THE UNIVERSALITY OF HUMAN RIGHTS AGAINST CULTURAL RELATIVISM: BETWEEN FICTION AND REALITY

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Abstract: *This paper aspires to defend the universality of human rights against cultural relativism. The relativism claims that human rights are not universal enough, but even if they were, it would not imply they should always prevail over other moral or legal norms. This paper advocates the opposite: the human right corpus is universal enough because it has been drafted and approved by representatives of all cultures which are dominant in the current globalized world in the context of actual or latent international political conflicts. The intercultural consensus on human rights is overlapping, i.e., the human rights corpus contributes to realizing the comprehensive doctrines of good that are held in all participating cultures. Although the consensus on human rights does not inevitably lead to a uniform moral and legal practice, it also plays a crucial role in a purely declaratory level – it creates a common language through which various cultures can conceptualize their different moral and legal attitudes. Therefore, the language of human rights should take at least prima facie precedence over other moral systems whether stemming from a religion or a particular moral or political philosophy.*

Keywords: *cultural relativism, human dignity, human rights, overlapping consensus, universality*

1. INTRODUCTION

The universality of human rights has various conceptions.[1] As an heir of the natural law theory, human rights might be conceived as normative claims which can be invoked everywhere in the world regardless of their official recognition.[2]

This absolutistic conception of universality provokes harsh critique from the part of relativists. Since ancient times moral relativists have started their argument by showing that different societies hold different social practices implying incompatible conceptions of good.[3] Keeping this tradition alive, cultural relativists object to the universality of human rights by pointing at cultures whose customs and institutions are incompatible with human rights; cultures which do not share the worldview in which individuals

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[1] DONNELLY, J. *Universal Human Rights in Theory and Practice.* 3rd ed. Ithaca – London: Cornell University Press, 2013, p. 93ff.

[2] Cf. GLENDON, M. A. *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights.* New York: Random House, 2001, p. 169.

[3] *"Herodotus relates that the Persian King, Darius, put the following question to some Greeks, who were visiting in his court: 'For what price would you be willing to eat the dead bodies of your fathers?' 'Not for anything in the world', came the answer. Whereupon Darius called in some representatives of an Indian tribe, among whom that which was abhorrent to the Greeks was the custom, and he asked them for what price they would be willing to burn the dead bodies of their fathers. They vigorously repudiated every thought of anything so horrible. The author applied this in the following way: If one showed all possible customs to men and asked them to choose out the best, each one would select those which he himself happened to follow."* HÄGERSTRÖM, A. On the Truth of Moral Propositions. In: A. Hägerström. *Philosophy and Religion.* New York: Humanities Press, 1964, p. 77.

are endowed with judicially enforceable trumps against the requirements of their communities.

Looking through this perspective, preaching about human rights is as a sort of moral imperialism by which the dominant West tries to take control of other cultures. A Kenyan-American law professor Makau Mutua portrays this picture quite dramatically:

"The human rights movement must not be closed to the idea of change or believe that it is the 'final' answer. It is not. This belief, which is religious in the evangelical sense, invites 'end of history' conclusions and leaves humanity stuck at the doors of liberalism, unable to go forward or imagine a postliberal society. As an assertion of a final truth, it must be rejected."[4]

In this view human rights are perceived as *"a liberal project with the overriding, though not explicitly stated, goal of imposing a Western-style liberal democracy"*.[5] Although human rights propagate diversity and tolerance, these values are relevant only if they are realized within the *"liberal paradigm"*, the imposition of which is not negotiable.[6] The human rights movement characterized by its *"pathology of the savior mentality"* and its *"relentless efforts to universalize an essentially European corpus of human rights"* should start to listen to critique from the viewpoint of non-Western cultures. This process could bring a *"multiculturalization"* of human rights corpus manifested by *"balancing between individual and group rights, giving more substance to social and economic rights, relating rights to duties, and addressing the relationship between the corpus and economic systems."*[7]

Cultural relativists believe that there is no objective criterion determining which morality should prevail, and therefore there is no reason for the preference of human rights over other moralities. The point of this objection can be conceptualized in two different ways: **(a)** either human rights are not universal enough because they do not reflect moral particularities of every culture, or **(b)** the concept of the universality of human rights does not imply these rights should always prevail over other moral or legal norms.

