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"It all Depends":

The Universal and the Contingent in Human Rights

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"It All Depends":

The Universal and the Contingent in Human Rights

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As Klaus Günther notes: "the idea of universal human rights is in itself a particular European idea…."[1] This simple phrase nicely illustrates what may seem to be a paradox: a conception aimed at universalism – aspiring to universal application – cannot claim universality itself. But, of course, the paradox is only illusory: there is no contradiction between a theory's aspiration to universal implementation and its being local in its pedigree and even reach. Indeed, if a test for the coherence of a theory's universalism were to be whether it is universally espoused then no substantive conception of political morality, or of any concept, would pass such a test.

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

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

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[1] Klaus Günther, "The Legacies of Injustice and Fear: A European Approach to Human Rights and their Effect on Political Culture", in Philip Alston, ed., *The EU and Human Rights* (OUP: Oxford 1999):117-44 at 117.

main categories of such factors, and provide illustrations for these categories by different case studies culled from our conventional human rights discourse.

As is clear from the description of the tasks of this paper, there in one glaring gap in the field covered. I am going to show (in the first part) that universalism is not vulnerable to certain charges usually levelled against it, and (in the second part), that it is only partly workable. But to defend a certain position against the habitual charges is not the same as to make a positive case for it, and if no positive case is made for it, the argument about incomplete workability may seem redundant: unless we can make a positive moral case for it, we do not need to enter into the argument about workability (so may be said). No such direct, positive case for universalism's moral attractiveness will be attempted here. *In lieu* of making such a positive case (which could be a theme for another paper), I will simply begin by making two assertions which will set the scene for the remainder of my argument. However, they will be precisely that; assertions rather than arguments. First, I assume that human-rights liberalism – a theory that the ultimate measure of a good society is how it contributes to the well-being of its members, and that among the criteria of this well-being, individual liberties have special prominence – has a universalist dynamic built into it. All the great, historical and contemporary human-rights declarations, from the French Declaration of the Rights of Man and the Citizen, up to the UN *Universal* Declaration of Human Rights, have been formulated in a universalistic language, and in predominantly liberal terms. The natural, inherent tendency of liberalism is to support the extension of its benefits (as perceived by liberals) to all individuals (or, in a weaker version, to all individuals who want it – a point to be discussed in more detail below). This sounds more convincing when formulated from a negative perspective; liberal defenders of human rights being committed to the protection of all people, regardless of their particular location in a specific culture, country or milieu, against harms to their life, physical integrity, dignity and sense of self-respect. Human-right liberals (an arguably pleonastic term!) are therefore prima facie hostile to contextualization, particularism, and any linkages of the conferral of human rights to the group-based identities of individuals. As a measure of this hostility, consider the characterization – by an adherent of a cosmopolitan theory of democracy – of the very notion of citizenship as "the last pre-modern relic of personal inequalities".[2]

There is a presumption, built into human-rights liberalism, in favor of universalism – a presumption which can be overcome only by very weighty arguments. Diversity, as an allegedly inherent value of a good society, does not in itself figure among such arguments. Unless, that is, it can be further reduced

[2] Luigi Ferrajoli, "Dai diritti del cittadino ai diritti della persona", in D. Zolo, ed., *La cittadinanza. Appartenenza, identità, diritti* (Roma-Bari: Laterza, 1994), p. 288.

to the good of the individual subjects for whom departures from the universal liberal freedoms are proposed. "True" liberalism is therefore reluctant to easily accept the arguments for cultural exceptionalism, group rights, membership-based particularities, and for community- and citizenship-conscious claims, as it suspects that all such arguments, exceptions and claims have a potential for exclusion, discrimination and inter-group oppression.[3] As noted by the author who has recently made by-far the most eloquent and passionate defence of such liberal universalism:

> [I]t seems overwhelmingly plausible that some groups will operate in ways that are severely inimical to the interests of at any rate some of their members. To the extent that they do, cultural diversity cannot be an unqualified good. In fact, once we follow the path opened up by that thought, we shall soon arrive at the conclusion that diversity is desirable to the degree, and only to the degree, that each of the diverse groups functions in a way that is well adapted to advance the welfare and secure the rights of its members.[4]

A little later, he declares: "The liberal position is clear. Nobody, anywhere in the world, should be denied liberal protections against injustice and oppression". [5] One does not have to endorse all the polemical excesses contained in Brian Barry's recent book, to agree that there is something deeply troubling to a person committed to the value of liberty, in the project of "political liberalism" which is tolerant of moral and cultural diversity, the price of which is paid by the most vulnerable and powerless members of illiberal groups and states. Such a project, associated with the writings of "late Rawls" (meaning, basically, the post-"Theory of Justice" Rawls), Michael Walzer or Chandran Kukathas, faces the problem of overcoming particularly high argumentative hurdles, stemming from the intrinsic universalist dynamic of human-rights liberalism. Tolerance for illiberal cultures, groups and societies, which deprive their members (usually, the weakest ones, but often all) of those very human interests in liberty and dignity which activated the liberal project in the first place, is hard to square with commitment to fundamental liberal values. A conception of cultural particularism, when applied to human rights, is on very shaky ground when the "This is the way we (they) do things here (there)" argument is extrapolated from the sphere of, say, table manners or norms of decorum in dressing, to the norms exemplified by the cases of, say, killing an author of a book not sufficiently respectful of religion, or execution by stoning of a woman accused of adultery. There are, of course, many intermediate points, but the closer we get from the

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[3] See Stephen Gardbaum, "Liberalism, Autonomy, and Moral Conflict", *Stanford Law Review* 48 (1996): 385-417.

[4] Brian Barry, *Culture and Equality* (Polity: Cambridge, 2001) p. 134.

[5] Id. p. 138.

former to the latter ends of the continuum, the more nervous human-rights partisans are, and rightly so. Or so I would claim, at any rate.

My second assertion is of a more epistemological nature. A human-rights liberal committed to the universalistic message, need not be required to provide an argument based on first philosophical principles, say about the alleged inherent nature of human beings. In other words, a universalist need not be foundationalist. One can (indeed, if one believes in human rights, one should) endorse the substantial part of the "Enlightenment project", without necessarily claiming that all those human rights which follow from it can be deduced from the objectively demonstrable precepts of Reason. For my part, I would declare myself to be a non-foundationalist, Rawlsian constructivist. I seek a reflective equilibrium in which the intuitions – the fixed points of our argument – do not reflect any alleged essence of humanity which must be necessarily shared by all human beings. In the search for universally applicable human rights, I suggest that we may repeat after Rawls (whose words apply to justice, not to human rights, in the quotation which follows) that "we are not trying to find a conception . . . suitable for all societies regardless of their particular social or historical circumstances" but rather "[w]e want to settle a fundamental disagreement over the just form of basic institutions within a democratic society under modern conditions".[6] One can be universalist (in aspiration) and non-foundationalist at the same time if only one believes that, in the process of seeking reflective equilibrium, one can convince others to one's own ideals by bringing their own convictions to bear upon the question of human rights. Whether those *others* are within or outside one's own polity which is largely bounded by national borders is a secondary and morally irrelevant issue; hence the scope of reflective equilibrium (its constituency, so to speak) may be planetary, and our theory – universalistic. As Rawls himself explains, his idea of a social contract extended upon the Society of Peoples – the "Law of Peoples" – is "universal in its reach" in that it "include[s] reasonable political principles for all politically relevant subjects: for free and equal citizens and their governments, and for free and equal peoples".[7]

The theory assumed here is therefore universal by virtue of an actual, perceived convergence of those considered convictions which feature in the cosmopolitan reflective equilibrium rather than by virtue of a deeper moral truth about human nature or the universally valid first principles; it is universal – to continue in the Rawlsian mode – because we can hope to actually identify a worldwide "overlapping consensus" about what rights we should have (regardless of why we think we should have them), and so the nature of the

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[6] John Rawls, "Kantian Constructivism in Moral Theory", *Journal of Philosophy* 77 (1980): 515--72, at 518.

