

INTERNATIONAL LAW AND ITS OTHERS

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Human rights, the self and the other: reflections on a pragmatic theory of human rights

FLORIAN F. HOFFMANN*

An introductory question: why (still) ‘do’ human rights?

This question, rare and insolent only a decade ago, has now become one of the refrains accompanying the arduous road from late- to post-modernity. For as long as criticisms of human rights seemed to be safely confined to a few die-hard neo-Marxists, securely departmentalized cultural anthropologists, and friends of the Chinese government, the (transnational) human rights activist – either ‘Western’,¹ middle class and well endowed with the traits of cosmopolitan *Kultur*, or non-‘Western’ and aspiring to all of the former – could simply ignore these discordant voices. Indeed, it seemed possible, then, to spend an entire working life ‘doing’ human rights without ever stepping back to reflect on why one was actually doing them, on what ground and with what final vision of the world and the human beings in it. It seemed self-evident that human rights were both real and good, and that their absence essentially denoted intolerable human suffering. And, as this absence was the usual state of affairs, the need to ‘do’ human rights seemed never to diminish, with the challenge being so immense that it seemed capricious to engage in petty arguments on relativism or cultural imperialism. Surely, one thought, the pain felt by torture victims was the same across national and cultural boundaries, arbitrary

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¹ For the problematic notion of the ‘West’, see Charles Leben, ‘Is There a European Approach to Human Rights?’ in Philip Alston, Mara Bustelo and James Heenan (eds.), *The EU and Human Rights* (Oxford, 1999), pp. 69–97 at p. 72; for a more philosophical reflection on the concept of ‘Europe’, see Jacques Derrida, *Das andere Kap & Die vertagte Demokratie: Zwei Essays zu Europa* (trans. Alexander García Düttmann, Frankfurt am Main, 1991). For simplicity’s sake, the term will nonetheless be used, though always as if in parentheses.

and increasingly ephemeral as these appeared to be. And as long as there was an endless supply of the weeping children, frightened-looking women and beaten-up men that, to this day, decorate the websites of the better-known human rights NGOs, there did not seem to be a moment's time for critical reflection.

Yet this (evidently stylized) sketch of the self-perception of 'the human rights activist' has come under enormous pressure in recent times. It is tempting to attribute this pressure solely to external causes, namely the very real competition now faced by human rights from an ever wider-ranging (human) security discourse that has been emerging since the 11 September attacks. The danger of this particular competition does not so much consist of the deliberate curtailment of the enjoyment of various human rights in the name of counter-terrorism,² but rather in the gradual and somewhat concealed replacement of human rights as the defining concept of late modern societies by that of (human) security. Yet, even if this shift actually materialized, and if it succeeded in seriously threatening the very concept of human rights, it would, nevertheless, only be capable of having this effect because of the internal contradictions which have always permeated human rights discourse, and which have only superficially been masked by the imagined consensus of earlier periods. Ultimately, terrorism and counter-terrorism, by cruelly manifesting the limits of multicultural cosmopolitanism and intercultural understanding, merely expose the fact that the fundamental questions underlying human rights have never been answered. Long before the clamour of the (counter-)terrorist attacks, post-Wittgensteinian and poststructuralist critics had worked out the epistemological implausibility both of universal rationality and of the supposed commensurability of language and culture upon which the idea of the inter-cultural translatability of concepts such as human rights is premised. And neo-pragmatist commentators had already pointed to the implications of that epistemological implausibility for the 'usefulness' and practical legitimacy of human rights.³

² See, inter alia, Joan Fitzpatrick, 'Speaking Law to Power: The War against Terrorism and Human Rights' (2003) 14 *European Journal of International Law* 241; Paul Hoffman, 'Human Rights and Terrorism' (2004) 26 *Human Rights Quarterly* 932; Anthea Roberts, 'Righting Wrongs or Wronging Rights? The United States and Human Rights Post-September 11' (2004) 15 *European Journal of International Law* 721; Frédéric Mégret, 'Justice in Times of Violence' (2003) 14 *European Journal of International Law* 327.

³ There is a vast literature on these lines of thought; for some indication, however, see Thomas S. Kuhn, *The Structure of Scientific Revolutions* (Chicago, 1962); Thomas S.

In the midst of that critique stands, of course, the human rights activist. Left uncertain about the foundations of the discourse she or he promotes, accused of being 'part of the problem' rather than celebrated as a missionary imparting its solution,⁴ and, perhaps, puzzled by the ambivalent role played by human rights discourse in such places as Kosovo, Afghanistan or Iraq, that activist may simply see the ground upon which she or he has been presuming to stand dissolve under her or his feet. What can, and, indeed, what ought that activist to do if she or he wishes to take these critical insights seriously?

Before attempting to outline a possible response to this question, two issues need first to be elucidated, namely who falls within that broad description of 'human rights activist', and what kind of reflection any potential response to that grand question implies. As to the former, there seem to be essentially three possibilities: either the stereotypical 'human rights activist' is merely a straw person, i.e. a stylized artefact constructed in order to polemicize against the infinitely more complex real-life activists, who can, therefore, safely ignore this critique; or she or he is a member of that relatively small group of people directly involved in cross-cultural human rights talk, i.e. those 'out in the field' trying to convince such (from their perspective) exotic others as Liberian child soldiers, Brazilian *favelados* or Albanian militiamen that they should re-describe their lives in human rights terms; or, finally, she or he is anyone 'doing' human rights vis-à-vis any others, whether exotic or just next door, with the intention of spreading the word and a determination to do good.

Kuhn, *The Essential Tension: Selected Studies in Scientific Tradition and Change* (Chicago, 1977); Paul Feyerabend, *Against Method: Outline of an Anarchistic Theory of Knowledge* (London, 1975); Ruth Chang (ed.), *Incommensurability, Incompatibility, and Practical Reason* (Cambridge, MA, 1998); Peter Winch, *The Idea of a Social Science and Its Relation to Philosophy* (London, 1958); Lawrence E. Hazelrigg, *Social Science and the Challenge of Relativism: A Wilderness of Mirrors: On Practices of Theory in a Gray Age* (Gainesville, FL, 1989); Cass R. Sunstein, 'Incommensurability and Valuation in Law' (1993–4) 92 *Michigan Law Review* 779; Jacques Derrida, 'Force of Law: The "Mystical Foundation of Authority"' (1990) 11 *Cardozo Law Review* 920; see also Drucilla Cornell, 'The Violence of the Masquerade: Law Dressed up as Justice' (1990) 11 *Cardozo Law Review* 1047; Costas Douzinas, *The End of Human Rights: Critical Legal Thought at the Turn of the Century* (Oxford, 2000); Zygmunt Bauman, *Postmodern Ethics* (Oxford, 1993); Richard Rorty, 'Human Rights, Rationality, and Sentimentality' in Stephen Shute and Susan Hurley (eds.), *On Human Rights: The Oxford Amnesty Lectures* (New York, 1993), pp. 111–34; Tom Campbell, K. D. Ewing and Adam Tomkins (eds.), *Sceptical Essays on Human Rights* (Oxford, 2001); on a different line, see also Michael Ignatieff's oft-cited essay *Whose Universal Values? The Crisis in Human Rights* (The Hague, 1999); David Kennedy, 'The International Human Rights Movement: Part of the Problem?' (2002) 15 *Harvard Human Rights Journal* 101.