Ad a) As mentioned above, the universality of human rights can be conceived in different ways. According to some authors, the universalization – as a necessary trait of every moral judgement[8] – has various stages. For example, John Mackie distinguishes three stages of this process: firstly, saying that something or somebody is right or wrong, good or bad, implies the commitment to take the same view about any other relevantly similar subject-matter or person. This stage is meant *"to rule out as irrelevant mere numerical as opposed to generic differences"*.[9] The unfairness resulting from grouping morally different particulars under one universal category lead us to the second stage of universalization where we place ourselves in the position of others taking into consideration their *"physical qualities and resources and social status"*.[10] Thus we make moral reasons reversible, acceptable to both us and others even if our situation and theirs were reversed. According to Mackie, in the third stage of the

[4] MUTUA, M. The Complexity of Universalism in Human Rights. In: A. Sajó (ed.). *Human Rights with Modesty: The Problem of Universalism*. Dordrecht: Springer, 2004, p. 54.
[5] Ibid., p. 56.
[6] Ibid., p. 55.
[7] Ibid., p. 58.
[8] HARE, R. M. *The Language of Morals*. Oxford: Clarendon Press, 1952, p. 129ff.
[9] MACKIE, J. *Ethics: Inventing Right and Wrong*. London: Penguin Books, 1977, p. 83.
[10] Ibid., p. 90.

universalization of morality, we should take into account not only the qualities and living conditions of others, but also their *"particular tastes, preferences, values, and ideals*".[11] Human rights failed to pass through this, the last stage of universalization, according to cultural relativists. Although human rights apply to all individuals, to the members of all cultures, and perhaps most of these individuals would benefit from enjoying them, still these rights are not universal enough because some cultures were not represented during their codification. We will examine this objection further in section 2.1.

Ad b) According to the second interpretation, cultural relativists object to the concept of universality *per se*. In this view, the main problem of human rights is not that they are not universal enough, but the misconception of universality itself. Even if cultural relativists conceded that human rights might be invoked as a valid moral or legal argument everywhere in the world, they would still refuse that this argument should prevail over other competing reasons. So, the misconception rests in the fact that the universality is by and large understood as a privileged position of one morality over other ones. This objection also fits into the traditional semantics according to which the original opposite of the attributive "relative" is not "universal", but "absolute" which indicates that the absolute norms are either *exclusive* or *overriding* standards for assessing the rightness of human conduct.[12] Cultural relativists, however, believe that there are no such standards. In section 2.2, we will try to demonstrate that they are wrong.

2. WHAT IS THE BASIS OF THE UNIVERSALITY OF HUMAN RIGHTS?

2.1. Is there a universal consensus on human rights?

The structure of the cultural relativists' argument is this:

A. If human rights are to be universal, they must be grounded on the consensus of all cultures.

B. Human rights are not grounded on the consensus of all cultures.

Ergo: Human rights are not universal.

Ad A) Consent as a source of legitimacy of norms and institutions is one of the central axioms of the Western legal culture. It is one of the founding principles of both the private law regulating horizontal relations between private persons[13] and the constitutional law regulating relations

[11] Ibid., p. 97. Cf. INOUE, T. Reinstating the Universal in the Discourse of Human Rights and Justice. In: A. Sajó (ed.). *Human Rights with Modesty: The Problem of Universalism*. Dordrecht: Springer, 2004, p. 133. HABERMAS, J. *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*. Cambridge (Mass.): The MIT Press, 1996, p. 228.

[12] However, the courts usually apply human rights with respect to the cultural particularities of their jurisdiction. András Sajó thinks it is because human rights are not classical rules, but imperfect (very vague) standards and they allow for their own limitation, e.g. in the name of security, morality, public order. See SAJÓ, A. Introduction. In: A. Sajó (ed.). *Human Rights with Modesty: The Problem of Universalism*. Dordrecht: Springer, 2004, p. 16ff. On the supremacy of human rights in the context of moral pluralism see also BREMS, E. Reconciling Universality and Diversity in International Human Rights Law. In: A. Sajó (ed.). *Human Rights with Modesty: The Problem of Universalism*. Dordrecht: Springer, 2004, p. 226ff.