[7] John Rawls, *The Law of Peoples* (Harvard University Press: Cambridge Mass. 1999) at 86.

justification is (to borrow from Rawls one more time) thoroughly "political, not metaphysical".

1. Intolerance, Paternalism, and Human-Rights Universalism

Our frequent reticence in making universalistic human rights claims – that apply to a society, different from ours, which seemingly does not value the same rights as we do (for the sake of simplicity, I will refer to such a society as a "distant people" but of course it may well be the people just across the border, or even within our own multicultural polity) – is usually grounded in an attempt to avoid hubris, a moral or intellectual arrogance. Indeed, we do not want to be seen as "imposing" our values on those who do not seem to espouse them. Hence, the celebrated Rawls's plea for the law of peoples – the plea which can be read as a warning against the (alleged) intolerance inherent in the missionary zeal of liberals: "If all societies were required to be liberal, then the idea of political liberalism would fail to express due toleration for other acceptable ways (if such there are, as I assume) of ordering society".[8] It is clear that he frames the duty to accept societies structured differently than the liberal ones in terms of toleration:

> Liberal societies may differ widely in many ways: for example, some are far more egalitarian than others. Yet these differences are tolerated in the society of liberal peoples. Might not the institutions of some kinds of hierarchical societies also be similarly tolerable? I believe this to be so.[9]

But the conflict between universalism and tolerance is illusory just as there is no connection between "localism" and tolerance. To consider why, let us translate the notion of "localism" into that of "relativism". Is such a "translation" legitimate? After all, "localism" as used in the sense of an opposition to universalism may mean many other things, and need not be based on a meta-ethical position of relativism. However, for the strictly limited purpose of examining a connection to tolerance, the reduction of "localism" into a form of moral relativism seems to be justified. It is because the version of moral relativism declaring that the moral worth of any norm, principle or judgment is relative to the society, group or individual to which it is meant to apply, so that one and the same norm, principle or judgment may have different moral worth in different societies, a conventionalist brand of relativism, as we

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

[9] Id. at 84.

might call it, seems fundamentally anti-universalistic and therefore lends itself well to a defence of localism. Now there is no intellectually respectable connection between the attitude of "moral relativism" and the attitude of tolerance (understood in the simplest way as the requirement of non-imposition of our norms upon those who do not share them). As Bernard Williams famously explained, the relativism-tolerance connection claim is incoherent because the normative demand of tolerance (saying that it is wrong for people in one society to condemn or interfere with the values of another society) is itself non-relative and so escapes (and undermines) the teaching of relativism (which in its vulgar form basically says that the proposition about something being right always means "right for a given society"). Such a combination results in a "logically unhappy attachment of a non-relative morality of toleration or non-interference to a view of morality as relative".[10] When extrapolated upon the discourse of human rights, this conclusion reads as saying that there is no connection between "localism" of human rights and the value of tolerance: tolerance by definition cannot be "local" because it is about the relationship (of non-interference) *between* different systems and not *within* any of them.

Suppose I am right about the resemblance of localism to relativism for the purposes of its relevance to tolerance, and consequently that there is no strict connection between localism and tolerance. Still, it does not show that there is a positive connection between universalism and tolerance, and that universalism precludes *in*tolerance. Universalism (the argument may go) may reveal intolerance towards the people upon whom we would like to "extend" our conceptions of human rights (when they seemingly do not share them) even if there is no necessary connection between localism and tolerance (hence, there may be some forms of intolerant localism). I admit that a universalism-intolerance connection is conceptually not inconsistent; however, it is *unlikely* as a practical matter that an intolerant attitude might move someone to postulate universalist conceptions of human rights. Rather, if there is a prima facie objectionable attitude which is likely to trigger a universalist conception of human rights, it is paternalism and not intolerance. This point needs to be explored in more detail.

1.1. Forms of Human-Rights Expansionism

Before I explain the role of the intolerance/paternalism distinction in the present context, first a digression about the forms in which any objectionable attitude, such as paternalism or intolerance, can be said to be revealed in the "imposition" of human rights. Human rights expansionism (as we may call it generically) may

[10] Bernard Williams, "An Inconsistent Form of Relativism", in J.W. Meiland & M. Krausz, eds, *Relativism, Cognitive and Moral* (Univ. of Notre Dame Press: Notre Dame 1982) at 172; see also Bernard Williams, *Ethics and the Limits of Philosophy* (Fontana, London 1985) 159.

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

The distinction between advocacy and interference (with various points in-between these poles) is *not*, however, a serious problem from the point of view of tolerance. For, *if we know* that the distant people does not value *X* highly (and this is presently accepted for the sake of argument), then the difference between the advocacy of *X* and the imposition of *X* is one of degree only. This degree naturally matters for the strength of our (putative) condemnation of human-rights expansionism but it may be bracketed for the purpose of a general discussion of principle. It would be eccentric to say that intolerance can be revealed only through a forcible imposition but never through an advocacy of a forcible imposition of our values upon those who do not share them. After all, many of us (probably, most of us) are *not in a position* to impose any human right on anyone in a distant society: all we *can* do is to advocate its imposition (as citizens, voters, writers of opinion pieces in newspapers or of letters to editors, etc) but that does not deprive us of an opportunity to be intolerant, so to speak. If “ought implies can”, then we *ought* to be tolerant only if we *can* be so, and we can be so only if it is available to us to be *in*tolerant: it would make no sense to talk about our tolerance if there is nothing that we can do to the other people, even if we wanted.[11] So there is no obstacle towards attributing intolerance to “mere” advocacy. While the principle of freedom of speech which naturally protects “advocacy” of anything, at least *prima facie*, may trump the moral wrong of advocating intolerance, it does not make it any less wrong: it

[11] See Wojciech Sadurski, “The Paradox of Toleration”, in Frank Fleerackers, Evert van Leeuwen & Bert van Roermund, eds., *Law, Life and the Images of Man: Festschrift for Jan M. Broekman* (Berlin: Duncker & Humblot 1996): 377-89 at 378.

just says that the balance of moral argument is for toleration of the advocacy of (putative) intolerance. Of course, the volume of moral harm is higher in the *imposition* of *X* than in merely *advocating* such an imposition but the moral wrong of the former radiates upon the latter. Likewise *vice versa*, if we come to the conclusion that the advocacy of an extension of human rights to a different society is justified, then it is also prima facie justified to try to bring it about that those rights are actually extended to that other society. This is only "prima facie" justification, as all the countervailing values and side-effects have to be taken into account before the final calculus is ascertained. Even if we believe women in Saudi Arabia should have full political rights, we probably would not support sending the US (or EU) military forces there to enforce free and democratic election rights for all adult Saudis, regardless of gender.[12] This is, however, for contingent reasons resulting in a particular cost-benefit calculus; in cases when the calculus is likely to fall on the opposite side (when the violation of rights is more drastic, and the costs of intervention are relatively lower), the very idea of forcible intervention from the outside is not anathema today. The growing recognition of the correctness, in some circumstances, of the international community to intervene militarily to prevent further human-rights abuses in a particular oppressive state, confirms that this intuition is now widely accepted.[13] The upshot is that, when talking about "intolerance" and the related attitudes which may be perhaps raised by universalism of human rights, we may disregard any distinction between the advocacy and the actual imposition.

