohen, Hermann, op. cit., p. 96.
[196] Levinas, Emmanuel: *Difficult Freedom. Essays on Judaism.* Translated by Seán Hand. The Johns Hopkins University Press, Baltimore 1990, p. 17.
[197] Ibid.

made the question is raised, which in its phenomenological form is the question of what I should do for the other. The moral dimension is not a result of the existence of the self, but rather its origin. According to my reading of Levinas it is here that one of his pioneering contributions to moral philosophy lies. Levinas namely turns around the relation between identity and responsibility, and while other European philosophers enquire after an existing subject before responsibility can be brought to the fore Levinas thinks that a self emerges when responsibility is taken.

Cohen and Levinas both challenge our view of identity by viewing identity as originating from and linked to responsibility before the other and forgiveness of the other. Forgiveness, which is a correlation of God's forgiveness of man, has a clear power dimension here and can thus be interpreted as the duty of the stronger to acknowledge the one who is in his power. In every meeting with a stranger who is seeking refuge, one's own identity is brought out while the identity of the stranger remains, in a moral sense, a non-question. In the scope of this moral phenomenology the meeting with the stranger becomes a pure form for moral inquiry where one is supposed to be able to overcome uncertainty about one's own identity through the radical risk-taking that hospitality towards a stranger is.

Does the Christian tradition break with the norm of unconditional hospitality? In one way it does. All the pains Christian theologians have taken and continue to take over seeking to prove the identity of Christ, introduce evidence that He is God's son, indicates the break with the religious traditions that explicitly problematize man's longing for security in a meeting with the stranger (God). In that respect Derrida is right when he argues that Christianity is a source of the negative European view of the stranger.[198] The Christian heritage strengthens and legitimizes the political pragmatism that permeates asylum and refugee politics.[199] To the

[198] You could see Christian anti-Semitism as a form of departure from the relational norm: "those who do not see Jesus' identity as we see it betray God".

[199] In the same way as we use the term "secular Muslims" we ought to be able to speak of "secular Christians" in order to emphasize the continuity that exists between European secular culture and Europe's Christian history.

extent that the Christian tradition links belief in the divinity of Christ to proofs of his identity, it abandons the traditional norm of unconditional hospitality and indirectly legitimizes the politics which play down responsibility of the stronger and requires strangers to prove their identity. However, I would like to maintain that the same Christianity that tends to legitimize this political pragmatism has effective tools for dissociating itself from it. Paradoxically these tools are also to be found in Christology, which is central for the Christian identity.

Who is the resurrected?

What resources of its own does the Christian tradition have for articulating the relational view of the identity of the stranger? To my mind Christology functions as a normative platform for the simultaneously impossible and vitally important unconditional hospitality. This happens thanks to a particular characteristic in the Christological paradigm, namely the fundamental uncertainty about the identity of Christ. In spite of countless attempts by institutionalized Christianity to offer infallible dogmatic answers to the question of who Jesus was (is), it is up to each and every believer to recognize his God in the vagrant on the cross.

The radical uncertainty of Christology is evident in the narratives of the evangelists, although it is not always accessible to us. As the church has tried to tone down this uncertainty for centuries, replacing the story of the vagrant Yeshua with stories of either the son of a regal God or a sweet little child, we may need new supportive stories in order to bring to our notice this thought that was originally so clear. There is a scene in Fyodor Dostoevsky's last novel *The Brothers Karamazov* which brilliantly interprets Christology as simply a story of fundamental uncertainty. The scene is set at the bedside of a dying boy. The boy's name is Ilyusha, and the remarkable thing about Dostoevsky's description is that Ilyusha does not appear to be afraid of his approaching death. What torments him is a guilt that he considers to be virtually unforgivable, namely that of badly mistreating a dog and now, approaching his

own death, he finds no comfort in thinking about this dog , which he fears has died. Dostoevsky resurrects the dog and liberates the boy from his guilt.

> 'Up, Perezvon, on your hind legs! On your hind legs!' Kolya shouted, jumping from his seat, and the dog, getting on its hind legs, stood straight up right in front of Ilyusha's bed. Something took place that no one expected: Ilyusha started, and suddenly made a great lunge forward, bent down to Perezvon, and, as frozen, looked at him.
>
> 'It's Zhuchka!' he cried out suddenly, his voice cracked with suffering and happiness.[200]

Ilyusha is happy when he sees that the dog has survived. The resurrection of the dog frees the boy from his guilt and the fear of death. There is however something very special and significant in Dostoevsky's description of this resurrection. At the same time as the narrator tells us that the return of the dog makes Ilyusha believe that he is already with God (in paradise) the reader is uncertain whether the dog that Ilyusha recognizes really is Zhuchka. In the original Russian text, the narrator alternates between Ilyusha addressing the dog as a bitch (Zhuchka) and the use of the masculine dog name (Perezvon) and the masculine pronoun (Ilyusha prizhalsya k *nemu*[201]) during his description of the dog at Ilyusha's bedside. To my mind the confusion is due to the fact that Dostoevsky is seeking to convey the radical uncertainty surrounding the identity of the resurrected. Ilyusha believes that the dog is Zhuchka, but the reader has to decide what he wants to believe. The scene also represents a clear contrast to an earlier scene in the novel when Christ returns to Earth. I am alluding to perhaps the most widely read part of *The Brothers Karamazov,* the section about the grand inquisitor in the fifth book of the novel. Dostoevsky's narrator does not hide the fact that the grand inquisitor's visitor really is Jesus, but the story ends with the cardinal of the church dismissing the message that the true son of God has brought. The inquisitor says:

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[200] Dostoevsky, Fyodor: *The Brothers Karamazov*, p. 544.
[201] Достоевский, Федор: *Братья Карамазовы.* По изданию *Полное собрание сочинений.*Наука, Ленинград 1979, том. 14, p. 492.

> Instead of the firm ancient law, man had henceforth to decide for himself, with a free heart, what is good and what is evil, having only your image before him as a guide – but did it not occur to you that he would eventually reject and dispute even your image and your truth if he was oppressed by so terrible a burden as freedom of choice?[202]

In another context I discuss Dostoevsky's thesis on the importance of freely discerning the difference between good and evil. [203] What is interesting here is that, when viewed together, the story of the boy, Ilyusha, and the grand inquisitor convey the significance of the Christological uncertainty. Ilyusha has no proof even in the matter of whom he meets and, in spite of that, he accepts the message of forgiveness while the grand inquisitor demands that God, who has recently proved his identity, give certain and irrefutable answers in moral questions. It is easy to interpret the stories as a variation of the New Testament's contrasting of the way the child and the way power relate to God and the kingdom of God. The genuine way is, "like a child", to trust the stranger while the controlled approach of power makes the tidings of God's kingdom inaccessible.

Among the philosophers who clearly saw the potential in what I call the fundamental Christological uncertainty is the Russian philosopher and literary scholar Mikhail Bakhtin. At the beginning of his literary career Bakhtin sought to shape a phenomenological ethics, the main category of which was to be responsibility. Responsibility, the ought (*otvetsvennost, dolzhenstvovanie*), according to Bakhtin, arises from the form of all kinds of moral experience that he, like Levinas, finds in the relationality between the self and the other. Unlike Levinas, who sees the other as the prerequisite for morality, Bakhtin thinks that it is the fundamental incompleteness of the self that constitutes the phenomenology of the ought and with it morality. Bakhtin distinguishes between three basic categories, namely I-for-myself (*ia-dlia-sebia*), the other-for-me (*drugoy-dlia-menia*) and I-for-the-other (*ia-dlia-drugogo*). These categories

[202] Dostoevsky, Fyodor: *The Brothers Karamazov,* p. 255.
[203] Namli, Elena: *Kamp med förnuftet. Rysk kritik av västerländsk rationalism.*

are the form for the difference between two kinds of evaluative perspective, the ethical and the aesthetic. Bakhtin writes:

> The highest architectonic principle for the actual world of the performed act and deed is the concrete and architectonically valid or operative contraposition of *I* and the *other*. Life knows two value centres, that are fundamentally and essentially different, yet are correlated with each other: myself and the other; and it is around these centers that all of the concrete moments of Being are distributed and arranged.[204]

While the other-for-me is evident in my experience and can thus be an object of aesthetic evaluation such as appreciation or understanding, I-for-myself only exists as a constant assignment, an endless event of being (*sobytiye bytiia*). A self is never given, but can either be endowed by the other (I see you!) or constantly constructed by taking of responsibility. Bakhtin says that the consciousness that can produce morality is necessarily situated and embodied; it relates to the world from one of the three positions where just an I-for-myself positions the consciousness within morality:

> I-for-myself constitutes the center from which my performed act and my self-activity of affirming and acknowledging any value come forth or issue, for that is the only point where I participate answerably in once-occurrent Being; it is the center of operations, the head quarters of the commander-in-chief directing my possibilities and my ought in the ongoing event of Being.[205]

That an I-for-myself is the position of responsibility is one of Bakhtin's most interesting theses. What is brought out by the discussion here however is Bakhtin's second thesis, namely the one that a self cannot be a given object for one's own consciousness. A self is its own object, a constant still-not-being while it *is* in the other's awareness. According to Bakhtin, this insight is obvious in Dostoyevsky's writing. In a fragment *K voprosam samopoznaniia i samootsenki* (On the question of self-awareness and self-evaluation) Bakhtin writes that an I always finds itself at the edge

[204] Bakhtin, Michail: *Toward a Philosophy of the Act*, p. 74.
[205] Op. cit, p. 60.

of the world; it sees the world and touches the world, but it cannot see itself in the world. An I needs the other in order to obtain a picture of itself. Bakhtin writes:

> This dependence on the other in every process of self-insight and self-recognition is one of Dostoyevsky's central themes, which also determines the distinctive way he has of creating his characters. The world is completely before me and the other is completely in it. For me it is a horizon (*krugozor*), for the other – environment (*okruzheniie*).[206]

With Dostoyevsky's help Bakhtin maintains that an I can only *be* as the gift of the other, never as something that exists for itself. Bakhtin goes on to say that Christology is a clear contextual articulation of the phenomenology of ethics and aesthetics. Christ knows a single norm for his own part, namely radical self-sacrifice, while it is mercy (compassion) that is manifested in every meeting with the other. In this light it is not difficult to understand how Bakhtin's fascination with Christology can be reconciled with his explicit anti-clericalism and criticism of power. The Christian God who fascinates Bakhtin is a God who renounces all power in order to put his fate in the hands of man, which, among other things, is manifested in the fact that it is left to man to recognize or crucify his God.

Several established scholars[207] have overlooked this Bakhtinian interpretation of Christology as they desired, at any cost, to find continuity between Bakhtin and the Russian Orthodox tradition in its anchorage in the legacy of the church fathers. I am convinced that Bakhtin is not dependent on the church fathers; on the contrary he is clearly opposed to them, not least because he implicitly rejects their agenda as far as it is intended to shape dogmatics into a kind of proof that Jesus Christ is God's son. As far as proof can exist for the divinity of Christ, it lies, for Bakhtin, in Christ's refusal to convince the other, his refusal to liberate man from the

[206] Бахтин, Михаил: «К вопросам самопознания и самооценки», in Бахтин: *Автор и герой.* Academia, Петербург 2000, p. 242. My translation.
[207] Among these are Katerina Clark, Michael Holquist, and Alexander Mihailovic.

responsibility of, at his own risk, granting the other his divine human identity.