[13] ROSS, A. *On Law and Justice*. New Jersey: The Lawbook Exchange, 2012, p. 203.

between the government and the governed.[14] Moreover, the consent of sovereign states is one of the bearing pillars of the legitimacy of international law.[15] Nevertheless, the consent of the subjects cannot be a sole source of the legitimacy of norms, since the non-consensual standards determine the very need for the consent and its acceptable boundaries.[16] The human rights catalogue fulfils these two functions precisely: political rights justify the duty of the government to seek the consent of its citizens[17] while civil rights and freedoms impose limits which the government must not violate even if the majority of citizens wishes the opposite.[18] Although the implementation of some of the human rights – typically social rights – might be thematized in the *regular* political competition within the *established* democratic institutions, it certainly does not apply to the human rights catalogue as a whole.[19] To sum it up: consent is one of the pivotal grounds of the legitimacy of norms, but it is not the only ground. Non-consensual or quasi-consensual legitimizing sources will be discussed in section 2.2.

Ad B) According to the second premise, human rights are not grounded on the consensus of all cultures. In the quote mentioned above, professor Mutua suggests that the idea of human rights is exploited by Western countries to justify their dominance over the non-Western cultures. So, the objection of the cultural relativists is better to be read as claiming that the human rights lack the consent of all cultures *which are dominant in the current globalized world in the context of actual or latent international political conflicts* (e.g. cultures delimited according to the axis East/West, North/South, Muslim/Christian world).

Although it is not entirely accurate, the measurement of the intercultural consensus on human rights usually takes a form of a count of the states which have discussed or signed any of the relevant universal human rights documents. For example, the final draft of the Universal Declaration of Human Rights, the first international document granting human rights to all human beings,[20] was discussed among the representatives from North and Latin America, West and East Europe, Africa and Asia, including representatives of Islamic, Christian and atheistic worldviews.[21]

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[14] The consent of the governed is doctrinally justified by the theory of social contract, see e.g. LOCKE, J. *Two Treatises of Government and A Letter Concerning Toleration*. New Haven – London: Yale University Press, 2003, p. 141ff.

[15] According to the principle of sovereign equality, all states are juridically equal and they enjoy full sovereignty. See SHAW, M. N. *International Law*. 8th ed. Cambridge: Cambridge University Press, 2017, pp. 168–169.

[16] See for example *ius cogens* in the international law forbidding state aggression or genocide. HILLIER, T. *Source Book on Public International Law*. London – Sydney: Cavendish Publishing Limited, 1998, pp. 146–154.

[17] Cf. WALDRON, J. *Law and Disagreement*. Oxford: Oxford University Press, 1999, p. 232ff.

[18] BERLIN, I. Two Concepts of Liberty. In: I. Berlin. *Liberty (Incorporating Four Essays on Liberty)*. Oxford: Oxford University Press, 2002, p. 211.

[19] Of course, political competition can also take place outside the established democratic framework, for example in a war, a revolution, or a coup. It is the protection of the human rights catalogue as a whole or the establishment of democratic institutions which are the regular subject matter of a political conflict in these cases.

[20] Cf. OSIATYŃSKI, W. *Human Rights and Their Limits*. Cambridge: Cambridge University Press, 2009, pp. 26–29.

[21] Ibid., p. 164. *"Without the arguments and votes of the small states, the UDHR would probably not have included socioeconomic rights or consistent condemnation of discrimination. The rights of women might also have been downplayed. Without the insistence of small states on the applicability of human rights even in the shadow of colonial tutelage, the Declaration might not have included explicit provisions of universality and its name might in fact have remained the* International *Declaration rather than the* Universal *Declaration of Human Rights."* WALTZ, S. Universalizing Human Rights: The Role of Small States in the Construction of the Universal Declaration of Human Rights. *Human Rights Quarterly*. 2001, Vol. 23, No. 1, p. 71.