⁴ See Kennedy, 'International Human Rights Movement'.

The first possibility will simply be rejected, as the present argument's working hypothesis is that the majority of statements made about human rights in academic, governmental or non-governmental contexts do, indeed, not fully reflect the epistemological and pragmatic critique of human rights, and are, thus, merely reproducing what could be termed a clichéd account of human rights (explored later). The distinction between the second and third possibilities, in turn, poses a question related to that of the possibility of human rights talk, namely whether the epistemological challenge such 'talk' implies is restricted to its cross-cultural dimension, or whether, in fact, any kind of rights talk, to anyone, should be seen as nothing but a 'shot in the dark'. On the one hand, human rights activism seems premised on a rigid and culturally defined 'we'/'they' dichotomy: the 'we' is presumed to have and understand human rights, and the 'they' to lack them and to be in need of them. As will be explored in greater detail below, it is Richard Rorty's great merit to have exposed this inner logic of human rights activism, even if his subsequent espousal of all its implications has brought him the charge of accepting cultural chauvinism. On the other hand, however, there is the often overlooked fact that at the heart of the epistemological critique of cross-cultural communication lies a more radical critique of communication as such which contradicts the very idea of a 'shared understanding' supposedly enjoyed by the members of an imagined community. Perhaps, ultimately, it is as uncertain whether my colleague across the corridor really understands what I mean when I 'talk' human rights to her/him, as it is when I talk to an Iraqi kidnapper of aid workers? Perhaps, then, everyone purporting to 'know' what human rights are about vis-à-vis *any* others ought, for heuristic purposes, to be considered a 'human rights activist'.

The second preliminary issue concerns the nature of a response to the implications of epistemological scepticism for human rights activism. This is an issue because the sought-after response is not clear-cut and one-dimensional, but consists, arguably, of three different dimensions: an epistemological one, a deontological one and an empirical one. The first is the most intuitive response, namely one to the question of whether human rights *can* be inter-personally and cross-culturally significant. This involves the kind of statements on the (in)commensurability of language games and socio-cultural spheres mentioned above. The second, deontological dimension derives from the first, as it concerns the ethical consequences of the acceptance of epistemological scepticism for human rights praxis. It seeks to answer the question of whether and how one *ought* to

'do' human rights once their purported ground of common values and shared understanding is taken to be a mere myth.

On the face of it, these two dimensions appear to account for all possible responses. Yet there is arguably also a third, empirical dimension, which relates to the pragmatics of human rights, i.e. their use in different contexts. For the epistemological and normative responses say nothing about the empirical fact that human rights discourse is being used by a host of different people in diverse socio-cultural contexts. One of the working hypotheses of the present argument is that, to quote an expression by Eduardo Rabossi popularized by Richard Rorty, 'today, human rights are a fact of the world'.⁵ They are, in other words, being 'talked' in virtually all places by virtually all kinds of people. Statements about this practical use of human rights are, hence, unrelated to statements about their theoretical foundations. Prima facie, this differentiation between the facticity and the validity of human rights discourse is trivial, as it appears simply to point to two fundamentally separate methodological perspectives, akin to H. L. A. Hart's well-known external/internal distinction: an external perspective analysing human rights discourse from a purportedly neutral observer position with reference to social-theoretical concepts; and an internal perspective hermeneutically seeking to reconstruct its inner logic, or lack thereof.

In contrast to this rigid separation of perspectives, a pragmatic approach seeks to link the facticity of human rights discourse to its epistemological and deontological validity, without, however, re-essentializing it through the post-metaphysical ideals of critical theory. The pragmatic perspective aims to comprehend human rights discourse not in terms of what it could be, or ought to be, but in terms of what it arguably *is*, namely a plural, polycentric and ultimately indeterminate discourse amenable to use by everyone (nearly) everywhere. Wherever individuals and groups wish to challenge what they perceive as oppressive or hegemonic structures, they can avail themselves of that discourse, as they might use a hammer to send shockwaves through a concrete wall. The logic of plurality implies, however, that the effect of these discursive irritations is beyond the control of those creating them, and is ultimately uncertain.⁶

⁵ Ernesto Rabossi, 'La teoría de los Derechos humanos naturalizada' (1990) 5 *Revista del Centro de Estudios Constitucionales* 159; Rorty, 'Human Rights, Rationality, and Sentimentality', pp. 116, 134.

⁶ The notion of such conceptual 'irritation' has been inspired by the idea of 'legal irritants' as developed by Gunther Teubner; see for example his 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences' (1998) 61 *Modern Law Review* 11.

There is no single ‘correct’ signification, and, therefore, *use* of human rights, but only context-specific *uses*. This, in turn, means that a pragmatically inspired acceptance of epistemological scepticism need not lead to the summary dismissal of human rights and the abrupt discontinuance of their active promotion. Instead, it may just be a precondition for a new discursive form, one that accepts at once the multiple validities of human rights, and the singular validity of their promotion. The following argument is an attempt to outline this, as yet, rough and uncut new form.

Because . . . they are an omnipresent cliché?

The *prima facie* content of ‘rights talk’ is what could be termed the standard cliché of human rights, the textbook answer to the question of what human rights (supposedly) are. It is zealously propagated and tirelessly reproduced by an institutionalized and professionalized human rights movement, both academic and activist. Its main tenets are that there are legally valid and institutionally enforceable human rights, most notably those listed in the ‘international bill of rights’;⁷ that these are universal in the sense that everyone has, or should have, them; that they are indivisible in the sense that the international bill of rights essentially forms a coherent package of claims to a certain type of personhood and community – subsumed precisely under the label of human rights; that, on account of the latter, empirical conditions of human beings can – and indeed should – be measured against the ‘standards’ set by these human rights norms; and, finally, that the foundations of these human rights norms lie in some mixture of common (rational) morality and cross-cultural equivalence. In particular, this clichéd version of human rights underlies the greater part of the ‘standard’ legal literature on the topic, and there has been a marked, if not unexpected, apprehension expressed in that literature in response to attempts at reconceptualization or re-description. Frequently, the argument is made that, for as long as even the mainstream canon of human rights is unrealized, and not fully embedded in doctrine, ‘playing around’ with esoteric concepts is at best useless and at worst detrimental to the ‘cause’. Hence, critical, postmodern or, indeed, pragmatic accounts of human rights are essentially taken to amount to

⁷ Universal Declaration of Human Rights, General Assembly Resolution 217A(III) (1948) (UDHR); International Covenant on Civil and Political Rights, New York, 16 December 1966, in force 23 March 1976, 999 UNTS 171 (ICCPR); International Covenant on Economic, Social and Cultural Rights, New York, 16 December 1966, in force 3 January 1976, 993 UNTS 3 (ICESCR).

bookish extravagances that fly in the face of the real needs of the victims of human rights violations.