I would like to conclude by saying that Christology possesses a special albeit not exclusive tool for articulating a religious dimension of morality that, like the Jewish and the Muslim tradition, singles out the meeting with a stranger as the decisive element in morality and faith.

From Christological dogma to a theology of refugees

Let us now return to the current European political discourse on asylum and refugee politics. It is evident to me that these politics are, from a psychological point of view, rooted in an understandable endeavour to maintain financial and political dominance without needing to acknowledge its cost. When we refuse to receive people it is easy to say that it depends on who these people are. Their identity is uncertain, they have insufficient grounds for asylum, they are a security risk, etc. The focus is always on the other, whereas what we do is explained in technical rather than ethical terms. Instead of referring to the UN documents, which are written in terms of political ethics, we prefer to cultivate juridical documents that give the appearance of not requiring any ethical standpoint in their application. Refusal of entry and discriminatory acts stand out not as moral injustices but as technical decisions resulting from laws that have already been tested and therefore do not require further discussion. The legitimacy of demanding proof of identity from others is to my mind an effective tool for upholding the discourse. A stranger who seeks refuge is received as an objectifiable danger without awakening any guilt feelings and with them any feelings of moral responsibility.

Is it, then, possible to change the dominant inhumane view of the stranger that pervades European politics? The first step could be to recognize that our politics today may be effective and pragmatic, but it is equally immoral. It plays down or even silences our own moral responsibility. In a meeting with a vulnerable stranger

the stronger party requires that the weaker give proof of his/her identity according to criteria defined by the receiver. Not least, considering the global dimension and our mutual responsibility for the injustices in the world, we ought to problematize and politicize the norm that justifies the vulnerable human being expected to prove that they do not threaten the strong party. An alternative norm might say that it is the stronger party's duty to offer the vulnerable an identity in an entirely new relation, which is what hospitality really is. Such a moral and political norm could be anchored in various traditions and function as a sort of overlapping consensus. While within the framework of Islam and Judaism people argue by invoking the ethical potential of strict monotheism we could, within the framework of Christianity and post Christian culture, build on Christological patterns of radical uncertainty.

If Christian ethics is to be able to provide a platform for political work to revive a humanistic view of people in asylum and refugee politics it must come to grips with its own problematic legacy. As is evident from my earlier argumentation, I think that an excessively strong focus on dogmatic *proof* of Christ's divine identity has led to the fundamental uncertainty and with it the believer's own responsibility being played down. I am looking for a re-evaluation of the theological work that has been done throughout the ages in order to secure Christ's divine nature. Christology in today's Europe can and ought to be a recognition of the responsibility of the believer and that of the Christian church to receive God as God "once" chose to reveal himself to man, namely as a homeless fellow creature of uncertain origin. However, this is not the same as playing down Christ's divine nature. It is about reminding oneself of the relational norm that unites Christian traditions with other premodern traditions and that maintain that even God's identity is only established by an act of faith (act of will).

Such a Christology of radical uncertainty conveys a clear moral demand. The mediation takes place when we dare to replace the regal (or angelic) image of God's son with the refugee who today tries to flee to Europe and then not only to save his own life, but also bring us a message of human suffering and our responsibility for it. The message is authentic, although there is no guarantee for

the bearer's identity. As I see the Christology of radical uncertainty, it asserts that the content of the message is not weakened by the recipient's fear of the unknown origin of the sender. If anything the character of the message is transformed from a descriptive statement (that can be dismissed as false) to a normative statement that requires taking a moral position, assuming responsibility.

As I write these lines I think of my meetings with representatives of Swedish churches who are engaged in refugee matters and who often stand out as naïve when, in the presence of researchers and politicians they try to formulate their view of the stranger. As a Christian theologian in today's Europe I want to show solidarity with the Christians, Muslims, and Jews and those whom I am not presently aware of, who take the side of the refugee and assert that they are not naïve, but carry out vital political work, which is about showing that the politics we choose today rests on an immoral norm and that there are other norms that demand considerably more, but deserve to be called moral.

In a long-term perspective it is doubtful whether the present asylum and refugee politics will even serve our own pragmatic goals. Europe does not suffer from a lack of experience that shows that our own future is jeopardized by replacing our own responsibility for the other with bureaucratic dehumanisation of the other. Levinas, Arendt, and many others offer clear-sighted philosophical analyses of the traumatic experiences that confronted Europe in the middle of the twentieth century and which led to the insight that respect for all people's equal worth and rights must be guaranteed on a political level. The challenge awaiting us today is not new; it only requires that we dare to see already familiar patterns and act before the technocratic view of humankind becomes all too pervasive.

Chapter VII

Orthodox Theology and the Temptation of Power

One of the most challenging issues raised by recent developments in Russia is the growing political and social role of the Russian Orthodox Church. Following a relatively long period of invisibility, the Russian Orthodox Church has reemerged in a number of areas as a significant political agent. State's authorities and Church leaders appear together at official ceremonies, the Patriarch comments on political issues, and the Church asserts its right and obligation to be a substantial moral voice in society. What do these developments represent? How should we evaluate them?

Recent developments can be seen as an expression of what scholars often describe as "the return of religion". This phrase is best understood as a contrast to the old axiom that the political role of religion diminishes in tandem with social modernization. Today, however, the world faces an increase in the political visibility of religion. This trend calls for a more nuanced understanding of how democratic secular states and their political systems are related to religion.

Consider John Rawls's famous exclusion of religion from public reason. In *Political Liberalism* (first published 1993), Rawls argues that public reason – defined as "the reason of equal citizens who, as a collective body, exercise final political and coercive power"[208] – does not include reasons of "churches […]."[209] Religious reason,

[208] Rawls, John: *Political Liberalism*, p. 214.
[209] Op. cit., p. 213.

like other types of reason, is understood as non-public and must therefore be transformed if it is to be integrated into the exercise of power in a democracy. Such an understanding of religion and its reason is premised upon a particular concept of liberal public reason: reasoning about basic norms of social justice, such as human rights, that are disconnected from any comprehensive view of good life, human dignity and so on. Interestingly, Rawls cites as an example of this public reason the Supreme Court, which, he argues, represents reasoning in terms of democratic power exercise and thus non-comprehensive public reason:

> The justices cannot, of course, invoke their own personal morality, nor the ideas and virtues of morality generally. Those they must view as irrelevant. Equally, they cannot invoke their or other people's religious or philosophical views. Nor can they cite political values without restriction. Rather, they must appeal to the political values they think belong to the most reasonable understanding of the public conception and its political values of justice and public reason.[210]

But the example in fact weighs against Rawls. The Supreme Court's practices show very clearly that its reasoning is heavily grounded in moral norms and ideas connected to several comprehensive world views. Ronald Dworkin, who typically follows Rawls's liberalism, and whom Rawls views as a supporter of his interpretation of the Supreme Court, has shown how the Court's legal reasoning is related to various comprehensive moral and political convictions. In order to determine what the Constitution says, its justices invoke, either explicitly or implicitly, different types of moral arguments.[211]

Limitations of space prevent me from developing a more extensive criticism of Rawls. For present purposes what matters is that it is possible to question his belief that public reason in a democratic liberal society can and should be independent of comprehensive

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[210] Rawls, John, op. cit., p. 236.

[211] Dworkin, Ronald: *Freedom's Law. The Moral Reading of the American Constitution.* Harvard University Press, Cambridge 1996. See also Dworkin, Ronald: *Justice in Robes.* Harvard University Press, Cambridge 2006.

world views, and, accordingly, that there is a need for other approaches to the relation between public reason and religion. One such approach, that developed by Jürgen Habermas, offers what I see as a more sensitive account of public reason. Like Rawls, Habermas advocates the ideal of a secular state. In light of the direction taken by contemporary democracies and the growing political visibility of religions, however, he admits that religion can play an important political role. He claims that in a globalized world religion often offers moral incentives for political participation that are lacking in traditional liberal ideology. Habermas is also critical of Rawls's position insofar as it tends to view secular reason as somehow less contextual than religious.[212]

I share Habermas's conviction that religion can shape political agency and encourage the public participation which is essential to a sustainable democratic society. At the same time it is important to elaborate further on the conditions under which religious political activity can be legitimate. A weakness of Western scholarly discussion of the issue has been the latter's tendency to consider such conditions as exclusively constitutional restrictions that supposedly secular societies impose upon religious individuals and groups. This account reduces religion to the status of an object of politics, underestimates the political potential of religious groups, and discriminates unfairly between non-religious and religious political forms of agency. A more balanced approach would be to supplement discussion of constitutional restrictions of political participation with an account of how religious traditions themselves perceive political activity, and thereby seek to establish criteria for legitimate political involvement that are inherent to religious traditions. This cannot be achieved on a general level of "religion" but requires deep knowledge of different religious contexts.

This chapter aims to contribute to the discussion by means of a closer investigation of the situation in Russia. While Rawls and Habermas focus on the arguments that individuals can justifiably invoke in political discourse, I will investigate the moral criteria by

[212] Habermas, Jürgen: "Prepolitical Foundations of the Constitutional State?", in Habermas: *Between Naturalism and Religion.* Polity Press, Cambridge 2008, pp. 101-113.

which the Church can legitimately exercise political agency. In so doing, my aim is to offer a critical analysis of the Russian Orthodox Church's involvement in Russian politics. I will address the issue from a theological point of view and demonstrate that the Russian Orthodox Church does not make proper use of its own theological tools when acting as a partner of the state, rather than as an independent political agent. One of the most devastating consequences of this behavior is its symbolic legitimizing of the multifaceted nationalism which has become a distinctive feature of political and social discourse in Russia today.

This analysis will focus upon the social doctrine of the Russian Orthodox Church and its official publications relating to human rights. These documents will be scrutinized and related to some alternative theological positions within the Russian Orthodox tradition. It will be argued that this tradition can enrich political life as well as counteracting Western colonialism while eschewing the rhetoric of cultural exclusivism and nationalism.

The Church presents its social concept

Contemporary developments in Russia indicate that the Russian Orthodox Church has chosen to connect its identity to the image of an important partner of the Russian state. Church leaders and political leaders alike have noted that the Russian Orthodox Church plays a very special role in the Russian Federation. Article 14 of the Russian Constitution stipulates that the state shall have a secular character and prohibits the institution of state religion. This principle is repeated in Article 4 in the federal law "On freedom of conscience and on religious associations". At the same time the preamble of this law stipulates that the legislator "recognizes the special role of the Russian Orthodox tradition in Russian history and in the formation and development of Russia's spirituality and culture". The law further clarifies that the criteria for legal recognition of religious associations includes the criterion of belonging to

the historical heritage of the peoples of Russia.[213] The stated purpurpose of the law is to balance this criterion with respect for human rights so as to guarantee every citizen's right to freedom of religion.[214]

The very fact that a legal document identifies different moral and political principles as necessary for the correct interpretation of its terms is not unusual. Many well-known international treaties on human rights seek to combine the protection of individual freedoms with the protection of collective security and the sovereignty of nation states. However, it is of paramount importance that a sustainable balance be struck between different principles without disregarding some of them. Developments in Russia reveal a tendency to override the principle of equal rights for all whenever the state wishes to protect "the traditional religions of Russia". The purpose of this chapter is not to develop a criticism of this tendency from the point of view of society. Rather, I wish to show how the Russian Orthodox Church has responded to the temptation of being publicly recognized as a key partner of the state, and what this response means in theological terms.