Some relativists argue that the consensus expressed in the Universal Declaration was prompted by the vivid memory of the atrocities of WWII and that over the next decades it collapsed.[22] Jack Donnelly, however, responds to this argument by referring to the number of states signed under international conventions that transformed the Declaration rights into the officially binding form. Six crucial documents – two International Covenants, the Convention against Racial Discrimination, Torture, Discrimination of Women and the Convention on the Rights of Child were signed by an average of 88 % of all states. Today it is almost 92 %.[23]

Nevertheless, even these impressive numbers do not convince everyone. It is one thing to verbally take a commitment, another is to invest real effort and resources in enforcing it in practice. It is one thing to sign a universal convention, another to sign an optional protocol, by which the state submits to the authority of the supervising international body or to abide by an official soft law specifying its meaning. In Czech political theory, Pavel Dufek raises these concerns with extraordinary eloquence. He doubts the firmness of the universal human rights consensus because many countries have signed human rights documents only from propagandistic reasons, i.e. as a part of their insincere political strategy.[24] The gap between "human rights in books" and "human rights in action" indicates that the consensus is a mere illusion. According to Dufek, the fictitious nature of the consensus makes itself apparent immediately after the individual rights get into a mutual collision. In order to resolve this kind of conflicts, lawyers need to supplement their legalistic argumentation with a moral and political philosophy which, however, produce only deeper controversies.[25]

Dufek's critique is, however, a little exorbitant because nobody expects that the human rights documents will produce uniform practice. Firstly, these documents are just codifications of norms, i.e. the ideal state of affairs as opposed to the actual state of affairs. Thus, the universal consensus on human rights only provides *reasons* to criticize conduct violating human rights, but as such, it does not guarantee that this conduct will never occur.[26] Indeed, international law is notorious for its imperfect mechanism of norm-enforcement. Nevertheless, it is by and large regarded as a valid system of law because it constitutes a specific realm of reasons used to justify and criticize the practice of states.[27] In this genuinely normative perspective, it is irrelevant whether the consent has been triggered by a strategic calculation, the only fact that counts is its proper manifestation according to the established legal procedures.[28]

[22] Cf. OSIATYŃSKI, W. *Human Rights and Their Limits*. Cambridge: Cambridge University Press, 2009, p. 147ff.

[23] DONNELLY, J. *Universal Human Rights in Theory and Practice*, p. 94. Donnelly made his count in the beginning of 2012. Nowadays (21st July 2020) the rate of the consensus reaches 91,92 %. Numbers of the signatory states: In: *United Nations Treaty Collection* [online]. [2021-07-22]. Available at: <https://treaties.un.org/>. The total number of all states was established as 196.

[24] DUFEK, P. Lidská práva, ideologie a veřejné ospravedlnění: co obnáší brát pluralismus vážně [Human Rights, Ideology, and Public Justification: What Does It Take to Take Pluralism Seriously]. *Právník*. 2018, Vol. 157, No. 1, p. 69.

[25] Ibid.

[26] Cf. HART. H. L. A. *The Concept of Law*. 2nd ed. Oxford: Clarendon Press, 1994, p. 89ff.

[27] Ibid., p. 228ff.

[28] Cf. OLIVECRONA, K. *Law as Fact*. 2nd ed. London: Stevens & Sons, 1971, p. 92.

Secondly, the language of rights is intentionally designed to express a plurality of human values and therefore, it is pointless to criticize it for generating value collisions. This language rules out manifestly illegitimate causes of action from the realm of valid reasons but keeps this realm sufficiently heterogenous to offer a plurality of solutions to our legitimate value dilemmas. Thus, the heterogeneous application practice is a virtue rather than a failure. As Mary Ann Glendon puts it when discussing the language of the Universal Declaration:

"The Declaration's architects expected that its fertile principles could be brought to life in a legitimate variety of ways. Their idea was that each local tradition would be enriched as it put the Declaration's principles into practice and that all countries would benefit from the resulting accumulation of experiences. That is evident from the leeways they afforded in the text for different modes of imagining, weighting, and implementing various rights (except the tightly drawn rights not to be tortured, enslaved, or otherwise subjected to aggression)."[29]

The law does not serve human needs only by resolving everyday human conflicts, but also by translating these conflicts into legal terms and forms in order to keep them non-violent.[30] The universal consensus on human rights aspires to support this mission.