Yet, upon closer analysis, this clichéd account of human rights is but a thin veneer that conceals the concept's deeper foundations – or lack thereof. What are human rights, after all? Are they to be seen as distinct from (just) rights? Are they moral, or legal, or something else, in character? Are they local or global; discourse, ideas, legal/moral prescripts, cultural practices, or, indeed, inverted empirical descriptions of their lack, namely human rights violations? And what assumptions underlie the claim that the concept of human rights can be known in socio-cultural contexts different from those in which it emerged? Behind these seemingly abstract questions lurk many of the most controversial issues surrounding human rights, including questions of universality, hegemony and ethnocentrism. The concept of human rights is not merely a multi-coloured, but nonetheless comfortably stable and static conceptual entity. Instead, what seems to mark reference patterns to human rights is their permanent bind within a multiplicity of overlapping tensions, notably between ahistorical validity and historical particularity, between cultural universality and relativity, between political consensus and hegemony. Human rights would seem to be a fluid concept indeed.

However, despite the haziness and fluidity of the concept of human rights they are nonetheless being *used*, whether in good or bad faith, and with whatever connotations, almost everywhere and by almost everyone. Indeed, no matter how hazy, reference to human rights is an undeniable empirical element of a world which is increasingly marked by global communication streams and material exchanges, a world in which the 'trans-', the 'cross-' and the hybrid has, at least in part, replaced what was previously assumed to be the co-existence of discrete, bounded formations such as nation-states, cultures or identities. Human rights are a firm part of this dynamic global intermixture of vocabularies, actors and institutions. Under such conditions, no particular use or connotation given to the term can have an a priori monopoly on expressing the essential nature of the concept.

This latter assertion becomes clearer when one thinks about the reason for the conceptual haziness of human rights – their discursive character. The meaning of human rights is produced by different linguistic constructions used in specific contexts. *Prima facie*, the content to which the discourse of human rights refers appears to be what could be termed empirical human rights conditions, i.e. the degree of the realization of those features of individual and collective human life prescribed by human

rights in the so-called real world. Indeed, the symbolic imagery invoked in much of human rights activism – and a good amount of academic reflection, too – is predominantly geared towards those empirical conditions, i.e. to different forms of physical suffering. Evidently, however, there is no empirical reality ‘out there’ of which human rights discourse would be a one-to-one representation. There are no tortured bodies, oppressed women, gagged journalists or persecuted indigenous peoples; it is only the linguistic structuring of the empirical ‘being’ of individuals or groups that creates these ‘facts’ as the reality of human rights. An injured body, for instance, can only be identified as a tortured one by understanding the context in which the injury occurred, i.e. by grasping the specific meaning of the social actions of which the event in question is made up, by means of the concepts provided by human rights. Hence, even where a direct reference to the external, physical world seems to exist, the apparent facticity of the respective rights is ultimately based on socially constructed meanings. In fact, in terms of their discursive constitution, these ‘physical’ human rights are but special cases within the general discourse, most of which does not at all relate to mind-independent objects – as analytical philosophy would have it – but purely to social facts. Hence, while there may be some rights that appear to refer directly to physical and mental states of individuals, such as the rights to physical integrity,⁸ health care⁹ or food,¹⁰ and while it is, arguably, this physicality which often turns these rights into stereotypes of human rights as such, they are ultimately no less grounded in the social – and, hence, the discursive – than are most other rights, such as the right to a fair trial,¹¹ the right to education¹² or the right to marry.¹³ This serves to illustrate two important points about human rights both as and in discourse. They are, like all social concepts, ‘never fully referential, in the sense of identifying a verbal sign that stands for or refers to (and thus comes to represent) some unambiguously identifiable feature of an external reality.’¹⁴ Instead, human rights discourse arises

⁸ See for example UDHR, Arts. 3, 4; ICCPR, Arts. 6, 7; European Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950, in force 3 September 1953, 213 UNTS 221 (ECHR), Arts. 2, 3; American Convention on Human Rights, San José, Costa Rica, 22 November 1969, in force 18 July 1978, 1144 UNTS 123 (ACHR), Arts. 4, 5.

⁹ See UDHR, Art. 25; ICESCR, Art. 12. ¹⁰ See UDHR, Art. 25; ICESCR, Art. 11.

¹¹ See UDHR, Art. 10; ICCPR, Art. 9; ECHR, Art. 6; ACHR, Art. 8.

¹² See UDHR, Art. 26; ICESCR, Art. 13; ACHR, Art. 26.

¹³ See UDHR, Art. 16; ICCPR, Art. 23; ECHR, Art. 12; ACHR, Art. 17.

¹⁴ Trevor Purvis and Alan Hunt, ‘Discourse, Ideology, Discourse, Ideology, Discourse, Ideology . . .’ (1993) 44 *British Journal of Sociology* 473 at 474.

from 'the complex of interconnections and relations that constitute the social',¹⁵ which cannot, therefore, be objectively explained but, at most, subjectively – or intersubjectively – understood.

Or, rather, two heuristic concepts: human rights discourse and human rights consciousness?

This 'understanding' of human rights implies a distinction – for heuristic purposes – of two complementary conceptual elements of human rights, namely *human rights discourse* and *human rights consciousness*. The former refers, prima facie, simply to human rights 'talk' in its broadest sense, i.e. to all references to human rights, independent of context or speakers' intentions. Importantly, it is a system or structure of signification which is taken to be analytically distinct from the subjective meaning constructed with it in specific contexts. However, while it broadly denotes the 'objective' linguistic aspects of human rights, it is not a unitary, bounded system of references with a clearly delimited vocabulary – or code – the 'grammar' of which would be determinative of the way it is used. It is rather a discursive formation in the Foucaultian sense, and hence characterized by 'dispersion, choice, division, and opposition'.¹⁶ This means, as Purvis and Hunt point out, that the articulation of discursive elements is always only provisional, that discourses, thus, never fully succeed in securing meaning, and that, indeed, a discursive formation may consist of several individual discourses which stand in a relation of competitive struggle with each other.¹⁷ Objective *human rights discourse*, therefore, has a subjective counterpart, namely *human rights consciousness*, which represents the subjective perception of human rights as an ontological (re-)description of personal identity. The precise content of the latter cannot be formalized, but is bound to remain fluid and non-theorizable. Ultimately, it is individuals who are, within their own consciousness, confronted with the question of what to make of that discourse of human rights which has entered their life-world, and ultimately that subjective sense-making cannot be objectivized. This, in turn, implies that, from a subjective point of view, the understanding of human rights discourse cannot be evaluated according to some objective criteria of correctness or

¹⁵ *Ibid.*

¹⁶ *Ibid.*, p. 492. The distinction between a discourse and a discursive formation has especially been clarified by Ernesto Laclau and Chantal Mouffe, *Hegemony and Socialist Strategy: Towards a Radical Democratic Politics* (2nd ed., London, 2001).

¹⁷ Purvis and Hunt, 'Discourse, Ideology', pp. 492–3.

fit, and that, indeed, there cannot be such a thing as a subjective misunderstanding of human rights.