The truly important distinction is not between the advocacy of the imposition of *X* and the imposition of *X* but between these two forms of giving effect to universalism of human rights on the one hand and a statement that it would be good for a distant people to enjoy *X*. Consider, for analogy, Gilbert Harman's distinction between two forms of judgments: "inner judgments", which have the form of a proposition that someone ought to do something or that it is right for her to do something, and on the other hand, evaluative ought-judgments, of the sort that it ought to be the case that someone acted in a certain way, or that it would be a good thing if she acted in a certain way. Inner judgments, Harman claims, make sense only if we believe that the agent to whom they apply "is capable of being motivated by the relevant moral considerations".[14] Ought-to-do statements presuppose a commonality of reasons

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[12] See, similarly, Barry, op. cit., p. 138.

[13] See, e.g., Antonio Cassese, "Ex injuria jus oritur: Are We Moving Towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?", *European Journal of International Law* 10 (1999).

[14] Gilbert Harman, "Moral Relativism Defended", in Meiland & Krausz, eds, op.cit, at 190; see also, similarly, in Gilbert Harman and Judith Jarvis Thomson, *Moral Relativism and Moral Objectivity* (Blackwell, Oxford 1996) at 59-61.

for action between the evaluator and an agent. It would therefore make no sense (and this is a matter of a "soberly logical thesis about logical form", as Harman assures us)[15] to say, for instance, that slave-owners should have not acted the way they did, or that it was wrong for Hitler to exterminate Jews. All we can say is, in a more anodyne fashion, that it would be good thing if slavery or Hitler had not existed.

I do not want to go into the merits of Harman's thesis which becomes truly fascinating (and highly controversial)[16] when he combines it with an agreement-based theory of morality which claims that all valid moral judgments presuppose prior tacit agreement or convention. I want merely to exploit Harman's distinction here in order to suggest an analogous distinction between a normative version of human-rights universalism (a distant people "ought" to enjoy the right *X*) and a merely evaluative statement of the form that it would be a good thing if a distant people enjoyed the right *X*. I wish to claim a symmetry between Harman's distinction between judgments about ought and evaluative statements on the one hand, and conferral of rights and evaluative statements on the other. Just as, in Harman, "inner judgments" are contingent upon an agent being capable of being motivated by our own moral considerations, so in the case of normative human-rights judgments we must believe that the people to whom they apply stand to benefit from the enjoyment of *X*. *X* defines an aspect of their good when we make a normative ought-judgment about extending a right upon a distant people but not necessarily so when we make a merely evaluative statement about it being "a good thing" if they enjoyed it. The latter statement may be valid exclusively by reference to our own preference (just as we say that it would be a good thing if there was a larger rather than a smaller number of biological species in the world, and we say so because it would make *our* life more interesting or colourful). Consider a distinction between: (1) "A distant people should not practice cruel penalties" and (2) "It would be good if it was the case that a distant people did not practice cruel penalties". This is the equivalent distinction to that between inner judgments and evaluative statements in Harman, extrapolated upon the language of human rights.

Note that the proposition (2) may come in two versions: (2a) "It would be good if it was the case that a distant people did not approve of cruel punishments, and consequently did not practice them", and (2b) "It would be good if a distant people did not practice cruel punishments, regardless of what they think about it". But from the point of view of the value of tolerance, both versions are equally unobjectionable although, *all things considered*, version (2b) seems more objectionable (but not for tolerance-related reasons) because it

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[15] Harman, "Moral Relativism Defended", op. cit., at 190.

[16] For a critique, see Wojciech Sadurski, *Moral Pluralism and Legal Neutrality* (Dordrecht: Kluwer 1990) at 70-86.

violates the principle of democracy. In the version (2a) we just make an evaluative judgment about the preferences of the people concerned: the outcome (non-practising of cruel penalties) is seen as tracking those preferences. In the second version, we make the same judgment about an outcome but we sever the link between the outcome and preferences of the people concerned. However, it is hard to attribute the wrong of intolerance to either version of such a proposition. For intolerance is implicated by the interference, advocated or actual, and no mode of interference is postulated by the proposition that the world would be better if there was no cruel punishment practised and condoned. In fact, such a proposition does not belong to the discourse of human rights *sensu stricto*. For when we engage in the discourse of human rights we are in the realm of performative statements: to make an ought statement about a human right is to postulate this right. A statement of the type that it would be good if the distant people enjoyed a particular right, when disconnected from advocacy altogether, does not lend itself to be part of the human-rights discourse, and so is outside our interest here, just as non-inner judgments are not really of interest for Harman.

1.2. The Problem of Defective Representation

The political context in which the universalistic claims of human rights are most often made (and refuted) in the modern world, must be briefly mentioned at the outset, just to make sure that we do not conduct our analysis in a fantasy-land. The political context suggests that, more often than not, the universalistic claims are neither paternalistic nor intolerant but aim at displacing the claims of non-democratic governments to represent the true values and preferences of their people – the claims which are rarely credible. This is, politically speaking, the most usual situation in which the universalistic human-rights claims meet the resistance of "other" societies which seemingly do not share those values. In reality, the "resistance" comes from a despotic elite of this other society, and has nothing to do with the actual preferences and desires of the members of the societies which often would be delighted by an "interference". Anti-universalistic objections are then usually merely a rhetoric used by a non-democratic power elite who wants to keep its grip on the society – *vide* the ideology of "Asian values" which should be properly seen as part of the authoritarian regimes' legitimation strategy.[17] As an ex-Deputy Prime Minster of Malaysia said: "[I]t is altogether shameful, if ingenious, to cite Asian values as

[17] See Mark R. Thompson, "Whatever Happened to 'Asian Values'?", *Journal of Democracy* 12 (2001): 154-65. See also, similarly, Ronald Dworkin, "Forked Tongues, Faked Doctrines", *Index Online*, http://www.oneworld.org/index_oc/issue397/dworkin.htm visited 18 April 2002.

an excuse for autocratic practices and denial of basic rights and liberties".[18] To "respect local values" is then based on a mistake about who is the genuine spokesperson for the society in question. Our universalistic claims are then of course based on *anything but* paternalism (much less, intolerance).

The ambiguity about how to ascertain the actual preferences of a distant people and, in particular, how representative of those preferences the governments are, may be seen as underlying some of the critiques of Rawls's *The Law of Peoples*.[19] The book caused a degree of dismay among those who had long postulated an extension of Rawls's conception of justice as fairness into international scale, and who thought that Rawls has now turned out to be inexplicably solicitous of various non-liberal regimes in his *Law of Peoples*. Putting the questions of economic justice to one side, we may say that the extension of the first principle of justice (as announced in *A Theory of Justice*) would result in a global human-rights principle (going much beyond the human rights minimum established by Rawls as a yardstick for "decent" but hierarchical societies). This solicitousness is based, I believe, on a question-begging connection between moral judgments and practical "feasibility" in Rawls. Responding to those who would like to ground the global principles of justice on a sort of "global original position", Rawls observes that "peoples as corporate bodies organized by their governments now exist in some form all over the world".[20] From this statement of fact (which, in itself, need not carry any moral significance) Rawls immediately proceeds to conclude that: "Historically speaking, all principles and standards proposed for the law of peoples must, *to be feasible*, prove acceptable to the considered and reflective public opinion of peoples *and their governments*".[21]

The status of this "feasibility" proviso is unclear. Why must the principles be acceptable to the governments in addition to their acceptability to the peoples in order to pass the constructivist test of justification? After all, the law of

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[18] Dr Anwar Ibrahim, quoted in "What would Confucius say now?", *The Economist* 25 July 1998 at 25.

[19] Op. cit.

[20] John Rawls, "The Law of Peoples", in Stephen Shute & Susan Hurley, eds., *On Human Rights: The Oxford Amnesty Lectures* (Basic Books: New York 1993): 41-82 at 50.