As I see it, the Church has two options. The first is to reject the state's "invitation" and act as an independent political and cultural agent alongside other such agents in society. The second is to embrace the roles of close partner of the Russian state, and of symbolic marker of "the Russian identity". There would be nothing new about this relationship, which has existed on many occasions in the past. It is well-known historically and sometimes described in terms of a symphony-like relation between Church and state. The present tendency towards closer cooperation between Church and state has been articulated in a policy document intended to guide the Church's social and political activities – "Bases of the Social Concept of the Russian Orthodox Church" – that was adopted by the Council of Bishops in 2000. Let us examine this document more closely.

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[213] Along with the Russian Orthodoxy Islam, Judaism, and Buddhism are recognized as traditional religions of Russia' peoples.

[214] *Федеральный закон о свободе совести и религиозных объединениях* (125ФЗ).

Chapter One of the document establishes some basic theological principles, including that "[the] Church is called to act in the world in the image of Christ, to bear witness to Him and His Kingdom". The metaphor of the Kingdom of God reappears in the following passage (I.4):

> Christian participation in [the world] should be based on the awareness that the world, socium and state are objects of God's love, for they are to be transformed and purified on the principles of God-commanded love. The Christian should view the world and society in the light of his ultimate destiny, in the eschatological light of the Kingdom of God.

Here the document identifies an eschatological issue of critical importance for Orthodox theology, namely the idea that the Church belongs simultaneously to the fallen world as well as to the Kingdom of God. In his *Introduction to Orthodox Systematic Theology* the metropolitan bishop Hillarion explains that Orthodox tradition understands the Church as a unity of the earthly Church and the Church in heaven.[215] The idea that the Church "already" belongs to the Kingdom of God is well developed in the liturgical praxis of the Russian Church. But what does it mean in terms of social ethics and politics?

The history of religion shows that eschatological perspectives have the potential to inspire political theology and to enable a critique of power. Social injustices become more visible when contrasted with Christian visions of the Kingdom of God. Further, theological critique of social injustices can inspire or even guide political practices of liberation. Unfortunately, the critical social dimension of Christian eschatology is not developed in the "Bases of the Social Concept". Nor is it discussed in the Church's official policy statement on human rights.[216] Rather, both documents almost completely replace an eschatologically informed social

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[215] Иларион (Алфеев): *Таинство веры. Введение в православное догматическое богословие.* Братство Святителя Тихона, Москва 1996, p. 108-112.

[216] *Основы учения Русской Православной Церкви о достоинстве, свободе и правах человека*. 26 июня 2008 г. Москва.

ethics with a strong focus on individual morality. This corresponds to the profound deficit of social-ethical reflection in contemporary Russian academic theology. While different writers identify various moral principles and norms, mostly relating to individual behavior, as important for Orthodox ethics, and published studies of Orthodox moral teachings list numerous positive norms and prohibitions, there is a striking absence of general theoretical reflection. For example, a textbook on moral theology by professor Platon that features on many curricula contains no chapter on social ethics.[217]

According to "Bases of the Social Concept of the Russian Orthodox Church", for the Church to fulfill its mission it must serve God and humanity while following "the principles of Christian ethics" and promoting human salvation (I.1.3.). The document does not clarify the meaning of these moral principles, nor does it explain how the Church should reason when social challenges contradict the doctrine of salvation. Let us delve deeper into the document to see whether it is possible to explicate these principles and priorities.

Chapter Two, "Church and Nation", asserts that "the Church unites in herself the universal with the national." The Church is now required to confront a familiar ambiguity in Christian faith: on the one hand, it addresses itself to all humanity; on the other, it operates in a world of different cultures and states. Christian churches handle this ambiguity differently, and these variations have both historical and theological explanations. Further these variations constitute different political and theological challenges. While the Roman Catholic Church emphasizes its universal character, one that to some extent transcends national borders, Protestant churches often highlight the importance of their respective national identities.

How does the Russian Orthodox Church handle the tension between its universalistic claims and its cultural identity? Clearly, the tension is recognized: the "Basis of the Social Concept" attempts to incorporate both approaches. The weakness of the

[217] Платон (архимандрит): *Православное нравственное богословие.* Свято-Троицкая Сергиева Лавра 1994.

document is that it downplays the universalistic claims and thereby fails to offer any check to nationalistic interpretations of the Russian Orthodox tradition. Later in this chapter I will develop a critique of religious nationalism. What needs to be stressed here is that the anti-universalist tendency is implicit rather than a result of direct theological argument. For example, the document emphasizes that patriotism is an important part of the Church's teaching and practice. The Church encourages Christians to love their homeland (II.3):

> The patriotism of the Orthodox Christian should be active. It is manifested when he defends his fatherland against an enemy, works for the good of the motherland, cares for the good order of people's life through, among other things, participation in the affairs of government. The Christian is called to preserve and develop national culture and people's self-awareness.

Where the document does comment on the restriction of national sentiments, it points out that "aggressive nationalism, xenophobia, national exclusiveness and inter-ethnic enmity" must be seen as sinful phenomena (II.4). The Church thereby seems to discriminate between a non-aggressive, inclusive nationalism on the one hand, and, on the other, a nationalism that deserves to be condemned, morally and theologically. But the document is vague about how such a non-aggressive nationalism is to be encouraged.

Moreover, it is unclear which definition of "nation" the authors have in mind. In §II.3 they claim that "[w]hen a nation, civil or ethnic, represents fully or predominantly a monoconfessional Orthodox community, it can in a certain sense be regarded as the one community of faith – an Orthodox nation". The formulation is vague and therefore problematic. It can be read as a description of the fact that some people do regard the Orthodox community as a (Russian) nation. But it can also be interpreted as justifying such an understanding of the relation between Church and nation. Yet another ambiguity in the document concerns its use of the word "Orthodox" as applied to either a community of faith or a cultural tradition. For the most part the authors refer to the faith community, but sometimes – especially when arguing for the

significance of Orthodoxy for society – they instead have in mind Orthodox culture. I submit that, in a political context, this distinction between religion and culture is important. For example, many Russian citizens who view Orthodox culture as an important part of their cultural heritage regard the Church's social teaching as neither binding nor relevant. A number of sociological surveys have shown that this holds especially true for respondents who identify themselves as Orthodox Christians.[218]

Regrettably, the confusion between Orthodoxy as a culture and a faith community is just one of many ambiguities in the document. Turning to the section that deals with the issue of state and Church, we find several statements and terms that contradict each other. The elaboration starts by confirming the theologically central idea that the state is "an essential element of life in the world distorted by sin" (III.2). As the authors explain, "the state arose not because God willed it for the primitive Adam, but because of the Fall and because the actions to restrict the domination of sin over the world conformed to His will" (III.2). Here we can remark a difference between Orthodox and Catholic views of the state. As is well known, Catholic theology teaches that the state is a part of the natural order and has its origin in God's creation. In the words of Leo XIII:

> But, as no society can hold together unless someone be over all, directing all to strive earnestly for the common good, every body politic must have a ruling authority, and this authority, no less than society itself, has its source in nature, and has, consequently, God for its Author. Hence, it follows that all public power must proceed from God.[219]

Natural law is seen as both the main ground and the main restriction of the state as a body, and this law should govern relations between Church and state. Natural law derives from God;

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[218] *Готово ли Российское общество к модернизации. Аналитический доклад*. Российская Академия Наук. Институт Социологии, Москва 2010, pp. 103-108.

[219] Encyclical of Pope Leo XIII on the Christian Constitution of States. *Immortale Dei.* §3. http://www.vatican.va/holy_father/leo_xiii/encyclicals/documents/hf_l-xiii_enc_01111885_immortale-dei_en.html [Accessed 2014-05-08].

it is universal and rationally comprehensible. From a theological point of view, this offers the Church tremendous possibilities for developing an independent political agency by means of rational moral and religious criticism of the state and its policies. Such a critique would not presuppose any revealed knowledge and, at least potentially, it could be understood by everyone. Even so, the Catholic Church teaches that natural law contradicts neither Christian revelation in general nor the Bible in particular. This means that religious ethics, understood as ethics revealed by God, can be applied in the political sphere.

We will return to the issue of different conceptions of natural law and its role in social ethics. For now, let us consider a tradition that differs significantly from the Catholic. How does Lutheran theology view the state? This tradition, which is theologically more pluralistic than Catholicism, tends to view the state, not as a natural part of Creation, but as part of a postlapsarian order. This does not entail a rejection of natural law but rather a highlighting of the need to view the world (and humans) as profoundly deformed by sin. In his most illuminating work on *Christian Faith and the Modern State*, published in 1937 and therefore reflecting the theological drama of the German Church, Nils Ehrenström argues that the Lutheran tradition contains "recognition of the fact that the world is 'possessed' by a devil, which makes a supreme and invincible authority, and strict loyalty towards it an indispensable guarantee against social self-destruction".[220] Ehrenström continues: "As a rule, Lutheran thinkers regard power and law as the constitutive elements of political authority, with the power of coercion as an inseparable element, logically issuing from them".[221] Ehrenström rightly criticizes the Lutheran tendency to provide theological confirmation of political authority on the basis of holding power. He saw very clearly the inherent danger of this view, especially when combined with the modern tendency "to interpret the State in terms of the national community

[220] Ehrenström, Nils: *Christian Faith and the Modern State.* Student Christian Movement Press, London 1937, p. 163.
[221] Op. cit., p. 163.