Hence, while human rights discourse can only be understood in concrete contexts and through the subjective sense-making of actors within that context, it is not purely constituted by these actors, but has an objective substrate that influences the way it is understood, and by whom it is understood. Yet that influence never reaches the level of full determination by which both the discourse, as well as its 'knowing subjects', are entirely constituted. Even if individual subjectivity is essentially determined by discursive formations, the content of individual consciousness cannot possibly be so fixed. It is, in principle, always capable of subverting pre-assigned subject positions by recombining the discursive elements at its disposal. No set of discourse rules can pre-determine the outcome of such recombinations – they are ultimately chaotic.

Put differently, human rights discourse cannot control the way it is used by actors. Human rights are indissociable from the subjective meanings actors bestow on them in concrete situations. They imply a particular first-person account in which the formula 'I have a right to' is woven into a concrete context. This first-person account is irreducible either to a systemic third-person account or to any pre-determined intersubjective rationality. Yet neither would it, therefore, be entirely controlled by the individual actor, as she or he can only construct that meaning through an always already given language of human rights. The outcome is, hence, from a third-person perspective, both unpredictable and inscrutable. This means, among other things, that there is no 'objective' way to determine the 'correct' use of human rights. Human rights discourse cannot manifest itself other than through the mutually incommensurable human rights consciousnesses of those actors engaged in human rights talk, regardless of the institutional context within which they are situated.

Two objections might be raised to this apparent emptying of objective or even intersubjective substance from the concept of human rights. The first concerns what could be termed the practice of international and domestic human rights protection in courts, commissions, government agencies and other fora. These fora, it could be argued, constitute particular interpretive communities playing a particular language game within which all actors are presumed to understand each other. Here, human rights are spoken in a specific 'dialect' – for example, formal legal argument based on legally positivized human rights instruments as used in legal proceedings – and, within the confines of that dialect, seem to have a reasonably clear core of meaning for all actors involved.

Moreover, anyone not speaking that dialect will be clearly identified as making 'mistaken' references to human rights. In one sense, this argument is, of course, plausible: truth and error need not be defined as relative to individual consciousness, but as relative to the relevant language game, not least because, as the later Wittgenstein has pointed out, that language game determines the way in which its participants can speak, think and understand. Yet, even within language games, there seems to be a potential for indeterminacy and meaning construction which transgresses their boundaries. Law, for instance, held out by so many human rights activists as a solid rock of meaning, is full of indeterminacies, making it in so many ways an essentially result-open process of contingent argumentation – Dworkin's image of the 'hard case'.¹⁸ What makes a case 'hard', as opposed to not a case at all? How can this difference objectively be fixed, if not by the mere fiat of those charged with determining what the law is? Let us take the concrete example of a Brazilian *favelado* alleging, before a parliamentary human rights commission, that his human rights have been violated by a neighbour who 'robbed' him of his twelve-year-old 'lover'. Compare this to the Prince of Liechtenstein, complaining before the European Court of Human Rights about an alleged violation of his right to a fair trial in relation to domestic (German) proceedings concerning a valuable painting formerly in the possession of his father. By what criteria is the *favelado* considered to use human rights incorrectly, and the Prince correctly?¹⁹ Of course, both cases seem intuitively clear-cut, not least since, in the former case, the 'mistake' consists of the fact that the complainant potentially claims a right to violate the rights of a third person (the female minor), whereas, in the latter case, a deprivation of the right to fair trial can potentially always constitute a human rights violation (with regard to the relevant instrument referred to), independent of the object the claimant pursues through the trial. Beyond intuition, though, what is the basis for calling the first use of human rights a 'wrong' re-description, but the second an, at best, clever application of human rights to a new problem set? Ultimately, the decision rests with those empowered to decide right or wrong, i.e. legality or illegality, within a particular language game. There can be no firmer foundation for such an inherently foundationless decision.²⁰

¹⁸ See Ronald Dworkin, *Law's Empire* (Cambridge, MA, 1986).

¹⁹ *Prince Hans-Adam II of Liechtenstein v. Germany*, 2001-VIII ECtHR (Ser. A) 1; see also Florian Hoffmann, 'Report – European Court of Human Rights – 2001/2002' in Russell Miller and Peer Zumbansen (eds.) (2003) 1 *Annual of German and European Law* 506.

²⁰ See Derrida, 'Force of Law'.

A second objection would hold up the possibility of (rational) argumentation as a means to tease out a plausible definition of 'rightness' of use that is shared, or at least hypothetically shareable, by all involved. *Prima facie*, this objection, too, has some force. It would plainly seem possible to engage the *favelado* in an argument which would compel him to rationalize his intuitive sentiments of justice and injustice and, in all likelihood, make him revise some of his earlier assumptions. Yet the point here is not that the *favelado* would not be susceptible to argumentation, but rather that the process of argumentation would not be unidirectional, and that its outcome would not be pre-determined. The interlinking of contexts is always a two-way affair, so that it is not merely the *favelado*'s human rights consciousness that is being 'corrected', but also his interlocutor's. Even if the former's claim to a right to an underaged concubine may not persuade the human rights commissioners, they are nonetheless forced to revise their particular horizon and to adapt their own counter-arguments to it. It is one thing to sense an absurdity in the *favelado*'s claim, yet quite another to try to understand it from his point of view. Both sides are locked in a continuous process of mutual irritation and adaptation which may lead to the *favelado* coming to 'understand' human rights in the way of the commission, or not. Indeed, the reprimand he is likely to receive might cause him to reject human rights discourse as a viable remedy, or his 'learning' might consist not of a genuine (communicative) understanding of human rights as conceived by the commissioners, but of a strategic understanding of how to manipulate human rights discourse and advance his cause more effectively. What is important is that none of these adaptations is ever a one-off renegotiation of meaning and identity. Instead, they constitute a dynamic process of mutual feedback loops. This implies that no particular interlinkage of human rights discourse and human rights consciousness at any one point in time is ever safe from subsequent modification. This is as true for any informal conversation about human rights, as it is for the judgments of domestic or international tribunals. Hence, human rights are only instantiated momentarily, when particular meanings emerge through the interaction of discourse and consciousness.

Thus, towards pragmatism: rights, relativism and Rorty

What, then are the implications of this pragmatic, use-oriented way of describing human rights for human rights activism, i.e. the very concrete practice of promoting and protecting human rights? There is, of course,

the question of the relativism which seems to lurk in the background of most of the preceding argument. Is one conclusion of this focus on the pragmatic ('use') dimension of human rights that they can no longer be conceived of in terms of any supervening objective or intersubjective content? Are they really capable of meaning 'nothing' to some people, and is there, ultimately, no way in which these people can be made to 'understand' a particular meaning of human rights? Are human rights as a particular formal and substantive conception of the social, simply incomprehensible in non-'Western' contexts?