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

peoples is determined in the same constructivist way as principles of justice in the conception of justice-as-fairness; hence, only the “appropriate reasons" guiding the specification of the Law of Peoples under "fair conditions" count.[22] True, the principles *un*acceptable to the governments (while acceptable to their peoples) have little chance of being universally followed but then we face the issue of non-compliance, and hence of non-ideal theory, while the principles for the law of peoples belong to the ideal theory, which aims to describe the world "in which all peoples *accept and follow* the (ideal of the) Law of Peoples".[23] Rawls explicitly announces that the extension of the law of peoples from liberal upon hierarchical societies belongs to the ideal theory;[24] it is therefore not a step triggered by non-compliance, unfavourable conditions, etc, and as such, is subject to the same justification procedure as within the liberal societies. The feasibility test demanding an additional acceptance of principles by government, over and above that of their people, presupposes that they are not the accurate spokespersons for their peoples’ preferences – that they are not democratic, in other words – but this seems to put them beyond the range of the societies which are “well-ordered and just”. They are therefore worse than being merely non-liberal, in the sense that they are “hierarchical”, not perfectly democratic and do not respect the separation of church and state – these are Rawlsian indicia of decent non-liberal societies. Those societies where the governments, routinely, fail to track the preferences of its peoples must surely fall below the level of “well-ordered and just”. Rawls explains that, while there is no fully-fledged democratic system required of those societies, there nevertheless must be “a decent consultation hierarchy” and public officials must be guided by a common-good conception of justice.[25] Since he explicitly contrasts a “consultation hierarchy” and a “paternalistic regime”[26] (with the implication that the latter would not pass a test of a well-ordered society) it follows that such regime must track the avowed preferences of its people (otherwise a common-good conception would be purely paternalistic: the only factor that stands between the common good test and paternalism is the tracking of the avowed preferences). Either way, there seems to be no reason for those governments to be included in the reflective equilibrium on the law of peoples: either they are so non-democratic as to place themselves beyond the pale of well-ordered societies,[27] or they do track the preferences of their people in which case they

[22] Id. at 32.

[23] Id. at 89, emphasis added.

[24] Id. at 5.

[25] Id. at 71-2.

[26] Id. at 72.

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

need not be included because they are treated, in the theory of justification, merely as a mouthpiece for their people. The “global original position” does not need, therefore, to invite the governments into its constituency.

1.3. Intolerance and Paternalism

But now let us put the case of defective representation of preferences to one side. Let us consider a situation in which our universalistic claims indeed meet a genuine resistance of the community upon which we would like to extend our conception of rights, and the ruling elite is at one with the large majority of the community. Under such circumstances, is it really *intolerance* that is implicated by universalist discourse of human rights? A distinction between intolerance and paternalism may be obscure in real life but is quite sharp and clear when stated in abstract terms. I will define here intolerance as an interference with other people’s behaviour based on our moral disagreement with their values. (Note that it is a maximally neutral, and perhaps somewhat artificial, concept of intolerance: under this definition, intolerance has no necessarily negative connotation because if you agree with me that the values with which I interfere are morally repugnant, then you are likely to approve of my intolerance, as in intolerance for thieves or plagiarists). Paternalism is defined as an interference with other people’s behaviour on the basis that their values, when pursued, are (in the opinion of an interferer) harmful to them, and that the overall consequences of interference will make them better-off.[28] So the criterion which distinguishes intolerance from paternalism is whether it is relevant for an interference that, in the eyes of an interferer, the interference is to the benefit of those upon whom we impose “our” values. Such a judgment of benefit is irrelevant for intolerance but crucial to (indeed, defining of) paternalism.

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

[28] See, e.g., Rolf Sartorius, "Introduction", in Rolf Sartorius, ed., *Paternalism* (University of Minnesota Press, Minneapolis 1983) at ix; Joel Feinberg, *Harm to Self: The Moral Limits of the Criminal Law*, vol. 3 (Oxford University Press: New York, 1986) at 3-8.

arguably, *less*) objectionable than the attitude of intolerance. What is the significance of this distinction?

I certainly do not want to make a general claim that intolerance, *in abstracto*, is more objectionable than paternalism.[29] I am not sure how one would go about supporting such a bizarre claim, and I suspect that it is meaningless. But I believe that in the present context, that is, in the context of the discussion of universalism/localism of human rights discourse, paternalism is an attitude which has some redeeming virtues. In such context, our "paternalism" is most likely to be of a moderate version only, that is, to be based on a plausible conviction that the resistance by the members of the distant societies to the rights which we would like to extend upon them results from ignorance and oppression,[30] and that this ignorance and oppression is often deliberately supported by the power elite – so, in the end, the situation is not totally unlike the one that we have discussed in Part 1.2, namely, that "local values" merely serve as an excuse for the ruling elite's oppressive policies.

Consider the issue of gender equality and a resistance of some Muslim societies to our insistence that women should be offered equal legal status and equal professional and educational opportunities as men. The resistance of *women* themselves to such an extension of human rights upon them raises the issue of paternalism. The most plausible explanation of their resistance, if genuine, is that they are not given the necessary information and the necessary political freedom to form a considered judgment on the issue. It is not the case that we (*qua* universalistic human rights proponents) will keep insisting upon their rights to equality despite their resistance but rather that we insist that they should have an opportunity to know the full range of options, to understand the issues at stake, and to decide freely on the matter. But, of course, once we have reached that point, we have extended at least some of the "universalistic" rights upon them in the process. Another, very likely explanation for the endorsement of such practices by women is that it is a case of non-autonomous preferences described by Jon Elster as a "sour grapes" syndrome, consisting of our adaptation of preferences to what is seen as possible to achieve under existing constraints.[31] The phenomenon of the victims of discrimination or oppression accepting their fate and convincing themselves that they are actually well-off is psychologically understandable (reduction of "cognitive dissonance") and

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[29] More on this distinction, in the context of freedom of speech, see Wojciech Sadurski, *Freedom of Speech and Its Limits* (Kluwer: Dordrecht 1999) at 173-78.

[30] For discussions of such a "mild", ignorance-removing paternalism, see, inter alia, Feinberg, op. cit. at 269-315; Gerald Dworkin, "Paternalism", in Sartorius, op. cit., 19-34, at 28-33.

[31] Jon Elster, *Sour Grapes* (Cambridge University Press: Cambridge 1983), esp. chapter III. See also Cass R. Sunstein, "Legal Interference with Private Preferences", *Univ. of Chicago Law Review* 53 (1986): 1129-74, at 1146-50.

reasonably well explored, and surely it is a instance of a pathology of preference-formation. These "adaptive preferences" do not fit the scheme of respect-deserving preferences as figuring in traditional liberal critiques of paternalism.

Paternalism conceived as a response to defects in knowledge and in preference-formation is not a particularly objectionable one as long as it is proportionate as a remedy to these defects;[32] indeed, it may be *more* objectionable to take at face value the expressed preferences without looking into the preference formation process. If we do the latter, we are likely to cheat ourselves, and end up producing comforting rationalizations for doing nothing about the oppression elsewhere: we hypocritically satisfy ourselves, for example, that those Muslim women do not want equality of access to education or employment, or that Asian peasants really do not want freedom of the press, etc. Perhaps they indeed do not want such rights at present, and if that is the case, our relentless insistence upon these rights for them is paternalistic; but if their not wanting it is a result of the state of ignorance in which they have been kept so that they never had an opportunity to consider that there may be a different way of living one's life, then our paternalism is actually less objectionable than our avoidance of interference.