To sum it up: today, more than nine states out of ten – representatives of all dominant cultures – participate in the universal consensus according to which the protection of human rights is an integral component of international law. The consensus relates to the norms of conduct, the ideal state of affairs, and therefore, the reference to actual human rights violations is not an argument against it, but an argument for its stricter enforcement. The consensus is about human rights, i.e. a catalogue of various values, and therefore, the reference to the collisions of rights resulting into relatively inconsistent practice is not a sign of the system's failure, but functioning.

2.2. Non-consensual or quasi-consensual grounds of the universality of human rights

2.2.1 Human dignity and the overlapping consensus

So far, we have concluded that the consent is a pivotal, but not exclusive, source of the universality of human rights. Nine out of ten countries agree with the most relevant human rights conventions, but is it enough to claim that they are also binding for the remaining tenth? Is there any non-consensual ground for the universality of human rights?

The voluntarist conception of morality is traditionally opposed by its rationalist alternative in the form of moral realism.[31] The advantage of this rationalistic theory is that it

[29] GLENDON, M. A. *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights*. New York: Random House Trade Paperbacks, 2002, p. 230.

[30] Cf. ROTTLEUTHNER, H. *Foundations of Law*. Dordrecht: Springer, 2005, p. 29.

[31] *"It is not the case that moral judgments become more right and true or more authoritative by virtue of the sheer number of people who share those judgments or put them into practice. Simply declaring that something is right does not make it right. Consensus does not produce either mathematical or moral truth, no matter how many people, nations, or powerful institutions, or elite members of society say it is true. It is not by majority vote, but rather through reference to reason and/or divine origin that a genuine universalistic moral realist stance demands justification."* SHWEDER, R. A. Moral Realism without the Ethnocentrism: Is It Just a List of Empty Truisms? In: A. Sajó (ed.). *Human Rights with Modesty: The Problem of Universalism*. Dordrecht: Springer, 2004, pp. 73–74.

provides an individual with a solid foothold – crystalline pure ought – from which he or she can criticize any conventional morality. Its disadvantage is, however, that each individual may find this normative foothold somewhere else. The notorious and devastating objection to the theory of moral realism is the problem of how to recognize moral reality.[32] If we cannot agree even on a rough framework of moral epistemology, then the assertion that "human rights reflect objective moral reality" is not an argument at all.

Nevertheless, if our ambition is not to replace voluntarism with rationalism, but only to supplement it, we can keep moral realism at bay. It is not our task to demonstrate that the universality of human rights is utterly independent of the consent of peoples, cultures or states. It is enough to show that human rights are binding *also because it is reasonable to consent to them or unreasonable to dissent from them*.[33]

The authors usually provide this demonstration by deriving human rights from a mother notion that is shared by all cultures, e.g. the concept of human dignity.[34] If human rights aspire to protect what all cultures have in common – the appreciation of human dignity – then it would be unreasonable for any of them to reject the idea of human rights altogether.

However, this strategy is questionable because human dignity is an overly abstract notion with plenty of various conceptions leading to incompatible social practices.[35] For instance, in the past, the idea of dignity – as a property of merit – has deepened social inequalities while today – as an intrinsic property – it propagates equality.[36]

An alternative approach to seeking a mother notion is to derive human rights from more specific moral ideas, even at the cost of their diversity. Why should we bother with a formulation of the conceptual basis of human rights shared by all cultures, if we have established (cf. supra 2.1.B) that these cultures share the human rights themselves?

Instead of the diversity of human rights catalogues, cultural differences are manifested in a variety of reasons for which different cultures support the idea of human rights in general. Indeed, the international consensus on human rights can be conceived as an example of the Rawlsian overlapping consensus.[37] The fact that human rights have various philosophical and religious foundations contributes to the expansion of their practical impact. Jack Donnelly puts it in the following words:

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[32] See in detail SOBEK, T. *Právní myšlení: Kritika moralismu. [Legal Thinking: A Critique of Moralism]*. Praha: Ústav státu a práva AV ČR, 2011, p. 64–66.