Here, a brief digression into the work of one of the primary exponents of (neo-)pragmatist thought, Richard Rorty, is called for. Rorty offers the most clearly articulated, if, for that same reason, also the most controversial, account of the post-metaphysical and post-epistemological life that is implied in the pragmatic vision of human rights. His starting point is the *prima facie* relativist assertion that truth, rationality and understanding are constituted within particular 'language games' which cannot be transcended.²¹ For Rorty this, however, does not imply a subscription to relativism as the opposite of objectivism (which is ultimately about the nature of truth). Instead, he argues that the dichotomy between the two should be dispensed with altogether and replaced with the figure of conversation; pragmatism, he explains, is a 'doctrine that there are no constraints on inquiry save conversational ones – no wholesale constraints derived from the nature of the objects, or of the mind, or of language, but only those retail constraints provided by the remarks of our fellow inquirers'.²² Hence, there can be neither any meta-language in which incommensurable beliefs could be compared and evaluated, nor any room for argument. The latter is, for Rorty, only possible within the same logically fixed space,²³ i.e. within the same language game or, as he prefers to call it, the same vocabulary, lest it amount to yet another attempt to re-found an all-encompassing meta-language.

Thus, up to this point, cross-cultural or cross-language game exchange would seem to be an impossibility, with individuals being 'stuck' within their interpretive community without reservation or distance.²⁴ Yet Rorty

²¹ Matthew Festenstein, 'Richard Rorty: Pragmatism, Irony and Liberalism' in Matthew Festenstein and Simon Thompson (eds.), *Richard Rorty: Critical Dialogues* (Cambridge, 2001), pp. 1–14 at p. 5.

²² Richard Rorty, *Consequences of Pragmatism (Essays: 1972–1980)* (Minneapolis, 1982), p. 165.

²³ Richard Rorty, *Objectivity, Relativism, and Truth* (New York, 1991), p. 94.

²⁴ Indeed, some fellow neo-pragmatist thinkers, notably Stanley Fish, Walter Benn Michaels and Steven Knapp, have taken this radical turn; see Stanley Fish, *Doing What Comes*

does not confine himself to this epistemological second-order observation of human ontology,²⁵ but, in a remarkable construction, links it to a first-order stance epitomized by his notorious liberal ironist. The second-order account is, of course, about the fundamental contingency of language, self and community. Here, the self, in particular, is seen as a 'web of beliefs without a center',²⁶ which is, however, in Rorty's view, capable not only of discerning but also of accepting this very contingency of the first-order, or first-person, level. It is this capacity to accept contingency in a concrete and 'practical' way that distinguishes Rorty's account from those of 'adjacent' theorists, notably the poststructuralists on the one side, and Habermas' universal pragmatism on the other. The former, especially through the ground-breaking work of Jacques Derrida, have attempted to deconstruct the linkage of language to subjectivity, thereby placing the traditional notion of agency in epistemological brackets.²⁷ While subject positions and the (subjective) agency implied by them are, from his perspective, possible, any positive affirmation of subjectivity is always qualified by the discernment of the impossibility of subjectivity in the face of the play of *différance* in language. Like Rorty and the poststructuralists, the universal pragmatists reject the metaphysical view that language is a medium between the subject and the object, but they retain the possibility of language being a medium between subjects, allowing, thus, for genuine communication (under certain circumstances). Moreover, the same inherent properties that enable language to mediate between subjects, also enable it to get behind contingency, not so much in the sense of a transcendental God's eye view, but at least by constructing, step by step, partial intersubjective truths by which the chains of historical and linguistic situatedness can gradually be broken. Rorty stays far away from Habermasian (neo-)foundationalism, but is equally determined to retain the instrumental character of language. Based on his reading of the original pragmatists, and especially Dewey, as well as on his epistemological behaviourism,²⁸ he sees language as a tool for that which, in his view, must replace argumentation, namely re-description. The latter essentially

Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies (Durham, 1989); W. J. T. Mitchell (ed.), *Against Theory: Literary Studies and the New Pragmatism* (Chicago, 1985).

²⁵ Or third-person account, as Meili Steele calls it, see Meili Steele, 'How Philosophy of Language Informs Ethics and Politics: Richard Rorty and Contemporary Theory' (1993) 20(2) *Boundary 2* 140 at 158.

²⁶ Richard Rorty, *Contingency, Irony, and Solidarity* (Cambridge, 1989); as discussed in Steele, 'Philosophy of Language', p. 158.

²⁷ Steele, 'Philosophy of Language', p. 158. ²⁸ *Ibid.*

consists of ‘grabbing hold of causal forces and making them do what we want, altering ourselves and our environment to suit our aspirations.’²⁹ Contrary to what argumentation presupposes, there is ‘no critical terminology to describe our textual strategies, only the metaphilosophical ontology that the self is a holistic web of beliefs.’³⁰ Accepting contingency, hence, means proactively and continuously engaging in the practice of re-description, not with the aim of ever reaching any higher truth, but of, at best, getting to final vocabularies – expressions of one’s fundamental values and beliefs.³¹ Of course, these ‘final vocabularies’ are always in principle also re-describable, and are not outside of contingency; what is outside of contingency is, for Rorty, the commitment one has to them. It is at the interface of these seemingly contradictory positions that the liberal ironist emerges – ironic in the sense of ‘recognizing the contingent historical causes of [their] beliefs,’³² so that the

realization that anything can be made to look good or bad by being re-described, and [the] renunciation of the attempt to formulate criteria of choice between final vocabularies, puts [the ironist] in the position which Sartre called ‘meta-stable’: never quite able to take themselves seriously because always aware that the terms in which they describe themselves are subject to change, always aware of the contingency and fragility of their final vocabularies, and thus of their selves.³³

And liberal in the realization that, as some sort of meta-‘final vocabulary’, the most practical way to attend to this ironic predicament is by adopting the liberal (Rawlsian) privileging of the right over the good. Only the liberal meta-values of justice and diversity can ensure the free exercise of re-description, though only at the cost, as critics have seen it, of a new form of public/private distinction in which the vocabulary of self-creation is consigned to the private sphere and attends to the maximization of the individual’s sense of autonomy, and the vocabulary of justice is reserved for the public sphere, where it provides the basis for argumentation (!) on the best way to reduce cruelty, another final

²⁹ Rorty, *Objectivity*, p. 81. ³⁰ Steele, ‘Philosophy of Language’, p. 153.

³¹ Rorty, *Contingency*, pp. 78–80; see also John Horton, ‘Irony and Commitment: An Irreconcilable Dualism of Modernity’ in Matthew Festenstein and Simon Thompson (eds.), *Richard Rorty: Critical Dialogues* (Cambridge, 2001), pp. 15–28; Steele, ‘Philosophy of Language’, p. 161.

³² David Owen, ‘The Avoidance of Cruelty: Josting Rorty on Liberalism, Scepticism and Ironism’ in Matthew Festenstein and Simon Thompson (eds.), *Richard Rorty: Critical Dialogues* (Cambridge, 2001), pp. 93–111 at p. 96.