But there is yet another, even less objectionable, version of paternalism which is likely to accompany many universalistic conceptions of human rights. Consider again the case of "our" (that is, enlightened liberals in the developed democracies) attitude to the subordination of women in some Muslim countries. The ignorance-removing paternalism may be a likely motive for proselytizing about gender equality towards the *women* who seem to be content with their condition in these countries. But what about the subordinating *men*? One answer is that the voice of the oppressors should not count in moral argument, but this is to proceed too quickly. For their persistence in maintaining the patterns of women's rights violation may result from a sort of collective-action dilemma: no-one is prepared to interrupt unilaterally the state of affairs which benefits everyone so long as everyone else practices the norms included in this pattern, but everyone (or, let us say modestly, a majority) would prefer a system of gender equality, under the condition that others play by the rules of this new system. (This is of course a sheer and perhaps fantastic speculation but it is provided here only *arguendo*). They might have this preference for all sorts of reasons: because they do not want to look like barbarians to their Western counterparts (for example, business partners) in a globalized world; because

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

they do not want to feel a sense of guilt toward the women they encounter; because they want to provide their wives and daughters with fair life opportunities; because they may realize that their religion, properly articulated, does not mandate a system of oppression of women, etc. In this case, the "imposition" of the system of gender equality by human-rights universalists is a rational solution to a Prisoner's Dilemma: it identifies an optimal solution (optimal in the eyes of those to whom it applies, not just by *our* standards), and it selects the most effective means to achieve this preferred solution.

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

> Paternalism is despotic, not because it is more oppressive than naked, brutal, unenlightened tyranny . . . but because it is an insult to my conception of myself as a human being, determined to make my own life in accordance with my own (not necessarily rational or benevolent) purposes, and, above all, entitled to be recognized as such by others.[33]

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

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[33] Isaiah Berlin, *Four Essays on Liberty* (Oxford University Press: Oxford 1969) at 157.

2. Universalism Mediated by Contingency

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

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

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

2.1. The Right Not to be Discriminated Against

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

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

This theory – which, for brevity, may be called a "*per se* theory of discrimination" – is as legally influential as it is philosophically implausible. Indeed, if one tries to give the best possible justification to this theory, its implausibility becomes apparent. The most likely candidates for "impermissible" traits are those which are immutable, such as race (hence, the postulate of "color-blindness")[34] or gender. But if one tries to provide a coherent justification for what is wrong *per se* in drawing legal classifications on the grounds which are immutable, then the theory breaks down. The most obvious reason which springs to one's mind is connected to an intuitive feeling that there is something particularly wrong in classifying people who are selected on the basis of

[34] For some typical expression of "color blindness" in the United States jurisprudence, see DeFunis v. Odegaard, 416 U.S. 312, 331-4 (1974) (Douglas, J., dissenting); Fullilove v. Klutznick, 448 U.S. 448, 523 (1980) (Stewart, J., dissenting); in the US legal scholarship: Alexander M. Bickel, *The Morality of Consent* (Yale Univ. Press: New Haven, 1975) at 132-3; Richard Posner, "The DeFunis Case and the Constitutionality of Preferential Treatment of Racial Minorities", *Supreme Court Review* (1974): 1-32.

characteristics which are beyond their control. There may be two ways of making this general intuition more specific. One such reason would be to say that immutable characteristics are, by their very nature, much more tightly linked to the *identity* of an individual than are the alterable characteristics which are more defining of a person's changeable *roles* in society. Under this argument, "immutability" is just a proxy for identity-defining characteristics. But, unless this equivalence is a matter of definition, so that anything that is immutable is *defined* as identity-constituting (in which case the argument is circular), immutability is a very imperfect proxy for identity. There are some characteristics which are immutable but which do not define anything particularly significant about an individual's identity (for example, freckles on one's back), and there are also characteristics which *may* define an individual to a great degree but which are alterable (for example, membership of a political party). But even if it were true that immutability properly captures identity-constituting characteristics, it would still be question-begging to say that legal classifications based on identity-defining characteristics are necessarily more suspicious than classifications based on more contingent properties.

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

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

So the theory of legal equality must work a little harder if it wants to identify the criteria for non-discriminatory classification – the criteria which would be both philosophically respectable (that is, would engage an explanation about the link between such criteria and that which confers moral odium upon discrimination), and also which would match our intuitive line drawn between discriminatory and non-discriminatory classifications. Such a theory most likely will refer to some legislative motives for classification as impermissible, and as tainting the classification with discriminatory character. It will say, for example, that it is not the very fact of drawing legal classifications along certain lines which renders a classification discriminatory, and not even the fact that it produces some winners and some losers (every classification does) but rather, it is the fact that such a classification gives effect to the legislators' contempt, hostility or prejudice towards the victims of classifications – those who lose more than they gain as a result of the classification – which renders the classification discriminatory, in a truly morally reprehensible sense.

The distinction drawn above between a "*per se* theory" (which is both theoretically shallow because does not reach the moral link with moral odiousness, and intuitively without vindication) and a motive-based theory appealing to the expressions of contempt, hostility and/or prejudice, corresponds to what Ronald Dworkin usefully characterized as "banned categories" and "banned sources".[35] An idea that certain "categories" drawn by a legislator are symptoms of discrimination is incapable of explaining an odious moral character of discrimination, in contrast to the theory which condemns certain "sources" of classification as discriminatory. But of course, to end the matter there would render the theory of discrimination largely unworkable because we need some more precise signposts for identifying the contempt (or hostility, or prejudice, etc) behind a given classification. In order to make a theory workable, we need some indicia of classification which would work as reliable indicators of

[35] Ronald Dworkin, *Law's Empire* (Fontana: London at 1986) 383-87, 394-97..

contempt as a likely source of a given classification. As often is the case, we need to infer about the legislator's motive from the outcome – this is not something peculiar to a conception of legal *equality*. But we certainly cannot content ourselves with saying: people have a universal right not to be subject to classifications triggered by legislators' contempt, hostility, or prejudice. Because the disagreement about whether a given classification actually does express contempt etc. largely replicates a more fundamental disagreement about whether such a classification is unjust, and the right against unjust classifications, without more, is meaningless as a universal standard – a standard of human rights which we would like to recommend to societies other than ours. We need some more workable indicia than some a vague standard.

What such indicia may be? A prior question to be answered should be, 'how do we go about searching for such indicia?' The answer I provide appeals to a familiar method of trying to match the general principles with our intuitive convictions that some actual patterns are unqualifiedly immoral – a method of reflective equilibrium. Here, we need to match our intuitive responses to what is wrong about some undoubtedly odious discriminations with our general theory that discrimination is a legislative expression of contempt. "Reflective equilibrium" in Rawls's explanation consists of achieving a rough coherence between our "considered convictions of justice" (understood as specific and intuitive moral responses to situations lending themselves to evaluations in terms of justice) and our "principles of justice" (understood as general and abstract moral maxims).[36] This methodology seems to be particularly well-suited to our purposes here. In the area of anti-discrimination law, many of us are relatively uncertain about whether remedial racial preferences or protective bans upon the employment of women in some positions or the exclusion of women from combat duty are discriminatory or not. Furthermore, even if some of us have strong views about these matters, we face a disagreement among rational people arguing in good faith about acceptability of those regulations. But we do not have similar doubts, and we do not face a similar disagreement in our societies, about whether racial segregation in public transport is wrong, whether refusal of voting rights to women is wrong, or whether religious tests for public office are wrong. The point is to elaborate the test of prejudice, hostility and other wrongful motives, using the latter (unquestionable) cases of discrimination as a starting point, and then be able to apply them to those actual moral disagreements and dilemmas which we actually face in our societies.

I have three such candidates for indicia of contempt which may emerge from such a process of reflective equilibrium: three indicia which are present in indubitable discriminations, and which connect with contempt, and yet give

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[36] John Rawls, *A Theory of Justice* (Harvard University Press: Cambridge Mass, 1972) at 19-20.