(*Volksgemeinschaft*)".[222] Ehrenström's critique of the Lutheran tradition does not mean that he favors a kind of return to the Catholic theology of natural law. I agree with Ehrenström that the abandonment of natural law in its Catholic shape as an important part of the Christian view on the state does not mean the end of theological discourse on social and political justice. A number of interesting approaches within the Lutheran tradition have suggested ways to secure legitimate political agency for the Christian Church. One such approach is an attempt to use the Gospel in order to create a theological theory of social justice. As some Lutheran theologians have shown, it is possible to modify universalism and rationalism of natural law by means of central ideals in the Gospel such as the ideal of self-giving love. A theological ethics of this kind challenges Luther's own doctrine of the two kingdoms by asserting that the Church can and should adopt a critical stance towards (state) power.[223]

The authors of "Bases of the Social Concept" seem well aware of the variety of comprehensive theological approaches to the issue of relations between Church and state, since they explicitly mention the different strategies adopted by other Christian churches when dealing with it. Yet they regard all of these strategies as unsuited to the Russian Orthodox Church. The authors of "Bases of the Social Concept" instead assert that the Russian tradition has its theological roots in Byzantium; even recognizing that the state is an element of a postlapsarian world, they call for a symphonic relation between Church and state. This tradition must somehow be harmonized with modern politics and legislation. §III.3 of the document stipulates that "state is normally secular and not bound by any religious commitments. Its cooperation with the Church is limited to several areas and based on mutual non-interference in each other's affairs". This could have been interpreted and used as a sustainable model for Church-state

[222] Op. cit., p. 167.
[223]See for example: Grenholm, Carl-Henric: *Protestant Work Ethics. A Study of Work Ethical Theories in Contemporary Protestant Theology.* Acta Universitatis Upsaliensis, Uppsala 1993, pp. 265-267.

relations in which both parties would retain a distinct and clearly defined role.

However, the document is inconsistent in its use of the ideal of the symphonic relationship between state and Church. In §III.4 we read that there is such a thing as an Orthodox state and that this kind of state is connected to the ideal of symphony:

> The Orthodox tradition has developed an explicit ideal of church-state relations. Since church-state relations are two-way traffic, the above-mentioned ideal could emerge in history only in a state that recognizes the Orthodox Church as the people's greatest shrine, that is to say, only in an Orthodox state.

The document observes that this relation is an ideal and, as such, not applicable to all Orthodox churches in all circumstances. For example, the legal status of the Church prior to the October Revolution is described as a mix of the legacy of this symphony-tradition and the tradition of state religion in the Protestant world. The document does not clarify to what extent the Church in contemporary Russia adopts the ideal of symphony. On the one hand, the document notes that state and Church have different natures and functions, and confirms that the state has "religio-ideological neutrality". On the other hand, the Church regrets the modern development of the principle of freedom of conscience, which, the authors of the document explain, "turned the state into an exclusively temporal institution without religious commitments" (III.6.). My reading of the chapter dealing with church-state relations leads me to conclude that the document in practice re-interprets the principle of the secular state by claiming that the Russian Orthodox Church has a special obligation with regard to Russian statehood. As it declares (III.6):

> The religio-ideological neutrality of the state does not contradict the Christian idea of the Church's calling in society. The Church, however, should point out to the state that it is inadmissible to propagate such convictions or actions which may result in total control over a person's life, […] as well as erosion in personal, family or public morality, offense to religious feelings, damage to

> the cultural and spiritual identity of the people and threats to the sacred gift of life.

Further, the document identifies no fewer than sixteen different areas in which Church cooperation with the state can be justified, including "concern for the preservation of morality in society; spiritual, cultural, moral and patriotic education and formation; care of the military and law-enforcement workers and their spiritual and moral education; opposition to the work of pseudo-religious structures presenting a threat to the individual and society". The spheres excluded are political struggle, civil or aggressive external war, and "direct participation" in intelligence activity. What is important and most problematic is that this extended cooperation restricts itself to issues of individual morality and behavior rather than addressing the norms of social justice.

In this way it can be seen that the Russian Orthodox Church is seeking a means to cooperate closely with the state in drawing up the legislation of the Russian Federation as well as in its own theology. Recent developments show that cooperation between state authorities and the Moscow Patriarchate are growing stronger, and it seems that, while having an ecclesiology which looks very much like that of the Catholic Church, the Russian Orthodox Church is attracted by the traditional Lutheran ideal of a state church. But an even more interesting matter, which warrants serious political and theological scrutiny, is the fact that the Church is seeking closer cooperation with the state even as it denies harboring any ideological ambitions. In Chapter Five of the document the authors state that the Church refrains from political struggle as well as distancing itself from *all* ideological and political programs. Representatives of the Church are not allowed to be involved in political parties, and ordinary members of the Church may act politically only if they refrain from connecting their political activities to their Orthodox faith. The Church issues a moral injunction against its members' engaging in political activity via the following formulation:

> In the face of political differences, contradictions and struggle, the Church preaches peace and cooperation among people of different

> political views. She also acknowledges the presence of various po-political convictions among her episcopate, clergy and laity, excepting those that clearly lead to actions which contradict the faith and moral norms of Church Tradition.

Here we find two ideas that deserve further consideration. The first is the idea, already mentioned, of non-political cooperation between Church and state. The second is the notion that there exist fundamental and unchangeable norms of individual morality within the Orthodox Tradition that must be used as critical instruments in the public sphere. I will argue that, while both ideas are intrinsically problematic, when combined they are extremely vulnerable to political misuse.

Social ethics and legitimate political agency

What difficulties are entailed by the ideal of non-political cooperation between state and Church? One obvious difficulty, which crops up frequently in Church documents and its practice, is the danger of hidden political agendas. Such agendas can serve specific political interests even if they have not been consciously formulated. This is true of any attempt to act within the political sphere without having a transparent ideological platform. Another risk connects more directly to Church's political agency, namely, the risk of becoming an important legitimizing factor in relation to power as such. It is of course possible to maintain this approach while claiming that a Church to which the majority of the population belongs should support whatever state authority happens to be in place.[224] On the other hand, historical evidence and theological reflection argue strongly against this position. One tragic, but far from unique, example is the "non-political" support extended to Nazi regimes in the twentieth century by many Christian churches in Europe.

[224] In the Russian case this is connected to a profound weakening of the very institution of the state as a result of developments in the 1990s.

As a representative of the Russian majority of the Russian Federation, it devolves upon the Russian Orthodox Church to exercise caution when faced by the temptation of exclusivity and, in particular, to join the state as an apolitical partner. My own view is that mere rejection of "aggressive nationalism" is inadequate. A responsible political agency demands either a clearly formulated political program or an explicit social ethics. The latter can be used to scrutinize different political alternatives and to identify some of them as unacceptable. There are various more or less extreme nationalistic groups in Russia which seek to connect the Orthodox tradition to Russian nationalism in its different forms. The Church should clearly distance itself from these groups, something that will require it to revise its view of how best to position itself in the political sphere. It is of a critical importance for both Church and society that Russian theologians and Church leaders begin to elaborate principles of Christian social morality capable of giving explicit guidance on cooperation with the state and other political actors.

Currently the Church is focusing very heavily on issues of private – mostly sexual – morality, and patriotism. I believe that this focus prevents the Church from developing as a legitimate political agent in Russian society. One serious consequence is that its conservative and reductionist view of morality indirectly connects the Church to extremist, nationalistic, and racist groups which frequently incorporate conservative sexual morality and traditional views on women into their agendas. The Russian Church has stated its concerns about the value of the traditional family, an issue which it represents as an important, perhaps the most important, social issue of the present moment.[225] I submit that in contemporary Russia the danger of political pragmatism, which is often connected to moral nihilism and even cynicism, exceeds any putative devaluation of traditional family values. Such pragmatism leaves a great deal of political space for nationalistic

[225] In numerous textbooks, on websites and in the media, representatives of the Russian Orthodox Church highlight the fact that traditional family and "traditional values" are of crucial importance for the survival and development of Russian society.

sentiments. These are now becoming the main ideological driving force in the political sphere, where they are invoked by various actors, including the state. Recalling the historical experiences of the Russian Church, thinking of the tragic success of the Deutsche Christen upon Hitler's accession to power in Germany – Russian theologians should have the courage to set out a clear social and political doctrine for the Church. Such a doctrine should not be an eclectic list of "traditional values" in the domain of individual morality but a well-formulated and theologically processed exposition of the basic principles of Christian social morality.

Is it possible, then, to create a tenable Orthodox social doctrine? Its absence may indicate that there are, beyond these immediate historical and political factors, inherent obstacles of a theological nature to the emergence of a coherent social ethical model in the Russian Orthodox tradition. As the document on human rights and dignity[226] shows, there is a solid theological tradition of viewing human dignity as a metaphysical category, rather than a value to be protected by the institution of human rights. When the Church outlines its own conception of human rights, it emphasizes that the traditional liberal protection of freedom (as a freedom of choice) differs greatly from the Orthodox view of human freedom as freedom from sin and to the realization of genuine human nature.[227] It is beyond the scope of this chapter to suggest a deeper analysis of this interpretation of human dignity. My point is rather to highlight that hitherto the Church has not articulated a social ethics that corresponds to its view of human dignity. In its document on human rights it elaborates on human duties while leaving aside such key issues as the state's responsibilities to its citizens. Does this mean that social ethics and a theory of justice lie beyond the scope of Orthodox moral teachings?

My own view is that we should consider such a hypothesis very seriously, and if it proves to be true, I would argue that the Russian Orthodox Church should restrain itself from being an active political agent, as many Russian critics of the Church are now

[226] *Основы учения Русской Православной Церкви о достоинстве, свободе и правах человека.*
[227] Op. cit., §1.5.

arguing.[228] Some commentators recall the experience of the Soviet era, when religion was an exclusively private matter. In fact, it did correspond to the Church's view of morality as a matter of personal human salvation. In order to prove the hypothesis, however, we should try to propose alternative ways to develop a sustainable Orthodox social ethics.

In fact, there exist a number of resources within Orthodox theology that might be used to create a coherent social ethics and thereby counter the prevailing tendency to attempt yet another transformation of the Russian Orthodox Church into a loyal servant of the Russian state and a source of symbolic legitimacy for Russian nationalism. One such resource is the theological critique of power. This critique has been developed in different forms throughout the history of the Russian Orthodox Church. Let us consider some relatively recent examples.

Among those who have contributed extensively to the Russian tradition of theological critique of power is the famous ethicist Boris Vysheslavtsev (1877-1954). In a study entitled *The Dilemma of Power* Vysheslavtsev argues against utilitarianism by claiming that from a theological perspective no power should be viewed as a neutral instrument for normatively differentiated goals. For Vysheslavtsev, all power is "essentially sinful": power is always about coercion and hence opposed to freedom.[229] This holds true even for legitimate forms of power such as the institutional "protection of legal freedoms".[230] It is therefore wrong to view any earthly power as comparable with the Kingdom of God: "God's Kingdom is a kingdom of freedom and as such excludes any coercion". It is, of course, both possible and desirable to discriminate between the legitimate and the illegitimate possession and exercise of power, but it is equally important to realize that the highest good is not "incarnated in the form of power".[231] This is so

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[228] Шахнович, Марианна (ред.): *Антиклерикализм как культурно-исторический феномен*. Издательский дом Санкт-Петербургского Университета, Санкт-Петербург 2011.

[229] Вышеславцев, Борис: «Проблема власти». По изданию *Этика преображенного эроса.* Республика, Москва 1994, p. 204.

[230] Op. cit., p. 212.

[231] Op. cit., p. 212.

because freedom and love, not victory and domination, are the highest values in Christianity.