³³ Rorty, *Contingency*, pp. 73–4.

vocabulary of liberal societies.³⁴ Rorty is, of course, careful not to make out the ironists' espousal of liberalism as a necessary, non-contingent feature. Rather, it has its ultimate basis in the contingent historical circumstance of the postmodernist bourgeois liberal inhabiting the real existing liberal capitalist democracies. Rorty thereby inscribes the liberal ironist within a double historicist circle: on the one hand, the only warrant for her liberal ironist beliefs is the particular tradition within which she encounters herself – or Rorty himself – while, on the other hand, those beliefs are the most plausible product of that bourgeois postmodernism. Hence, unlike the radical pragmatists, the liberal ironist is fully aware not just of her own situatedness, but of the substantive content of that situatedness. Unlike Habermas, however, she not only does not believe in the possibility of using that insight to emancipate herself or others from the existing state of affairs, but, more importantly, actually has no desire to do so. In fact, as Steele has insightfully observed, Rorty formally admits a duality between first-person (self-understanding) accounts – namely those in the private sphere – and third-person (liberal justice) accounts of oneself as a liberal subject among others – those in the public sphere. But instead of thematizing potential conflicts between the two, i.e. between the inner self and the outer subject, Rorty simply imposes the latter onto the former. Thus, ultimately, Rorty makes the liberal ironist see herself as one because she is one.³⁵

The question that arises at this point is on what basis the liberal ironist practises her liberalism vis-à-vis others, given that it is not founded on any objective, or even intersubjective, truths. Rorty's well-known answer is, of course, that only solidarity can replace metaphysical foundations as a motivational force. The latter is, however, closely tied to the group that constitutes one's immediate context – a position connected to Rorty's Wittgensteinian conviction that one's own language game is as far as one can go. It is, in other words, essentially only people who are already in, or can be brought into, that language game to whom some form of solidarity can be extended. Indeed, there is a modestly deontological element within the logic of solidarity, in the sense that, according to Rorty, it is part of liberal ironic solidarity to try to expand, wherever possible, the group of people towards whom commonality is felt. As such, there is what has been

³⁴ *Ibid.*, pp. 141–3. For such a critique see Steele, 'Philosophy of Language', pp. 166–7.

³⁵ Steele, 'Philosophy of Language', pp. 166–7; also David Conway, 'Irony, State and Utopia: Rorty's "We" and the Problem of Transitional Praxis' in Matthew Festenstein and Simon Thompson (eds.), *Richard Rorty: Critical Dialogues* (Cambridge, 2001), pp. 55–88.

called a liberal humanism inherent in Rorty's thought.³⁶ Yet Rorty's solidarity stands in not only for epistemological objectivity, but also for some of the latter's brainchilds, such as equality or humanity. It entails, in other words, nothing short of an ethnocentric position, as Rorty freely admits: 'for now to say that we must work by our own lights, that we must be ethnocentric, is merely to say that beliefs suggested by another culture must be tested by trying to weave them together with beliefs we already have',³⁷ and which, it should be added, Rorty believes we share with other participants in 'our' common culture. Thus, per se, cultures are incommensurable in a strong sense, and 'radical difference is unintelligible'.³⁸ Yet, somewhat paradoxically, within this incommensurability, Rorty admits the possibility of what he calls comparison between 'societies which exemplify [habits such as toleration, free inquiry, undistorted communication] and those which do not . . . [s]uch justification is not by reference to a criterion, but by reference to various detailed practical advantages'.³⁹ It is difficult not to be puzzled by this deus-ex-machina appearance of comparability without foundations, based merely on the inner understanding of contingent practices. The only way such an approximation could work, given Rorty's premises, is by what could be termed a bee's eye view – reducing comparison to a crude form of analogizing in which the 'other' is converted into a rough and hazy mosaic of which broadly familiar features, such as colours and shapes, could just about be discerned. The 'other' is, of course, not ever reached in any real way, and is, in fact, internalized at arm's length, without needing to get into its messy concreteness, in correspondence with the necessarily superficial image of the great happy liberal family.

This seemingly celebratory stance on ethnocentrism has, of course, attracted fierce criticism from a variety of corners.⁴⁰ On a moral-political level, 'conservatives' have attacked the ironist for allegedly espousing nihilism and cynicism,⁴¹ and 'progressives' the liberal for advocating a self-satisfied complacency with her own privileged status quo, and, of course, for endorsing what they see as the scourge of modernity, notably

³⁶ Cary Wolfe, 'Making Contingency Safe for Liberalism: The Pragmatics of Epistemology in Rorty and Luhmann' (1994) 61 *New German Critique* 101 at 105.

³⁷ Rorty, *Objectivity*, p. 26. ³⁸ Steele, 'Philosophy of Language', p. 164.

³⁹ Rorty, *Objectivity*, p. 29.

⁴⁰ Farid-Abdel Nour, 'Liberalism and Ethnocentrism' (2000) 8 *Journal of Political Philosophy* 207 at 207.

⁴¹ See for example Neal Kozody, cited in Richard Rorty, *Philosophy and Social Hope* (New York, 2000), p. 3.

ethnic chauvinism. On the epistemological level, in turn, foundationalists of diverse quarters have attacked Rorty: analytical philosophers for his anti-realism, liberals for basing liberalism on too shaky a ground, and communitarians for not letting substantive conceptions of good enter the public sphere. He has even taken heat from anti-foundationalists, either on account of his pragmatic insistence on language as a tool, or for drawing allegedly wrong or unnecessary conclusions from the correct epistemological premises, thereby re-cementing a transfigured form of essentialism where, instead, a freer and more complex dynamic of forces would seem to follow. Within the latter strand of (constructive and, in part, still sympathetic) critique, two targets emerge in particular: Rorty's alleged reduction of difference, on the one hand, between communities, cultures or language games; and, on the other hand, within the particular 'we' in question. With regard to the former, the main alternative conception broadly within Rorty's epistemological premises has been articulated by Clifford Geertz, in a comment on Rorty's inversion of the commonly negative connotation of ethnocentrism. Geertz, who is an interpretivist, but would not call himself a postmodernist, charges Rorty, by means of the now well-known 'Drunken Indian and the Kidney Machine' example,⁴² with a priori rejecting any attempt to overcome or diminish the ethnocentric indignation and distrust which marks the relationship between the Indian and his doctors. In this view, Rorty rightly rejects the universalist reduction of difference to an abstract sameness, only to replace it, wrongly, with a rigid separation of a concrete 'we' pitted against an unreachable 'they'. Here, too, difference, or rather alterity, is treated as something to be avoided at all cost. Geertz, on the other hand, suggests that an encounter with difference should lead to a proactive engagement with it, not to reduce it to either sameness or otherness, but to construct bridges to it in its alterity. This does, of course, correspond to an essentially hermeneutic programme, though one which is well aware that whatever understanding is attained of the other as other is always precarious, subject to revision, and never objective. Such a programme may, of course, run up against the poststructuralist insistence that language cannot possibly function even

⁴² In which an alcoholic Native American, after having waited for his turn in the customary queue, receives dialysis treatment despite the fact that he refuses to stop drinking; his irritated but liberal-minded doctors apparently ruminate about the value of giving him this treatment in the face of potentially more cooperative patients further back in the queue, but they refrain from critically raising the issue with him: see Clifford Geertz, 'The Uses of Diversity' in *Available Light: Anthropological Reflections on Philosophical Topics* (Princeton, 2000), pp. 68–88.

as an imperfect medium, but the important point is that Geertz inverts Rorty's liberal humanism: the consequences of anti-foundationalism cannot be the withdrawal, however liberal, into an imaginary 'we', but ought to be the urge to engage alterity, and thus one's own situated self, in a constructive and permanent way.