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

Now it would take a long argument to defend the use of these three indicia (a task I have attempted elsewhere)[37] and all that I can do here is assert that they fare quite well in a reflective equilibrium test. If one thinks of some paradigmatically invidious discriminations, such as the exclusion of women from education or work, or denial of voting rights to members of racial minorities, one finds all these three features prominently present in these classifications. And not just present but also functionally related to the contempt, prejudice or hostility underlying the lawmaker's attitude towards the victims of classification. To confirm this insight, consider why the "reverse discrimination" – affirmative action based often on those same criteria of classification as those which had featured in more paradigmatic discrimination – is so much less obvious a candidate for objectionable discrimination It is because it usually lacks some of the three (often, all three) indicia proposed above. It is not an classification which adds to the already existing pattern of disadvantage. It is not an act of imposing burdens upon others by those who have privileged access to law-making. And nor does it carry (at least, it is not supposed to carry) a message of inferiority of those disadvantaged by the classification (here, the non-beneficiaries of affirmative action schemes). To the degree to which any of these indicia are present in a purported affirmative action, its benign (and morally unproblematic) character is correspondingly reduced.

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[37] Wojciech Sadurski, "The Concept of Legal Equality and an Underlying Theory of Discrimination", *Saint Louis-Warsaw Transatlantic Law Journal* (1998): 63-104 at 93-102.

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

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

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

answer to the question we need to look at the local circumstances through the lens of our three proposed indicia, and the answer will differ from place to place, from country to country, and from epoch to epoch.

2.2. A Right to Outrageous Speech

My second case study is about the universal human right to free speech, more specifically, about free political and academic speech, and even more particularly, free speech the contents of which are likely to hurt deeply – and for understandable reasons[38] – many people who will be likely to consider it as a deliberate and grave insult at their national, ethnic or religious group. To focus the examination even more narrowly, I will consider just one example of such speech, namely the case of Holocaust denial.[39]

My choice of the case study is dictated by several factors. First, it is a real and lively issue in a number of contemporary democracies (the so-called historic "revisionists" made themselves known and heard in countries as diverse as Poland, France, Germany, the United States, the UK, Canada and Australia). Second, it is the issue which elicited diverse responses in those countries – with some (France, Germany, Austria) introducing formal legal sanctions for expressions of such views, and other (notably the US) considering these expressions as belonging to the sphere of constitutionally protected speech. Hence, from the point of view of the question of universality of rights, the case provides an interesting litmus test for universality: if the right in question is universal, and if it extends to this particular form of speech, then we have good reasons for remonstrating with those countries (such as France or Germany) which prohibit these expressions, and urge them to comply with the universal human right. Of course, it is important to remember that the Holocaust denial law is used here merely as an instantiation of a broader right, that is the right to unpopular or hurtful speech on public matters. To postulate a universal human right to deny the fact of Holocaust sounds bizarre but to postulate a right to political speech which may hurt many of the listeners is not.[40]

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

[39] For two good discussions of different legal approaches to Holocaust denial, see Markus G. Schmidt & Raphaële L. Vojtovic, "Holocaust Denial and Freedom of Expression", in Theodore S. Orlin, Allan Rosas & Martin Scheinin, *The Jurisprudence of Human Rights Law: A Comparative Interpretive Approach* (Institute for Human Rights, Åbo Akademi University: Turku/Åbo, 2000): 133-58; Jonathan Cooper & Adrian Mitchell Williams, "Hate Speech, Holocaust Denial and International Human Rights Law", *E.H.R.L.R.* (1999): 593-613.

[40] Universality, just as "fundamentality", of any given right can be easily ridiculed by formulating a right at a very concrete level but the rhetorical force of such a ridicule disappears when we remember that these concrete formulations are instantiations of a more abstract right, as the dissenting judges in *Bowers v. Hardwick* announced in the opening

This particular case study is significant because it encapsulates at least two, independently significant, themes in traditional thinking about what makes free speech valuable even if it is deeply offensive and hurtful to some. First, that speech which aims at making an academic or scholarly finding (however misguided) should never be censored or penalized because the best way to pursue the truth is by letting all the hypotheses and theories compete freely in the marketplace-like environment – a variation on Millian anti-censorship theme.[41] Second, that speech which is about matters of public (and more specifically, political) interest deserves particularly stringent protection regardless of its contents and regardless of the hostility it may provoke because any attempt to censor some speakers in that domain reduces the sovereign position of the people exercised through democratic self-government. This may be referred to as the Meiklejohnian theme.[42] The case study selected here seems to implicate both the Millian and Meiklejohnian themes because it is both about an alleged statement of a historical truth and an intended political position about the alleged exploitation by Jews today of the Holocaust. The fact that, to most of us, the denial of the Holocaust is an absolute historical nonsense does not make it any less worthy of protection under the Millian theory, and the fact that it is morally and politically abhorrent does not diminish its claim for protection under the Meiklejohnian thesis.

Suppose you believe (as I do) in the two themes of the free speech argument – the Millian and the Meiklejohnian themes – as providing good reasons for a robust protection of speech even if it is offensive, harmful and patently untrue. Suppose you believe that it is a universal human right that, as a general proposition, all societies should tolerate speech on public and academic issues even if many people are upset by it, and even if most of us think the speech false. Or, to put it more moderately, and from a negative side, you

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passage of their dissent: "This case is no more about "a fundamental right to engage in homosexual sodomy," as the Court purports to declare, than *Stanley* v. *Georgia* was about a fundamental right to watch obscene movies, or *Katz v. United States* was about a fundamental right to place interstate bets from a telephone booth. Rather, this case is about "the most comprehensive of rights and the right most valued by civilized men", namely, "the right to be let alone"", *Bowers v. Hardwick* 478 U.S. 186, 199 (1986) (Blackmun, J. dissenting) (citations omitted).

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

[42] See Alexander Meiklejohn, *Free Speech and Its Relation to Self-Government* (Kennikat Press: Port Washington, 1948); see also Alexander Meiklejohn, "The First Amendment Is an Absolute", *Supreme Court Review* (1961): 1-45.

believe that it should be at least a universally recognized part of the right to free speech that the very fact of its patent falsity and its strong offensiveness are *not* sufficiently good reasons for its suppression. No genuine right to freedom of speech (you believe) can survive the proviso that an act of speech, to enjoy protection, must be true and must be inoffensive. And since you believe, let us assume it for the sake of argument, that the right to free speech, at least as far as speech on public and academic matters, should be universally recognized, this proviso forms a part of your understanding of universal human rights.

But it does not settle conclusively the question as to which legal regime of Holocaust denial conforms with the universal principle of freedom of speech. The proviso that offensiveness and falsity are not sufficient reasons for speech suppression does not imply that *any* offensive and/or false speech must be, in virtue of its offensiveness and/or falsity, legally protected. For the offensiveness may be of such magnitude that the presumption in favour of speech protection regardless of its marginal offensiveness will be rebutted here. And the harm incident to its falsity may be of such gravity that it will defeat all usual arguments for protection of harmful speech.[43] This is the proviso which Dworkin had expressly attached to his initial "rights as trumps" articulation: to say that rights trump utility considerations means only that a simple net disutility of a right-exercise is not a sufficient ground for preventing this exercise, but at a higher level of the scale of disutility, we may be authorized (indeed, obliged) to stop the exercise of a right without at the same time denying the trumping characteristic of this right.[44]

So where does it place us with respect to Holocaust-denial laws? "It all depends", again, although this time, it depends on the factors that are somewhat different than those depicted in the case study of discrimination. Let me suggest an intuition with which to work through. Those who do not share the intuition, will admittedly have no reason to follow me in the attempt to unpack it and provide rationalization for it - this will not be *their* reflective equilibrium.[45] But when I think about Holocaust denial (and even more generally, anti-Semitic and other hate speech) I have this intuition - I do not object to this type of speech being legal in the United States (where it is legal) or in Canada (where it is illegal), but I do object to such speech being protected in Germany (where it has been declared illegal) and perhaps in Austria (where it is also illegal).