Vysheslavtsev uses the term "dialectics of evaluation" and claims that a Christian ethics combines the dialectics of the Old Testament, what he calls "a capability to unveil the worthless in what is powerful and triumphant", with the dialectics of the New Testament that entail "a capacity to value the highest even when it is humiliated".[232] As he sees it, a Christian ethics offers a basic norm which runs contrary to the ideal of exercising power. Where the latter holds that "the victors are beyond any judgment", the former promises that "the victors will be judged". Vysheslavtsev reverses the Russian adage *победителей не судят* (the victors are not to be judged) in order to arrive at the eschatological promise of the Last Judgement (of victors). It is important to highlight that he believes that this eschatological dimension can and should be applied as a critical instrument in social life. I have already pointed out that the social doctrine of the Russian Church, as presented in "Bases of the Social Concept", includes an eschatological dimension yet without making full use of it. By invoking God's kingdom as a realm of ideal love and justice, Vysheslvatsev shows very clearly how Christian eschatology relativizes worldly power.

What is also important here is that Vysheslavtsev quite deliberately downplays the notion of divine omnipotence by claiming that God's authority is based solely on love and freedom. A similar and explicitly Christological critique of power can be discerned in the intellectual legacy of Mikhail Bakhtin. The Christian God who fascinates Bakhtin renounces all power in order to put his fate in the hands of human beings, a gesture made evident in, among other things, the fact that it is left to humanity to recognize or crucify its God.[233] It is clear that Bakhtin, like Nikolai Berdyaev (1874-1948) and other Russian philosophers and theologians, was much inspired by Fyodor Dostoevsky's Christology and his critique of the power vested in the Church. In an oft-cited passage in *The Brothers Karamazov*, Dostoevsky's

[232] Вышеславцев, Борис, op. cit., p. 227.
[233] Бахтин, Михаил: «Автор и герой в эстетической деятельности», pp. 132-134.

inquisitor, who I take to be a proxy for the worldly ambitions of all Christian churches, tells Christ himself:

> Instead of the firm ancient law, man had henceforth to decide for himself, with a free heart, what is good and what is evil, having only your image before him as a guide – but did it not occur to you that he would eventually reject and dispute even your image and your truth if he was oppressed by so terrible burden as freedom of choice?[234]

I would argue that in contemporary Russia, as elsewhere in the world, a further development of the Christological critique of power could play an important political role. Different forms of power can be questioned by means of this critique. It has a great deconstructive potential insofar as it can lay bare the various forms of domination and coercion that are inherent elements of power as such. This critique can be used in order to develop a tenable Orthodox approach to the issue of human rights. Moreover, this approach combines reasonable suspicion of liberal individualism with power analysis that demands moral accountability on behalf of all forms of power.

At the same time, it is obvious that this kind of critique will not suffice if we are to locate a theological ethics capable of shedding light on the concrete political agency of a Christian church. The weakness of the critique as developed by Vysheslavtsev, Bakhtin, and other Russian Christian philosophers lies in its habit of focusing on the sinfulness of power as such and thereby overlooking the difference between legitimate and illegitimate uses of power. To create a sustainable theology of political participation it is therefore crucial to elaborate principles of social morality in a traditional sense, ethically speaking, which is to say by means of a normative theory. Such as theory seeks to present a clearly articulated set of criteria for discriminating between right and wrong actions, legitimate and illegitimate forms of power, etc. There is an obvious lack of normative ethical theory in the Russian tradition.[235]

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[234] Dostoevsky, Fyodor: *The Brothers Karamazov*, p. 255.
[235] This is true even in relation to Russian philosophical tradition.

To develop such a theory, or to prove that there exists a normative theory compatible with the Russian Orthodox tradition, lies beyond the scope of this study. My point is that the social program of the Church as presented in "Bases of the Social Concept" and as practiced by the Church, is dysfunctional in that it focuses on private morality while at the same time seeking a legitimate social and political role for the Orthodoxy. This contradiction derives not only from short term political pragmatism on the part of the Church but from the lack of a theological reflection on social ethics. It is therefore worth reviewing a number of theological approaches that might help to develop a coherent social ethics or set of norms with guiding priorities that might both inspire and restrict the political agency of the Church.

A promising candidate for such a guiding set of norms, in my opinion, is Christian humanism. In the late 1980s when the Russian Orthodox Church was actively looking for a new social role, many people hoped that it would take direction from some form of Christian humanism. Alexander Men (1935-1990), one of the most famous and respected Orthodox theologians at that time, articulated this hope very clearly. Men argued that the absolute value of human personality is the very essence of the Christian message.[236] Accordingly, humanistic Christian theology must be developed in a dialogue with society, culture, and science. For Men, treating a handful of concrete conventional norms adopted by Church Fathers centuries previously as an unchangeable basis for Orthodox tradition is a gross betrayal of the Christian message. In this respect he echoes one of the most prominent Russian theologians of the twentieth century, Georges Florovsky (1893-1979), who used to criticize theologians for claiming that fidelity to tradition was a way "*back* to the Church Fathers". Florovsky emphasized that the development should be "*forward* to the Church Fathers". The real challenge is to understand the meaning of this heritage, not to collate individual opinions on specific issues.[237] Men encouraged readers to embrace theological creativity

[236] Мень, Александр: *Культура и духовное восхождение.* Искусство, Москва 1992, p. 21.
[237] Флоровский, Георгий: *Пути Русского богословия.* Вильнюс 1991, p. 506.

and critical thinking.[238] What is important here is the fact that Men recognized the crucial role of humanism in the social sphere and politics: "Christianity considers the division between the Church and the state to be the optimal situation for the faith and recognizes a great danger in the very idea of the state religion".[239] He concluded his reflection on the relation between Christianity and the political sphere by stating that "the value of any politics should be measured by what it brings to human beings: by humanism and appropriateness".[240]

In developing his Christian humanism, Men was relying on the heritage of Orthodox theologians such as Nikolai Berdyaev and Sergei Bulgakov (1871-1944). At that time it appeared that the Church might continue to develop a vital and convenient theological ethics based upon ideas of Christian humanism. Today, when metropolitan bishop Hillarion comments on the issue of Christian humanism, he confirms that it is much less developed in the Orthodox tradition than in Catholicism. Unfortunately, he does not believe that it is time to develop an Orthodox form of humanism. Rather, he submits that Christianity is by nature humanistic and the Orthodoxy is "more humanistic than secular humanism".[241] This statement should be questioned on theological as well as historical grounds. We know that Christian theology could be, and often has been, developed as a critique and an alternative to humanism. For this reason, Christian theologians should either distance themselves from humanism or apply its norms when formulating the social ethics of the Church. I believe that it is both possible and desirable to revitalize Russian theological humanism in order to use it as the foundation for a sustainable social doctrine and a theory of human rights.

Other concepts suited to the development of an Orthodox social ethics include the notion of natural law. The doctrine of natural law, with its characteristic belief in the universal capacity of

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[238] Мень, Александр: *Культура и духовное восхождение*, p. 28.
[239] Мень, Александр, op.cit., p. 28.
[240] Op. cit., p. 30.
[241] Иларион (Алфеев): *Таинство веры. Введение в православное догматическое богословие*, p. 309.

human reason to discriminate between right and wrong, is recog-recognized as a part of the Orthodox tradition,[242] but has not been used in the current theological discussion of social morality. It is worth mentioning that many Russian philosophers and theologians have been critical of the rationalism of the natural law tradition. While this critique is valuable in highlighting various shortcomings of rationalism,[243] critique should not prevent us from trying to use the natural law tradition, or some of its elements, in the domain of social ethics, where the very rationalism and universalism of natu-natural law offer effective tools for productive ethical analysis. The claim made by Platon, a professor of moral theology, that we "don't need natural law because we already have a higher ethic of the Gospel"[244] does not stand up to serious theological critique. First, natural law is recognized as a part of the Orthodox tradition. Second, there is no such thing as "*the* ethics of the Gospel": the moral message of the Gospel is always a result of interpretation, and moral reasoning is one of the most reliable tools of any interpretation. For this reason, I am convinced that it is worth discussing possible ways of using elements of natural law in the moral theology of the Orthodox Church.

Towards a universalistic Orthodox social ethic

How then to combine my defense of the potential of the natural law tradition with the aforementioned critique of Western rationalism? I agree with both Russian and Western critics who highlight the obviously colonialist character of the universalistic claims of natu-natural law and its rationalism. In Chapter Three of this study I used Gianni Vattimo's term "violent reasoning" in order to describe the phenomenon. To pronounce any norm as natural (and thus universal and rational) is to suppress the potential questioning of this norm by the other. Vattimo claims that "violence is the fact of shutting down, silencing, breaking off the dialogue of questions

[242] Платон (архимандрит): *Православное нравственное богословие,* p. 38.
[243] See Chapter III and VI of this book.
[244] Платон (архимандрит): *Православное нравственное богословие* , p. 43.

and answers."[245] He believes that there is a connection between what he describes as the metaphysics of ultimate foundation, rationalism, and violence. Vattimo defines this metaphysics "as the violent imposition of an order that is declared objective and natural and therefore cannot be violated and is no longer an object of discussion".[246]

However, listening to this kind of critique and learning from it does not oblige us to reject the very possibility of a rational normative theory. Nor does it prove the absence of any constructive potential in rationalistic ethics. Vattimo himself does not advocate irrationalism nor does he approve of moral relativism, but proposes a kind of interpretative (hermeneutic) reason as an alternative to the reason of natural law. He describes this reason as non-violent and responsible in relation to one's own heritage. Commenting on the meaning of traditional values, he explains:

> Seen for what they are, a cultural legacy and not nature or essence, such rules can still hold good for us, but with a different cogency – as rational norms (recognized through dis-*cursus, logos,* reason: through a reconstruction of how they came about), rid of the violence that characterizes ultimate principles (and the authorities who feel themselves entrusted with them). Whether or not they still hold good is something to be decided in light of the criterion that, with a responsible interpretation, we take to be characteristic of whatever "really" forms part of the legacy to which we feel ourselves committed.[247]

Follow Vattimo and develop a more hermeneutic approach to practical rationality is one possible avenue. There are, of course, others. In any case, it would be wrong to use the post-colonial experience of oppressive universalistic projects as a justification for the exclusivity of one's own position. Unfortunately, this is precisely what is happening in the Russian context today. The representatives of the Church, uncritically and without argumentation, identify different foreign traditions as incompatible with Orthodox Christianity.

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[245] Vattimo, Gianni: "A Prayer for Silence", in Caputo, John D. and Vattimo, Gianni: *After the Death of God*, p. 93.
[246] Vattimo, Gianni, op. cit., p. 43.
[247] Vattimo, Gianni: *Nihilism and Emancipation. Ethics, Politics, and Law*, p. 46.