This is, of course, at the heart of the second main line of critique, namely Rorty's alleged reduction of difference even within his 'we' language game. Many critics have not been prepared to overlook what they charge is Rorty's complacency with his own status and position, and an implicit assumption that the whole of 'his' society lives like this. In fact, the accusation goes, by denying the emancipatory power of theory – notably by confining re-description to the private sphere – he seeks to a priori undermine attempts to show that 'we' as fractured, asymmetrical and full of cross-cutting social antagonisms. In this vein, Nancy Fraser has observed that:

Rorty homogenizes social space, assuming that there are no deep cleavages capable of generating conflicting solidarities and opposing we's. It follows from this absence of social antagonisms that politics is a matter of everyone pulling together to solve a common set of problems. Thus, social engineering can replace social struggle.⁴³

The Rortyan contribution to the epistemological debate, and the responses it has triggered, can be seen as the latest incarnation of the rationality debate, ultimately still circling, however, around the same questions. In one sense, Rorty can be understood as the most consequential thinker of incommensurability, precisely because he does not, like the poststructuralists, transfer all agency towards language, making it thereby in the very least difficult to thematize understanding, or its lack, from the subject's position. Yet at least the poststructuralists thereby bring into the picture the seemingly unbridgeable linguistic margin between two language games, whereas Rorty takes the central consequence of incommensurability to be that those margins ought to be respected and not infringed. Geertz's, and in a different vein Habermas', alternative is, of course, to postulate an (albeit heavily circumscribed) possibility of mutual bridge-building. Habermas arguably believes that this effort may be capable of completion, thereby enabling real cross-language game understanding, while Geertz places the main emphasis on the mutual trial, the attempts at bridge-building being made on both sides, without, however,

⁴³ Nancy Fraser, as cited in Steele, 'Philosophy of Language', p. 167.

necessarily leading to a Habermasian success. Geertz is, like all hermeneuts, not very clear on his own belief, or not, in the real possibility of bridges, but the image he inspires might, nonetheless, be at the core of the problem.

For if one accepts, with Geertz, that the 'other' can inspire something more than either acceptance or rejection, namely interest in it as an other,⁴⁴ but at the same time rejects both purely hermeneutic and 'critical' accounts for their continuing connection of subjectivity with rationality, as well as purely poststructuralist accounts for their emptying out of the subject position, a space for mutual perturbations between language games emerges. These would be akin to bridge-building attempts, without, however, there being any verifiably shared consonance, and hence with understanding never quite achieved. Rather, it would be a mutual signalling exercise, with the signals neither entirely lost in linguistic transmission, nor transformed into meta-discursive forces. They would cause something on the other side, but neither the sender of the signal nor the medium of its transmission could entirely control that cause or its consequences.

In lieu of an answer: human rights activism without a safety net

Hence, from a Rortyan point of view, the absence of objective, rational, abstract foundations is, in fact, a necessary precondition for a contingency-accepting, self-revising and self-responsible political activism based on personal beliefs and felt solidarity. Only if the 'world outside' is not forcefully pushed into predetermined categories can one freely engage concrete 'others' in ongoing micro-political processes. Yet, if Rorty's ethnocentrism thesis plausibly demonstrates that relativism is not inimical to activism, it also has obvious and grave shortcomings. Indeed, its reduction of the 'I' to a concrete historical 'we' and the (admittedly contingent) foundation of political action on a solidarity strictly tied to that 'we' is unconvincing. It is so, because Rorty seems here to be willing to buy into the highly stylized myth of his particular American 'we' which is all too easily exposed as a grand meta-narrative. It precisely lacks the cultural authenticity upon which he bases the sentiment of solidarity, and therefore brings him close to the chauvinism he otherwise considers incompatible with liberalism. It also makes it all too easy for some critics

⁴⁴ Rejecting here not merely Rorty's scheme, but also his Freudian justification of it; solidarity is, for Rorty, not linked to universal values but to a subconscious recognition of similarity: see Rorty, *Contingency*, pp. 31–4; and Steele, 'Philosophy of Language', p. 164.

to reclassify him as just a postmodern variant of old Eurocentric bias. Indeed, a proactive, cross-cultural human rights activism groundlessly founded on Rortyan ethnocentrism can ultimately only base itself on the exercise of at least discursive, if not political or military hegemony.

At this point, Rorty has, arguably, not got it quite right. For, instead of taking epistemological relativism as a cue for a simplification of reality, it might just as well point to the need for complexification. Instead of continuing to subscribe to a logic of the either/or, the unitary, singular, static and organic – whether in a postmodern or another guise – the logic of complexification would be one of the ‘both’, the hybrid, fluid and the contingently constructed. Three implications of such a logic of complexification can, in particular, be highlighted.

To begin with, first- and third-person accounts of the self and its identity need to be seen as distinct but interrelated. Rorty, as was seen, essentially reduces the first-person account to a clichéd third-person account, which completely misses the complex interaction of the ‘I’ with the ‘we’; the former can never be entirely subsumed in the latter, and there is an irreducible residue of subjectivity which cannot be translated into fully rationalized third-person accounts – hence the necessary category of human rights consciousness, which can never be entirely absorbed by human rights discourse. From this perspective, sentimentality, anointed by Rorty to substitute for human nature as a foundation for human rights (activism), need not be tied to any concrete ‘we’, but emerges as the result of a complex mixing together of multiple variables within the self. Thus, why an individual feels sentimental towards another cannot be rendered entirely transparent, nor does it need to be.

Secondly, the difference between the ‘us’ and the ‘other’, i.e. between different socio-cultural spheres, needs to be de-reified. A useful strategy would be to de-exoticize the ‘other’, and re-exoticize the ‘we’.⁴⁵ Both are much more interrelated and marked by mutual confluence than the rigid we/they dichotomy would suggest. The de-exoticization of the ‘other’ would essentially consist of granting it the same degree of irreducible complexity as is characteristic of the I/we. Hence, instead of, for example, reducing the religiously motivated suicide bomber to an entirely alien being whose inner logic we cannot understand, and whose primary characteristic is her/his belonging to a ‘species’ of de-subjectivized suicide bombers, she or he could be seen as marked by the same complex mixing

⁴⁵ For an interesting reflection on, inter alia, exoticization, see Nathaniel Berman, ‘Aftershocks: Exoticization, Normalization, and the Hermeneutic Compulsion’ (1997) *Utah Law Review* 281.

of a multiplicity of variables, only some of which are incommensurable, as any I/we identity. De-exoticization does not, therefore, mean the imposition of (ethnocentric) standards of normality, but simply the refusal to think in simplistic, orientalist-type categories. Exoticizing the we, in turn, would consist of a similar attempt to complexify the familiar and known by self-consciously adopting an anthropological gaze vis-à-vis ourselves. It would involve looking at concepts, practices or institutions from a resolutely third-person perspective, and it would entail a strong historicism. Regardless of the epistemological limits to socio-historical understanding, exoticization would attempt to render the familiar as strange as possible, thereby showing its contingent and idiosyncratic nature. In the case of human rights, this would, for example, entail a deliberately anti-anachronistic reading of their historical emergence, highlighting the nearly alien and incommensurable character of, say, the medieval contexts in which proto-rights concepts were discussed, or the much more communitarian – as opposed to individualistic – character of late-eighteenth-century North American society, a fact almost entirely drowned out by the prevailing historical myth of the ‘founding fathers.’⁴⁶