Those who do not find this intuition outlandish might ask themselves a question about what accounts for the difference between the United States and

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[43] See Frederick Schauer, *Free Speech: A Philosophical Enquiry* (Cambridge University Press: Cambridge 1982): 7-10.

[44] Ronald Dworkin, *Taking Rights Seriously* (Duckworth: London 1978, rev'd ed.) at 92.

[45] As is clearly the case of Cooper & Marshall, op.cit.

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

If that is all there is to the distinction between (say) the US and Germany then it arguably gives us no mileage in providing a plausible rationalization to our initial intuition. But there may be more. There are different types of social harms which may result from speech, and some are disallowed from figuring as justifications for restrictions on speech (for example, "harm" consisting of lowering the reputation of politicians as a result of political satire) while others - not (for example, harms consisting of weakening of national security resulting from willful publication of military secrets). There are many harms which lie in-between such obvious cases: they are not absolutely disallowed from figuring in justifications for speech suppression but the threshold is placed relatively high for showing that harm was sufficiently severe and/or sufficiently likely. Something like a doctrine of "a clear or present danger" (or its equivalents) acts as threshold-lifting devices, and such doctrines place a high presumption (with varying degrees of ease of rebuttability in various types of cases) in favour of legal protection for speech.

A danger to the democratic system and to peaceful stability of society resulting from the growth of extreme political movements is one type of evil which may result from certain types of speech, and is a sort of harm that lies between the two extremes just noted. It *may* figure among the justifications for speech-suppression but the threshold for showing the reality of threat must be relatively high. This proposition is, obviously, a mere assertion which would call for a further argument, but for the present purposes I will take this assertion to be plausible. And this may provide us with an explanation of our initial intuition about Holocaust-denial laws. Holocaust denial is (as I would suggest without risking sounding eccentric) an expression of anti-Semitism masquerading as a historical theory. It is a part of a larger package of an ideology which maintains that Jews cannot be trusted on anything, even on their own past. As such, it is not merely a veiled incitement to societal distrust toward an ethnic group.[46] It is

[46] As Professor Troper concludes, with respect to the French *loi Gayssot*: "En punissant la négation du génocide des mêmes peines que l'incitation à la haine raciale, [le Parlement] présume qu'elle est une acte équivalent parce qu'il est de même nature et qu'il porte comme lui

also a useful symbolic rallying theme for extreme anti-Semitic movements. But the danger that such a speech is likely to provoke is different in different countries. In Germany, with racist and other extreme-right movements reaching a high point of political mobilization, the threat is real that an unrestricted circulation of openly racist propaganda may bring the democratic stability to a point of crisis. In the United States, the groups which feed on the literature such as "historical revisionism" are part of the political folklore, just as are flat-Earthers and Montana separatists: probably irritating and deeply offensive to many, but very unlikely to reach a capacity to challenge the democratic system to its core.

The question about applicability of this particular "universal human right" – the right to express publicly one's political opinions and one's scholarly findings – depends therefore upon some contingent local circumstances, in this case, how is the exercise of this right likely to undermine social stability of a democratic system? This boils down to a debate about "intolerant democracies". Some democracies have urgent reasons to be intolerant toward undemocratic movements if the integrity of their democratic institutions is at stake, while others can afford to be tolerant towards extreme, anti-democratic movements.[47] This is not a matter of an intellectual choice of one theoretical conception of democracy as opposed to another but rather a matter of political urgency which is of contingent and local character. And so is the case with human rights in general, and this particular human right in particular. To the question whether one should have a right to speak one's mind freely even if it may be seen as offensive or false, the answer is again, "It depends", and again, we have a rough idea of what it depends *on*. The factors which are decisive in this case have a form of empirical evidence about what is the level of mobilization and organisational capabilities of the extremist movements which use this form of speech as their tool, what is the societal support for these organizations and the level of social frustration which feeds the social demand for these movements, how likely they are to perpetrate acts of violence and ignite social instability, etc.

Of course, to an orthodox civil libertarian such criteria are anathema. The right to free speech, we will be told, cannot be guaranteed under the condition that this speech will be ineffective. But "effectiveness" of speech in terms of leading to social disturbances is an argument which fits the proportionality or necessity analysis in the European tradition (whether a restriction is necessary in a democratic society to avert certain, clearly specified, social evils) or "strict

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atteinte à des intérets qui doivent être protégés", Michel Troper, "La loi Gayssot et la Constitution", *Annales* 54 (1999): 1239-55, at 1252.

[47] See G. H. Fox & G. Nolte, "Intolerant Democracies", *Harvard International Law Journal* 36 (1995): 1-70.

scrutiny" of restrictions of constitutional rights in the US constitutional parlance. The contingent factors related to the facts which affect the likelihood of the dangers which a restriction of a right permissibly averts, enter the analysis of how a universal right blends with a local situation.

2.3. Extra-Political Articulation of Rights

My third case is not about a universal human right but about an allegedly universal institutional device to give effect to *constitutional* rights. This may be therefore seen to be outside this topic. After all, not all constitutional rights are human rights, and further, the substance of constitutional rights is a separate issue from that of their articulation and protection. But these things cannot be so neatly separated from each other. The universal move of constitutionalization in the contemporary world has led to the situation of a virtual inclusion of human rights into the ambit of constitutional rights. It is hard to think of rights which have been postulated as human and which have not been (at least in some places) constitutionalized. Consider Rawls's catalogue of human rights which, as he says, express a minimum standard for all decent societies: the right to life and security, to liberty, and to formal equality as expressed by the rules of natural justice.[48] All these rights form a canon included in modern explicit or implicit constitutional charters of rights. And when constitutionalization have been seen as a paramount form of a recognition of a human right, it has been often thought that constitutionalization of rights is meaningful only when accompanied by certain forms of protection of those rights, not only against oppressive practices of law enforcement and private power, but also against the vicissitudes of political process. It has been therefore posited as a universal requirement of constitutional rights that the power of articulating them should be vested in some or other extra-political institutions, typically of judicial or quasi-judicial character.

But how "universally" valid is this demand? To see it, one must explore the reasons that the advocates of extra-political articulation of rights (for example, through a system of judicial review) provide. I hope that I am fair to these theories and that I am not constructing a man of straw when I claim that all the main arguments in favour of extra-political articulation of constitutional rights boil down to two types of arguments stemming from distrust and from deliberativeness. The first argument is straightforward. It claims that we cannot expect our democratically accountable representatives (and those directly dependent on them) to produce a fair articulation of constitutional rights because it was distrust of them that activated constitutionalizing rights (and thus, put them outside the day-to-day political agenda) in the first place. The actual reasons for this distrust may have to do with our awareness of various incentives

[48] Rawls, *The Law of Peoples*, op. cit., at 65.

which act upon the democratically accountable politicians, and those incentives are not conducive to the fairest articulation of vague constitutional rights. In particular, those incentives support the oppression of minority by majority because there are not enough votes in supporting minority causes, and it is precisely the protection of minority against majoritarian oppression which is one of the main rationales for constitutionalizing human rights.[49] (Note that, contrary to some simplistic interpretation, the argument from distrust is not a version of the "*nemo iudex in res sua*" precept which is sometimes presented in the form that those who made the law should not sit in judgment on constitutionality of this law. The invocation of this principle in the context of scrutinizing the laws *in abstracto* under criteria of constitutional rights is an obvious mistake, for reasons so convincingly supplied by Jeremy Waldron).[50]

The second fundamental argument in favour of an extra-political articulation of constitutional rights connects rights-reasoning with the concept of deliberation. It claims that the reflection which optimally leads to the fairest possible articulation of rights is deliberative (or discursive, in the meaning of the word given to it by Philip Pettit)[51] rather than representative in nature. In other words, that it consists of dispassionate consideration of all possible arguments which can be mustered in connection with the given issue, in circumstances in which all the parties to disagreement may in the conditions of equal freedom present the best possible case for their argument, and the outcome is dictated by an honest choice of the option for which the best reasons can be produced. In contrast, the representative type of reasoning consists in a mere articulation of different preferences (or desires) avowed by those who are represented, and the choice is dictated by a procedure which envisages a content-insensitive manner of aggregating, and eventually selecting, the strongest and the most widespread preferences (such as, majority rule). As the argument goes, a political system (typically relying upon the representative institutions and the executives accountable to them) has a representative nature while extra-political institutions, such as judicial or quasi-judicial ones, are deliberative in that they are guided by the strength of the reasons (as opposed to the strength of preferences) which can be adduced to alternative options.