Liberalism is very often presented as one such "foreign and non-Orthodox" tradition. Hostility towards liberalism is today becoming entrenched in the Russian Church, where it overlaps with a hostility towards Protestant churches that incorporate liberal values in their social policies.[248]

The phenomenon is not new. The Dostoevskian intellectual legacy reveals a marked tendency to combine the Orthodox Christianity "of the Russian people" with a complete rejection of liberal freedom as a foreign value. I have shown elsewhere that Dostoevsky's critique of "Western rationalism" offers valuable insights.[249] But what is equally important is that Dostoevsky exemplifies a dangerous habit of uncritical rejection of liberalism, one which he combines with the most problematic acceptance of nationalistic sentiments. In *Winter Notes on Summer Impressions* (1863), he draws upon a critique of liberal freedoms in order to stress the distinctiveness and superiority of Russian Orthodox culture. Rightly criticizing the individualism and consumerism of European capitalist society, he distorts that critique in order to identify a cultural opposition between that European individualism and the Russian people's capacity for solidarity and self-sacrifice.[250] His last novel, *The Brothers Karamazov*, evinces the same ambivalence in its critique of liberal values. On the one hand, Dostoevsky delivers a devastating critique of the ideal of freedom as liberation from responsibility for the other; on the other, this critique degenerates into a nationalistic admiration of Russianness. Westernized liberal doctors and lawyers, Poles, and Jews are all depicted as embodying a lack of solidarity with suffering people and animals.

It is not difficult to read Dostoevsky's masterpiece against the grain of his nationalism. But it is also important to recognize this nationalistic dimension, which to a large extent consists of transforming a moral controversy into a discourse on identity.

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[248] Иларион (Алфеев): *Таинство веры. Введение в православное догматическое богословие*, p. 127.

[249] Namli, Elena: *Kamp med förnuftet. Rysk kritik av västerländsk rationalism*, pp. 253-260.

[250] Достоевский, Федор: *Зимние записки о летних впечатлениях*. По изданию *Полное собрание сочинений.* Наука, Ленинград 1973, том 5, pp.78-82.

Tragically, history seems to repeat itself. Instead of developing a clearly articulated social ethics that might respond to the problems of society, the Russian Church is constructing its political agency in terms of identity and by distancing itself from other traditions, above all, that of European liberalism. Instead of searching for theologically sustainable criteria for social norms, the Church chooses to assert a kind of normative priority for its "traditional norms". The weakness of this strategy is obvious. There are many norms that might lay claim to be traditional. In order to discriminate between relevant and outdated norms we need clearly formulated criteria. In their absence, the exercise of power tends to become the sole criterion. The temptation of power goes beyond material benefits; it rests ultimately on the desire to make one's own judgement binding. All political agents are vulnerable in this regard and for this reason must be held accountable to society. The Russian Church must not become an exception unless it is ready to abandon politics and restrict its practice to liturgical activity.

It is my fervent hope that the Russian Orthodox Church will not abandon its commitment to social responsibility. However, there is no other way to address what I call "the temptation of power" than by engaging in dialogue with society. To do this, the Church will need to develop a social doctrine with clearly articulated guiding principles that will allow everyone to evaluate the position of the Church. In the beginning of this chapter, I stated that the Russian Orthodox tradition combines a universalistic approach with a very strong connection to Russian culture and statehood. I believe that in the current situation it is of a great importance to utilize the universalism of this tradition. Such universalism should not be that of Dostoevsky, who claimed that Russian people already possess the truth. Rather, we should look for what I call an "open universalism". Universalism of this kind functions as a deconstructive tool in relation to every concrete norm that claims to be universal. It counteracts relativism by seeking values that cannot be justified on exclusively traditional grounds. By the same measure, its consistent injunction that we attend to the arguments of the other prevents us from claiming that we already possess universal norms.

An open universalism cannot lead to a stable set of unchangeable concrete norms. It must call for social justice, but this justice uncovers injustices rather than stipulating "the just order". On these grounds, it would make a fine instrument for critical investigation of any political agency.

My view is that an open universalism of moral doctrine is compatible with the distinctiveness of the Russian tradition, which rests upon neither a single text nor a single theologian whose statements are considered mandatory in the field of social ethics. It is thus possible both to develop a doctrine with core moral principles and to give different interpretations of those principles in light of rational and critical discussions. In actual fact, the Church might well function better as a prop to stable Russian statehood if it cleansed itself of nationalistic rhetoric and instead began to work on the social challenges of Russian society untroubled by irrational fears of colonization by a foreign culture. As Georges Florovsky once declared, Russian theology may offer its own answers but it cannot ignore the questions posed by the European tradition.[251]

[251] Флоровский, Георгий: *Пути Русского богословия*, p. 513.

Chapter VIII

Human Rights as Political Morality

This study has sought to develop a critical approach to the connections between law, politics, and morality as they figure in human rights discourse. My point of departure was an explicit recognition of the fact that the issue of human rights is very often addressed from either a perspective of what might be called human rights nihilism or a perspective of naïve utopianism. The first position rejects human rights as a form of impotent or purely pragmatic political rhetoric, while the second uncritically depicts human rights as a universally accepted law. I argue that the utopian trend within the current human rights discourse is related to the fact that many of its defenders ignore the political dimensions of human rights. Nihilists, by contrast, tend to underestimate the potential of political morality and view politics of human rights as a field of mere material interests. Accordingly, my thesis is that human rights must be interpreted and practiced as a form of *political morality* that to some degree can and should be legally institutionalized.

In this study I have argued that human rights must be understood – ethically, politically, and legally – through the prism of reasonable skepticism towards the legitimacy of contemporary institutions for the protection of human rights. The colonial legacy of human rights, the lack of transparent principles for dealing with conflicting rights, and the counterproductive overemphasis upon the importance of legal instruments have all been considered as offering serious challenges to the lasting legitimacy of human

rights. I have analyzed these challenges by means of selected hu-human rights-related cases as well as theoretical discussion.

My central ambition has been to avoid restricting human rights discourse to a legalistic definition of human rights as these are understood and practiced in Western liberal democracies. To this end, I have tried to escape the fallacy of ignoring critiques of human rights discourse that originate in cultures traditionally viewed as "violators of human rights". At the same time, I have adopted a critical stance with regard to a number of human rights practices and policies in cultures that collectively style themselves as defenders of human rights.

Universal and rational norms – for whom?

What conclusions can be drawn from my analyses? The more I study human rights, the more I am made aware of the fact that their credibility is jeopardized by the incoherent or unjust application of human rights law and politics. As shown in Chapters Two and Three, the liberal Western notion of universal rights bears a weighty cultural and political legacy that brings with it considerable problems by virtue of being unstated. For example, both universalism and rationalism in current human rights discourse are in many regards anchored in the European natural law tradition, which is a secularized and historically transformed variant of the Christian theology of natural law. This tradition views reason as a universal tool for distinguishing what is good, right, and valuable. The good is defined in terms of a correspondence with human nature that is given and identical for all and one. Although natural law can be framed in different ways, it often leads to a variety of rationalism that elevates one's own mode of reasoning to the status of a binding principle even as it describes other modes as irrational and therefore not worth discussing. This happens because rationality is understood as universal, which in practice means that it can have only one form. Alternative modes of reasoning are viewed as irrational, and the norms which such "alternative reasoning" justifies are rejected.

It is important, moreover, to note that European modernity has dramatically transformed the Christian tradition of natural law by linking its universalistic rationalism to normative individualism, i.e. the ideal of human freedom as freedom from the constraints imposed by social relations upon members of human collectives. While Christian theology of natural law is firmly connected to personalism and views human beings as fundamentally relational and dependent, the secularized modern natural law tradition considers human being as independent individuals.

The view that freedom is, first and foremost, individual independence is therefore a highly contextual norm, yet one that many Western proponents of human rights regard as uniquely rational and universally valued. In this study I have argued that, although normative individualism is a plausible position, we must question its monopoly on human rights discourse. I strongly disagree with scholars such as Michael Ignatieff and Jack Donnelly who believe that individualism is the only reliable basis for universal consensus on human rights. While Ignatieff admits that this individualism, which attracts people all around the world, is of Western origin,[252] Donnelly views it as a formal prerequisite of any meaningful theory of rights.[253] Both positions are related to the variety of rationalism mentioned above, which presupposes that people reason similarly when reasoning rightly. It is often presumed that freedom as individual independence is universally valued because everyone would chose it if they could chose freely. I am critical of this idea. Moral reasoning can be, and in fact is, constructed in many ways. Freedom as individual independence is not an absolute or a purely rational ideal but the historical product of contextual experiences of liberation; as such, it possesses advantages as well as limitations. What liberates people and what makes them unfree vary over time and by context. To claim that one type of normative reasoning is universally valid thus increases the risk that the priorities of the strong will be imposed upon the rest.

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[252] Ignatieff, Michael: *Human Rights as Politics and Idolatry*, pp. 56-58.
[253] Donnelly, Jack: *Universal Human Rights in Theory and Practice*, p. 38.

To deconstruct human rights universalism and rationalism of this kind has been a central task of this study. My analysis in Chapter Five of how Sweden interprets and implements freedom of expression demonstrates the importance of traditional individualism in modern capitalism for how freedom of expression is understood and practiced. The individualism of the post-industrial and secularized Protestant culture that we encounter in Sweden is neither (Ignatieff's) universally approved nor (Donnelly's) formally rational individualism but a highly concrete and traditional form of individualism. While reasonable under some conditions, this individualism creates serious tensions when applied to the protection of human rights within the multicultural society that is contemporary Sweden. Vulnerable groups are exposed to the rhetorical aggression of actors who cloak their racism in a defense of freedom of speech for all individuals. Today's racists often claim that freedom of speech is threatened by other cultures, something that justifies the public humiliation of vulnerable groups in the name of "freedom". The language of human rights is used here in order to legitimize the marginalization of particular communities. To reclaim human rights as a means of protection for those whose dignity is being violated accordingly demands a careful analysis of concrete forms of social injustice. When the violations of dignity manifests itself as a structural phenomenon related to specific social groups, it is eminently reasonable to enquire as to possible strategies for dealing with it that take into account the collective dimensions of freedom and dignity. To acknowledge the limits to concrete forms of individualism is a good starting-point for further discussions of how to balance the individualism of liberal traditions with various forms of collectivism.

The unacknowledged cultural legacy of universalistic claims becomes even a more serious problem when human rights are invoked in the international arena. In practice, universal rhetoric is very often associated with ideas and policies that require non-Western agents to redefine their cultural and political identity in order to achieve harmony with human rights, whereas liberal cultures claim to be naturally compatible with human rights.

Although there are cases where "liberal missionaries" have pro-promoted the development of human rights, the objective of this study was to highlight the risk of devaluing human rights when the latter are draw into culturally colonizing projects of this kind. This risk is recognized by many global actors who retain a sceptical view of human rights as yet another Western project for liberating all of humanity. At the moment we are facing a new wave of violent escalation in international politics that has partly been justified by means of the rhetoric of protecting human rights. On the other hand, in many Western democracies human rights are viewed as "naturally present", something that renders their violation invisible and weaken the inherent potential of human rights to encourage political action.

In this study I have repeatedly contrasted European Islamophobia with the kinds of difficulties encountered by antidiscrimination initiatives in countries like Sweden. As I have shown, the assumption that Islam is hostile to universal human rights constitutes an important element of the ongoing but unacknowledged discrimination of Muslims. While Muslims are discriminated and exposed to an array of forms of violence in Europe, Islamic countries are often denied the right to introduce and explain their own understandings of human rights. Serious communicative distortions arise as a result of such double-standards.