Thirdly, a de-reification of both the ‘we’ and the ‘other’ would reveal that the simplistic hegemony thesis does not hold. In the same way as, for example, oriental peoples cannot be reduced to orientalist stereotypes, the real complexity of occidental identities is hardly captured by the all-or-nothing label of Eurocentrism. In this sense, the (non-essential) essence of human rights in postmodernity could be taken to be the concession of an irreducible complexity to all.⁴⁷

Yet this, too, would not be immune from the anti-relativist accusation of disabling any form of (political) action. Respect for the other’s complexity amounts, *prima facie*, to having to accept everything she or he does; thus, we would be back to the ‘anything goes’ nihilism of which the anti-realists are so fearful. At this juncture, several ways out, or, more properly, ways through, are imaginable. Martti Koskenniemi, for one, comes from a critique of human rights discourse resonant of David Kennedy’s ‘pragmatic’ objections to the human rights movement,⁴⁸ which thematize

⁴⁶ Hendrik Hartog, ‘The Constitution of Aspiration and “The Rights that Belong to Us All”’ (1987–8) 74 *Journal of American History* 1013.

⁴⁷ In a similar vein, notably on the need to not reduce complexity, but try to live up to it, see Klaus Günther, ‘The Legacies of Injustice and Fear: A European Approach to Human Rights and Their Effects on Political Culture’ in Philip Alston, Mara Bustelo and James Heenan (eds.), *The EU and Human Rights* (Oxford, 1999), pp. 117–44.

⁴⁸ Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Helsinki, 1989); Kennedy, ‘The International Human Rights Movement’; see also David Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (Princeton, 2004).

the fundamental (political) manipulability of human rights discourse – associated by Kennedy with a ‘rights-as-trumps’ logic⁴⁹ – as a consequence of its institutionalization, professionalization and routinization. Arguing against the simple dispensation of the discourse for want of any alternative that would have the same potentially emancipatory properties, Koskenniemi initially sees as the only ‘way through’ a slightly ill-humoured ‘bad faith belief’ in human rights which retains the discourse, but more or less openly acknowledges that it rarely gets beyond being a mere masquerade for politics. This ‘liberal cynic’ would, thus, be an antidote to Rorty’s happy, if smug and inadvertently chauvinistic, ironist. At a later stage, though, Koskenniemi develops his earlier vision into a cautiously positive endorsement of what he calls a ‘culture of formalism’, which, he argues, resists the forcible reduction into substantive policy.⁵⁰ It does so by allowing for an ‘empty’ universality, or the universal articulation of what he describes with Laclau as the lack of fullness and presence which infects all discourse. Hence, not unlike the pragmatics of human rights outlined here, formalism makes it possible to take a position and argue proactively for it – within the formalist framework – while avoiding substantive fixation, since ‘every decision process with an aspiration to inclusiveness must constantly negotiate its own boundaries as it is challenged by new claims or surrounded by new silences.’⁵¹ This is an appealing position, and quite close to the one espoused here. Doubts only arise with regard to formalism itself, since, for all its anti-foundationalist potential, it would appear to derive its ability to provide an ‘empty’, but nonetheless universal communicative medium from its own, more or less forcible, imposition. Formalism allows for that universality not because its inner logic would, in fact, be universal, but only because the particular language game of which it is made up allows its ‘speakers’ to use it as a simulacrum for universality. And, what’s more, not all those within the formalist ‘dialect group’ are aware that it is but a placeholder for an unattainable unity. They tend to essentialize formalism itself, treating it as an expression of a higher reason and more objective truth than non-formalist discourse. Indeed, a good part of the (formalist) legal profession – whether in human rights or not – arguably manifests a hegemonic gatekeeperism that does not quite square with the – albeit ‘gentle’ – transgressive capacities of the uses of formalism endorsed by Koskenniemi.

⁴⁹ On which he is contradicted by Philip Alston, ‘Introduction’ in Philip Alston (ed.), *Human Rights Law* (Aldershot, 1996), pp. xi–xxvi.

⁵⁰ Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge, 2001), pp. 503–9; see also Anne Orford’s masterful ‘The Gift of Formalism’ (2004) 15 *European Journal of International Law* 179.

⁵¹ Koskenniemi, *Gentle Civilizer*, p. 508.

The slightly distinct position taken here is that there is room for action, precisely on account of the recognition that there is no objective foundation for it. As both Derrida and Laclau, among others, have shown, action is always ultimately based on an unfounded moment of decision, a momentary reduction of all context to the deepest self.⁵² And, indeed, such decisionism, insofar as it impinges on the 'other', is nothing but hegemonic, as its basis is no mutual consensus, but a unilateral act. However, if the entirely contingent character of such decisionism is always recognized, it becomes no more than an imposing gesture, a cautious 'jump into the dark', so to speak, which cannot control its consequences. It seeks to establish temporary hegemony – namely by 'succeeding' in the action undertaken – always knowing that it is merely temporary, subject to revision at any moment. And, most importantly, the unfounded decision is always a mutual process. It engages an 'other' in its (or her/his) otherness, and it is, thus, intrinsically political – premised on the irreducible existence of the 'other' as 'other'. This, then, would point to a basis for human rights praxis: 'we' need not construct or presuppose any common basis for defending human rights, and for acting accordingly. As long as any such action is done in full awareness that it will never do more than irritate the 'other', and in full acceptance that the end result will always be an unpredictable, non-linear and non-dialectical blend of 'my' action and the 'other's' response, it does not, in fact, constitute violence and cruelty. The latter only occur where the complexity of the 'other' is forcefully reduced, and where rigid divisions, categories and essentialisms are introduced instead. In this sense, the 'essence' of human rights could, in fact, be taken to be their enabling of transgression; no hegemonic imposition, no rationality, no law, no judgment,⁵³ no argument is ever safe from being challenged by the many uses of human rights. In sum, human rights could be likened to an ever-rotating kaleidoscope, or, indeed, a recursive algorithm, endlessly re-applying itself to the forms it has itself generated, thereby producing a beautiful, if ultimately unpredictable, 'chaotic' image.⁵⁴ And, on this basis, perhaps, the 'human rights activist' may again rise, like a phoenix from the ashes, from the shambles of late modernity.

⁵² See Derrida, 'Force of Law'; Ernesto Laclau, *Emancipation(s)* (London, 1996), p. 54.

⁵³ On this point, in particular, see Julie Ringelheim and Florian Hoffmann, 'Par-delà l'universalisme et le relativisme: la Cour européenne des droits de l'homme et les dilemmes de la diversité culturelle' (2004) 52 *Revue interdisciplinaire d'études juridiques* 109.

⁵⁴ See, on this line of thought, Robert L. Devaney, *Chaos, Fractals, and Dynamics: Computer Experiments in Mathematics* (Boston, 1989).