This may appear to be a drastic reduction of the wealth of arguments about how best to articulate rights in an extra-political way – after all, the arguments about the rationales for judicial review are probably the most fertile

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[49] See e.g. John Hart Ely, *Democracy and Distrust* (Harvard University Press: Cambridge Mass., 1980): 135-79.

[50] See Jeremy Waldron, "Precommitment and Disagreement", in Larry Alexander, ed., *Constitutionalism: Philosophical Foundations* (Cambridge University Press: Cambridge 1998): 271-99 at 280-81.

[51] Philip Pettit, *A Theory of Freedom* (Polity: Cambridge 2001), in particular at 90-93.

ground for constitutional theory, certainly in the United States – but it seems to me that most of the important argument boil down to one of the two just mentioned. In turn, these two arguments are independent from each other: the argument from trust does not hinge upon the deliberative nature of an institution (we can distrust an institution for reasons other that it is non-deliberative), and, on the other hand, the expectation of deliberativeness is not necessarily based on the trust that perverse incentives will not affect a given institution.

How "universal" are these two types of arguments? Hardly at all. Consider first the issue of trust. The argument for extra-political articulation of rights proceeds usually along the negative path: that the political procedures and institutions cannot be trusted to avoid irrelevant (especially, selfish) concerns in forming authoritative articulations of rights. First of all it needs to be noted that what matters is how trustworthy is one institution (or one set of institutions) compared to another institution (or another set of institutions) in its actual functioning.[52] It is no good to compare a real, unwholesome description of a political institution with an idealized model of an extra-political one. Whether we can trust a particular institution more than the other one that it will strive to articulate human rights in the fairest possible way rather than pursue the self-interest of its members depends on a great variety of factors. Most of them (though not all)[53] are of institutional character, that is, they are related to the formalized patterns of screening, selection, accountability, length of term, revocation etc. of those who people those institutions. For example: limited term with no possibility for reappointment may promote self-serving behaviour consisting of adjusting one's action to post-term career; limited term, with the possibility of re-appointment, may promote self-serving behaviour of trying to ingratiate oneself with those political agents (or citizens) who have the greatest influence on re-nomination and re-appointment; life tenure may promote a disregard for changing social values and perceptions regarding the articulation of a particular right; specific professional or competence-related conditions for appointment may promote various types of *déformation professionnelle*; transparency of official proceedings leading to an authoritative articulations of rights may increase the importance of good reputation (avoidance of public shame) as a motive for behaviour and thus an impediment for self-serving conduct (but may also, under less favourable circumstances, engender demagogy and populism), etc. There is a long list of institutional variables which produce different types of incentives, each of which may affect

[52] For an impressive statement and elaboration of the "comparative institutional" thesis, see in particular Neil K. Komesar, *Imperfect Alternatives* (The University of Chicago Press, 1994).

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

dishonesty, self-serving conduct, myopia or sheer stupidity. Different constellations of these institutional variables – different institutional designs – and their corresponding incentives may affect differently our judgment about comparative "trustworthiness" of one institution vis-à-vis another, and there is no universal reason to believe that political (representative) institutions are affected by perverse incentives-creating factors necessarily to a higher extent than *any* extra-political institutions.

In this context it is perhaps useful to recall Pettit's distinction between two different strategies in institutional design: the deviant-centred strategy and the complier-centred strategy. The former presupposes that people are likely to cheat whenever they can do so with impunity, and so the institutional design is focused on the elimination of pathologies, but in the process, it fails to provide optimal incentives for the non-knaves.[54] The complier-oriented design presupposes a more optimistic view of human nature, namely that most people are not knaves and so it tries to maximize the opportunity for valuable action though it also provides some sanctions of knaves (without, however, focusing all its attentions on the prevention and punishment of knavish action). These two strategies correspond to two very different sets of specific "screens" and "sanctions" (to use another useful distinction by Pettit), and of course both have their advantages and benefits. It may be the case that within one and the same system, the relative proportion of deviant- v. complier-centred strategies varies from one institution to another but these proportions will also vary from country to country. For example, election laws in different countries may reflect different approaches towards deviant- v. complier-centred strategy. As a result, in some countries we will have stronger reasons to suspect members of political institutions of behaving in a self-serving way, and in other – weaker reasons for harbouring such suspicions.

Now consider the argument from deliberation. Political, representative institutions are considered to be inherently less deliberative than the extra-political ones because, what ultimately matters in the former is a representation of the preferences rather than contemplating the good reasons which can be provided for opposed arguments. Of course, in order to make a link between extra-political institutions and the best articulation of rights via the medium of deliberation one must presuppose that human rights are indeed better articulated, compared to other political standards, through deliberation than through representation. After all, we do not use the deliberation-based antipathy to parliaments as a basis to deny them the powers to enact laws in general (even though these laws might be thought to be superior if resulting from deliberation rather than mere representation of preferences) or control policies of government. Suppose, for the sake of argument, that a link between rights and

[54] Philip Pettit, *Republicanism* (Oxford University Press: Oxford 1997): 215-30.

deliberation (as the superior method of the best articulation of rights) can be established. There is, however, no reason to accept in abstract terms a proposition that representative institutions are *eo ipso* less deliberative than the non-political ones. After all, the aggregation of preferences which is one of the functions of parliaments, may (though does not have to) be mediated by the deliberation about the relative reasons which can be supplied for various conflicting preferences in question. And the virtue of representative institutions, which compares them favourably to direct democracy, is precisely that they allow for a deliberation and consideration of conflicting arguments. On the other hand, just as representative institutions make room for deliberation, so there may be a strong streak of "representation" in extra-political institutions, such as courts. If one considers the literature on the Supreme Court of the United States, for example, one finds as a very strong theme the idea that the Justices behave as if they were representatives of certain dominant political forces which are responsible for their selection – the theory which most recently has been labelled as that of partisan entrenchment.[55] In this perspective, the position of Supreme Court justices is not unlike that of Senators except that the former have longer tenure.

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

[55] Jack Balkin & Sanford Levinson, "Understanding the Constitutional Revolution", *Virginia Law Review* 87 (2001): 1045-1109, at 1066-83.

process for rights articulation, etc. – all these variables will affect how a particular institution, whether political or extra-political, will engage in a deliberation as opposed to merely asserting the preferences for this or that decision.

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

3. Conclusions

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

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

indicate the point of the conflict between the right and other social goods which may enter into collision with the goods protected by that right.

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

One should not exaggerate the differences between these types of variables. "Justificatory" variables are of empirical character, "empirical" variables may figure in the justification for the definition of a scope of a right, “institutional” variables are affected, for their function, by such empirical phenomena as the patterns of political culture, etc. And they are not meant to be an exhaustive list. Put together, they provide an illustration for a proposition made at the outset: there is nothing intolerant (perhaps only paternalistic, but in an unobjectionable way) in formulating human rights with a universalistic aspiration – meant to apply to different societies from our own – but for their articulation, they will blend with local, contingent circumstances in different ways, resulting in different local shapes of universal rights.