Unfortunately, Islam is not the only culture that is discriminated against in current human rights discourse. One of several widespread myths that have sustained a lamentable tendency of equating universal human rights with the political and legal culture of liberal democracies concerns the fabled historical origins of the international human rights law. Until very recently, most standard accounts have presented human rights law as originating in an almost univocal international reaction to the crimes committed during the Second World War. Eleanor Roosevelt has often been depicted as someone who managed to unite progressive agents from all over the world into a collective project of formulating a single set of universal human rights. This biased description has recently been scrutinized by historians. Several extended studies in

the field of human rights historiography have demonstrated very clearly that international human rights law contains numerous inconsistencies that originate in the different political, economic, cultural, and ideological positions of its creators.[254] Moreover, the origin of international human rights law, like its implementation, has been and remains highly polarized. Scholars, such as Jack Donnelly, who persist in the claim that human rights norm are universal because of their genesis are in practice refusing to address the need for a critical evaluation of human rights history. There are good reasons for believing that this history offers an explanation as to why "universal" human rights discourse so closely resembles the discourse of Western liberalism. The dominance of the West becomes even a larger problem when we face the challenge of unequal power distribution in the global world.

Taking into consideration historical as well as contemporary knowledge about the embodiment of human rights within various imperialist practices, it becomes necessary to locate strategies for recovering the legitimacy of human rights and minimizing the risk of their being abused. The main argument of this study has been that a transparent recognition of political dimensions of human rights can serve to counteract this imperialist legacy. Further, I have argued that political morality should be used as a way to suggest reasonable and broadly acceptable interpretations of human rights law and policy.

An open universality

Human rights are claims that every human being may reasonably raise against those in power (the nation state in most of cases). Insofar as these claims are discussed in general terms – declarations and the like – it is possible to find a broad consensus about what might be called a core checklist of human rights. However, such agreements do not pass the test of implementation,

[254] Moyn, Samuel: *The Last Utopia: Human Rights in History*. Belknap Press of Harvard University Press, Cambridge MA 2010.

which is to say, the agents of human rights policies interpret and prioritize human rights differently. Some of these differences are natural and productive while others undermine the credibility of the whole human rights project. One such problematic difference is inconsistency in the treatment of conflicting rights. Accordingly, one purpose of this study has been to show that current systems of protection of human rights are marked by a profound deficit of transparent strategies for setting internationally approved priorities among rights and values when those rights and values clash with each other. A key finding of this study has been that proponents of human rights tend to view their own priorities as natural and universally applicable even as they readily recognize the relativity involved in other actors' priorities, whose legitimacy they therefore dismiss.

Accounting for this tendency poses no great challenge. Wielding power and remaining confident of the superiority of one's own tradition is a reasonable explanation. What is more difficult is to suggest strategies that could counteract this tendency of elevating the traditional norms of powerful cultures to the level of universally binding morality and law. In this study I have argued in favour of a notion of universality of human rights that can be termed *open universality*. This concept has two main normative components. The first is a clear recognition of the fact that every concrete norm and practice is culturally and politically framed. Such recognition does not allow the identification of any concrete norm or practice as universal. The second is the equally important notion that any tenable interpretation of moral values must be scrutinized in relation to the criterion of normative universalizability. When applied to human rights, this means that every understanding of human rights must be discussed as potentially universally valid, something that implies, in turn, that all concrete notions as well as practices of human rights are insufficient.

In practice this means that any norm which is to be considered openly universal must be articulated as a moral ideal that challenges existing and always contextual forms of violations of human dignity. Consider, for example, the discussion of freedom

of speech in Chapter Five. It is not possible to identify the scope of such a freedom that would be generally applicable to all situations. Particular forms of exclusion from political participation demand different approaches to justification of the scope and limits of freedom of speech. At the same time there already exist ways of distinguishing between just and unjust regulations of public space. A just regulation holds up under scrutiny from different perspectives and in competition with alternative models. As previously shown, unlimited freedom of speech on behalf of Islamophobic groups and individuals may violate the dignity of minorities and increase the democratic deficit by narrowing the space for, and agency of, public deliberation. In another context, it might be crucial to resolutely protect critics of Islam. This is not a relativistic position since it presupposes that any concrete norm must be justified in a way that is accessible transcontextually. As already stated on several occasions, I share Jürgen Habermas's vision of a practical rationality that replaces universality in terms of consensus with the criterion of inter-subjectivity. According to my interpretation of this criterion, a norm of political morality is acceptable if its justification is potentially understandable by every participant in a non-violent communication.

Another feature of the notion of open universality is its potential to create a space for dynamic compatibility between different normative systems. As I showed in Chapter Four, claims of universality on behalf of two different traditions – Islamic social ethics and international human rights law – may promote progressive developments of both traditions if universality is not regarded as already achieved. When a tradition views its conventional values as universally binding it runs the risk of suppressing and marginalizing reasonable alternatives. Conversely, if a tradition rejects the very ideal of universality it loses a powerful means for further development. For Islamic ethics as well as human rights, as for any other tradition, the most tenable option is to constantly test and re-define their meaning through the criterion of ongoing and never-completed universalization. This logic prevents any tradition from offering itself as the incarnation of universal human rights. Simultaneously, it remains sceptical

towards any charge of fundamental incompatibility between par-particular traditions and human rights. Islam, for example, is compatible with universal human rights, but the human rights with which Islamic cultures should seek compatibility are not identical with the current system of international human rights law. In this study I have been critical of the current trend of overemphasizing the importance of legal regulations and of dealing with human rights agreements in an exclusively legal perspective. As argued above, the more we view international human rights conventions as normal legal regulations, the more difficult it will be to sustain any reasonable claim of universality. I have therefore proposed that we reclaim a historically more traditional view of international human rights law as a set of openly formulated norms of political morality.

Ethics and politics of liberation

The analysis proposed in this study is based on a particular and explicitly normative view of the political sphere. I have argued that any reasonable politics must be framed in relation to a clearly articulated vision of social justice. I am well aware that there are material and structural factors behind all political actions. However, this does not mean that a politics of liberation is not possible. What it does mean is that no liberation can ever be completed. Nor can it be innocent. Liberation by means of human rights follows the same ambivalent logic. It has the potential to frame a broadly attractive vision of social justice that simultaneously runs the risk of being perpetuated and transformed in the material interests of powerful actors.

Throughout this study I have sought to analyze human rights with this ambivalence in mind. In the first place, human rights cannot be disconnected from particular material interests. I have demonstrated how the "universality" and "rationality" of human rights are embedded within a structure of Western cultural and economic domination: Islamophobia in the field of human rights is one of its most urgent examples. In Chapters Four and Five I showed how particular interpretations of human rights can function

as a means of marginalizing Islamic cultures and Muslims. When freedom of speech in Europe is understood and practiced in terms of unlimited protection of anti-Islamic statements, it serves the highly concrete material interests of Europe's majority populations. By creating an atmosphere of intolerance, and by preventing minorities from political participation, such "freedom" serves to help preserve the political and social status quo. In today's Europe the social and economic segregation of Muslims, like that of several other groups, has become an important platform for economic exploitation that justifies itself as a legitimate treatment of groups presumptively hostile to human rights.

In the second place, visions of liberation from particular forms of oppression can be framed as either exclusively particular liberation or, at least potentially, broadly attractive. Herein lies an important explanation for the fact that human rights is a globally valued project. It includes the ideal that protection should be granted equally to all humans: different groups and individuals can use human rights in order to liberate themselves at the same time as claiming that such liberation contributes to a more just world for everyone. How, then, should we seize this potential and minimize the risk of using universal rhetoric for particularistic or even discriminatory policies?

In this study I have argued that the principle of equal human dignity should be used to direct human rights politics towards an openly universal liberation. This demands a contextual analysis of oppression that violates human dignity, combined with a universally recognizable vision of freedom that confirms the humanity of each and all. In practice, such a strategy presupposes that ethics and political theory are viewed as related. In Chapter One, I argued in favour of the so-called genealogical interpretation of the principle of equal human dignity, which states that the very notion of universal dignity results from an extended recognition of social status. Sociologists such as Habermas and Joas have proposed theoretical accounts of social recognition that are useful for further development of the ethics of human rights. It is possible to discriminate between interpretations of human rights that promote human liberation, and interpretations that serve interests

of the strongest, if we pay attention to the concrete forms of power and domination. As this study has shown, under different conditions the same norm can either promote or counteract the implementation of the principle of equal human dignity.

Is it possible, then, to recognize and adequately respond to oppression beyond one's own – and thus familiar – context? Should the imperialism of human rights be understood as a consequence of inescapable epistemological limitations? In this study I have argued that it is both possible and desirable to further develop a theory of rationality that can facilitate a transcontextual recognition of violations of human dignity and openly universal visions of dignified human life. The study has taken its point of departure in various forms of critique of the traditional rationalism of liberal human rights discourse. Many critics rightly argue that this rationalism is built upon a reductionist view of reason that can and should be overcome.

I have used a Russian critique of "Western rationalism" in order to point to several limitations of traditional liberal understandings of human rights. According to these Russian critics, such limitations are related to a kind of rationalism that narrows the scope of responsibility by establishing a technocratic distance from the suffering of the other. It further creates an alibi in relation to suffering that "we can do nothing about". As argued in Chapters Three and Six, this alibi is related to a form of Cartesian rationalism that justifies the preservation of the "I" as a fundamental moral value. One practical consequence of such reasoning is the rejection of, or, sometimes, even hostility towards, the ideal of self-sacrifice for the sake of the other. Many proponents of human rights view them precisely as a way to overcome traditional moralities that include the ideal of self-sacrifice. This ideal is viewed as irrational, i.e. impossible to justify rationally, and human rights defenders encourage people to claim their own rights instead of focusing on duties and responsibilities. With the help of Russian critics of "Western rationalism", I argued that under certain conditions self-sacrifice is still a powerful and justified moral ideal. Moreover, the logic of self-sacrifice is sometimes the only rational response to the suffering of the other.

In many critical situations where institutional mechanisms for pro-protection of individuals are lacking or useless, the human capacity for solidarity and self-sacrifice becomes a fundamental moral dimension of social life.

I agree with those Marxists and feminists who point out the risk of misusing the ideal of self-sacrifice. This risk lies in the tendency on behalf of those in power to encourage the oppressed to endure suffering for some sort of higher collective purpose. That said, it is also important to realize that there is no necessary link between the ideal of self-sacrifice and the normalization of social oppression. As this study has demonstrated, there exists a kind of rationality that can frame the ideal of self-sacrifice without justifying social injustices. A tenable ideal of self-sacrifice can be differentiated from an oppressive one by means of the criterion that forbids generalization of this radical norm. Such a norm cannot be redirected towards any other position except the "I" in a first-person perspective. Within the discourse of human rights this kind of reasoning can compensate for the lack of personal responsibility that characterizes much individualistic right-focused morality. With the help of Dostoevsky and Bakhtin I have argued that reasoning in terms of radical responsibility, though different from the reasoning of modern individualism, can be learned and comprehended.

To propose a tenable model of social ethics that is based on the ideal of self-sacrifice and also compatible with the rationale of human rights lies beyond the scope of this study. However, such a model is worth further consideration; it is already clear that a rationality that justifies the ideal of self-sacrifice can be used in order to scrutinize several problematic features of the contemporary discourse on human rights. One such shortcoming which this study has discussed is the fundamental incapacity of existing human rights bodies efficiently to address the issue of protecting non-citizens. State parties to human rights agreements use this loophole to find legitimate ways of reducing their responsibilities towards refugees. It is taken for granted that one's own security is threatened by further broadening the scope of responsibility of states. The most important reasons for the

vulnerability of refugees are material, i.e. in this case economic. Generous refugee policies are difficult to reconcile with the persistent economic privileges enjoyed by the populations of rich Western countries. Even so, I believe that the rationalism of a human rights discourse that is linked to the ideal of an independent "I" remains an important part of a human rights culture that continues to discriminate against most vulnerable people.

One example of a rationality that challenges the rationalism of human rights is the Jewish tradition of connecting personal identity to justice towards strangers. This tradition has been contrasted with the Cartesian view of the self-sufficient "I" that underpins current Western views of identity. Hermann Cohen's interpretation of a Jewish understanding of God and human as radically estranged was presented and discussed in Chapter Six. Cohen argues that this fundamental estrangement makes justice (the Law) the only morally and religiously tenable form of relating to the stranger. I have contended that this kind of rationality challenges the inhuman European refugee policies that, by means of a technocratic implementation of human rights regulations, ignore the suffering of people. One important element of such technocratic practices is the unquestioned desire for security on behalf of European host states. For security reasons, asylum seekers in Europe are subjected to rigorous identity checks. Refugees are required to convince the authorities that no risks are being taken in allowing people access to Europe.

Are there resources within the human rights field capable of challenging the prevailing security discourse? One serious problem with the human rights culture of today is the fact that these rights are expected to be protected by states. While inhuman practices are often condemned, European citizens rely on the authorities to whom the protection of rights has been delegated. In the case of refugees, European authorities prioritize what they see as the security of their own populations. In my opinion, this profound lack of solidarity with suffering people is related to some features of the current human rights culture. It could be argued that a focus on right-holders creates limits to the efficient protection of people in cases where a duty-holder is absent. A state is responsible for

protecting the rights of its own citizens, including those who do not view themselves as duty-holders in relation to strangers. At most they address authorities with the expectation that better ways of dealing with refugees will be found while not conceding any kind of personal responsibility. National borders are just one example of borders that narrow the scope of responsibility within human rights discourse. For this very reason refugees figure prominently among those whose rights enjoy reduced protection.

The notion of justice (Law) which Cohen proposes radicalizes justice by introducing a demand, explicitly directed at the strongest party, to receive the stranger as a stranger, i.e. without securing his identity. Rather, it is the identity of the recipient that is tested, either by showing hospitality or refusing the stranger equal protection under the law. The ideal of hospitality as framed in Jewish as well as Islamic cultures is often perceived by Western human rights proponents as excessively radical, and even irrational. But if we take global developments seriously, i.e. recognize global inter-relatedness and the global character of human security, we may be able to transform radical hospitality from an irrational fantasy into a powerful vision of political morality. Indeed, several Islamic texts on human rights make use of the religious ideal of radical responsibility in connecting human rights protection to the explicit prohibition of the misuse of power. Within such logic, human rights is not just a matter of individual protection but primarily about the responsibilities of the stronger party towards the powerless.

Is there any risk, then, that focusing on the responsibility of the stronger might undermine the fundamental rationale of human rights, namely, the protection of everyone's *rights*, i.e. their reasonable claims? To my mind such a risk exists but can and should be dealt with. Here it is of vital importance to differentiate between subjects of rights and subjects of duties. For a rights-holder, there is no connection between their reasonable claims (rights) and their capacity or incapacity to fulfill their social duties. In this regard rights are alienable and independent of duties. Human rights-related duties should be based on power-holding alone. This power can be economic, political, or discursive but in

each case it must be accountable to the rights held by the objects of that power.

In Chapter Seven I scrutinized the way that the Russian Orthodox Church views human rights. My argument was that the Church is rightly suspicious of the strong individualism in current human rights discourse. At the same time, the Church is wrong in trying to replace this individualism with a discourse of personal or even private morality. Such efforts prevent human rights from becoming an instrument for counteracting the abuse of power. I believe that it is both possible and desirable to develop a critique of current human rights culture as a culture of extreme individualism. But such criticism must be complemented by a vision of social morality that combines personal responsibility with the institutional protection of individuals and groups. I have shown that there are resources within Russian Orthodox tradition that could be used to propose a legitimate vision of human rights as a culture of solidarity rather than of individualism.

Law and politics

One of the main objectives of this study has been to problematize the widespread belief that human rights are always most efficiently protected by legal instruments. This view is very often connected to the idea that human rights conventions must be interpreted and used as legal documents with universal jurisdiction. By contrast, I have been arguing here that human rights protection is and should be acknowledged as a political matter. Human rights conventions are political documents. To admit it means, firstly, to recognize the fact of the marginalization of such actors with little or no access to the process of creating and interpreting human rights law. Secondly, it allows us to find more sensitive and democratic policies for implementing international human rights law in different countries. Lastly, it creates the possibility for reconnecting human rights protection with a form of social liberation that must be pursued in the political realm.

It follows from the argument of this study that the current ten-tendency of reducing human rights and international human rights law to legal statements and instruments is perpetuating colonial relationships, precisely because it transforms people into victims of violations who need external protection by professionals. Very few can hope to access this legal protection because international human rights law has naturally weak enforcement mechanisms, while those currently in operation are both time-consuming and very expensive. To view human rights law as a set of principles of political morality would make it easier to transform this law into contextually sustainable, efficient legislations at the same time as harnessing its political energy. It must be up to people of every individual country to create a human rights culture and make it function as a means for protecting human dignity. The international community can support such processes where they are taking place. To force people to follow the clauses of international human rights law as if they were normal legal system is wrong, and in almost every case it leads to increased hostility and violence.

My research indicates that there is a connection between the legal positivism currently dominating many legal cultures and what I have described as a problematic identification of human rights with legal instruments. While legal positivism has many faces, in all its different forms it seeks to disconnect the law from morality: the law is the law and should not be judged by moral criteria. In the field of human rights, legal positivism demands that the legislator formulate positive legal norms in such a way that moral reasoning is not required for the implementation of these norms. For legal positivists, moral as well as political discussions should be completed when legislators pass the law onto the judicial sphere. Several forms of legal positivism also include a belief that legislators need not exercise moral reason in order to create a legitimate law. The legislator is required only to identify people's moral preferences and give them proper legal form. This kind of legal positivism is firmly connected to an aggregative ideal of democracy that, in turn, resists harmonization with human rights protection. Legislation that is "only" a result of aggregating the preferences, moral preferences included, of citizens cannot

guarantee the human rights of all. This is precisely why proponents of deliberative democracy encourage democratic legislators to engage in substantial and inclusive moral deliberation. I agree with this argument and believe that legislation should be framed and judged by means of political morality.

At the level of implementation, legal positivism does not cause problems for many ordinary legal cases. International human rights protection is an exception, however. International human rights law is not a normal legal system and legal positivism, presupposing the existence of a legitimate power and a legitimate monopoly for the use of violence, cannot be practiced within this law. Yet most specialists in human rights are trained lawyers who view moral and political elements in human rights documents as highly problematic. To strengthen the legal dimensions of human rights law and find ways of implementing it as "normal" legislation is regarded by many as the most important, and even the only, way to strengthen human rights protection.

I am critical of many forms of legal positivism, especially attempts to extend it into international human rights protection. One of my arguments has been that law understood in terms of legal positivism cannot aspire to universality. In Chapter Two, I criticized the current tendency of viewing human rights law as simultaneously positive law and universally valued law. This tendency can be explained as an understandable but overly optimistic liberal interpretation that followed on the end of the Cold War. Contrary to naïve perceptions that the world is now united around the ideals of democracy and liberalism, we are facing developments in the international arena testifying about sufficient ideological and geopolitical conflicts. For this reason, any acknowledgment of the realities of today's world also requires an admission that there is no globally legitimate actor which could interpret and enforce human rights in terms of international positive law. On the contrary, such attempts undermine the credibility of human rights claims. Faced with the reality of global inequality, it is far more productive to reclaim the original vision of international human rights as a set of openly formulated principles of political morality. This would weaken the link between human

rights and colonialism and, hopefully, enhance the trans-contextual appeal of human rights law.

The importance and the potential of strictly legal protections for human rights are often overestimated, even within traditional legal systems. I share this skepticism towards legal human rights protection, which has been articulated by postcolonial scholars like Mohanty. As shown in Chapter Five, human rights can function in a way that makes crucial social injustices less transparent. Oppression related to class, gender, or ethnicity is particularly difficult to address from a purely legal perspective. For example, an equal legal right to freely express an opinion does not guarantee equal freedom of speech in a society where economic and political power is unjustly distributed. On the other hand, the moral ideal of an equal right of freedom of expression can function as an effective means of revealing inequalities as regards access to public space. Legal positivism makes no use of this potential. My analysis of recent legal cases in Sweden indicates that interpretative tools of courts make no recognition of the economic, social, and political segregation of Muslims, something that makes the law a fairly weak instrument for challenging the discrimination of socially vulnerable groups.

Does all this mean that human rights and human rights law are useless for those fighting against oppression in terms of class, gender, or ethnicity? In this study I have argued that such is not the case. It remains possible to use the potential of human rights as a vision of protection of *equal* human dignity in order to frame progressive projects for social liberation. Such projects must include judicial components, but most of all they should be political and address people as political agents. Human rights as political morality are powerful because they always reveal the limitations of concrete legal protections, and thereby promote further developments in both law and policy. Moreover, human rights can in fact have a crucial impact on class or gender liberation because human rights are opposed to the forms of particularism that are often inherent in liberation movements. For example, to propose a feminist policy that can be justified in terms of human rights requires a demonstration that such a policy promotes the

protection of the equal dignity of all individuals. When fighting domination, one always runs a risk of replacing one kind of oppression with another. There is obviously no technique or strategy that can guarantee to avoid the reversible logic of liberating one group while oppressing another. But human rights can be used in order to critically and self-critically evaluate different political projects for social liberation.

In concluding this study of human rights, I find myself wishing that I had greater confidence in their lasting legitimacy. I do not. Regrettably, human rights have been and still are used in order to promote the material interests of the strongest. In many parts of the world human rights have been elegantly formulated while remaining impotent paragraphs in constitutions that are seldom applied within the legal and political spheres. Elsewhere, they are used to make people subordinate themselves to dominant foreign powers. However, despite the fact that human rights, like other similar utopian projects, are misused and/or neglected, I remain convinced that it is a utopia that is worth fighting for. Like any powerful utopia in an inhumane world, human rights hold out the promise of another and better world.

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