[33] In papers on authority, this kind of legitimizing reason is usually analyzed under the heading of "hypothetical consent". According to Sobek the notion of hypothetical consent *"is designed with cognitive intent to demonstrate that an agent has a reason to abide by a rule voluntarily because the rule has substantial merits."* SOBEK, T. *Právní rozum a morální cit. Hodnotové základy právního myšlení. [Legal Reason and Moral Emotion. The Axiological Fundaments of Legal Thinking]*. Praha: Ústav státu a práva AV ČR, 2016, s. 269. Some rules are justified in a way that it would be unreasonable, perhaps even unjust, not to consent to them.

[34] BREMS, E. *Reconciling Universality and Diversity in International Human Rights Law*. Cham: Springer International Publishing, 2004, p. 215ff.

[35] *"Even if people in all societies respect the value of human dignity, they may have extremely diverse ways of interpreting and expressing it, to the extent that in certain societies some human rights may be considered as unnecessary, incomprehensible, or undesirable."* Ibid.

[36] See DONNELLY, J. *Universal Human Rights in Theory and Practice*. New York: Cornell University Press. New York: Cornell University Press, 2013, 2013, p. 121ff.

[37] RAWLS, J. *A Theory of Justice. Original edition*. Cambridge (Mass.) – London: The Belknap Press of Harvard University Press, 1971, p. 388.

"Christians, Muslims, Confucians, and Buddhists; Kantians, utilitarians, pragmatists, and neo-Aristotelians; liberals, conservatives, traditionalists, and radicals, and many other groups as well, come to human rights from their own particular paths. Today, almost all the leading paths to social justice and human dignity centrally involve human rights."[38]

However, this solution also has its cost. Although different moral reasons may lead to the formulation of the same rules, they usually also affect how the rules are interpreted and may, therefore, lead to different decisions.[39] For example, a conservative and a liberal both support the right to respect for family life, but from different reasons: the former because she considers the family to be the basic unit of society, the latter because she appreciates family life as one of the most distinguished manifestations of the individuals' autonomy. These different reasons may then lead them to differing views as to whether the "right to respect" includes the right to same-sex marriages. In this example, we see that human rights fail in the same way as their mother notion: they split into mutually conflicting applications.

2.2.2 The problem of idealization

Nevertheless, when criticizing the inconsistent application of the human rights catalogues, we should make clear what we consider to be the optimal state of consistency. Nobody would claim that the law is functioning well only if it generates entirely consistent judicial and social practice across the country or even around the world.[40] So, we could readily admit that the overlapping consensus on the right to respect for family life does not entail the consensus on same-sex marriages, but keep insisting that this failure does not set aside the disputed right as useless junk. After all, liberals and conservatives still agree that the right to marry belongs at least to heterosexuals, roughly 90 % of the population.[41] So, if they agree to pass the same decision in nine out of ten cases, it is not very convincing to claim that there is no consensus between them.

The controversies about marriages might pop out between many other antagonistic parties, e.g. between polygamists and monogamists, but that does not deny the relevance of the overlapping consensus either. Indeed, this kind of criticism is available only because of the unrealistic expectations about the optimal state of consistency which the justification (and a subsequent application) of human rights should provide. However, moral justification does not produce any moral truths to which everyone would agree from any point of view and under any circumstances. Tetsuo Inoue:

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[38] DONNELLY, J. *Universal Human Rights in Theory and Practice*. New York: Cornell University Press, 2013, p. 58.

[39] Cf. INOUE, T. *Reinstating the Universal in the Discourse of Human Rights and Justice*. Cham: Springer International Publishing, 2004, p. 127.

[40] Some degree of the vagueness of law is beneficial for the proper functioning of the legal system because it enables lawyers to adapt legal texts to the particularities of a pending case or the specific circumstances of society. *"Much of the uncertainty of law is not an unfortunate accident: it is of immense social value."* FRANK, J. *Law & the Modern Mind*. New Brunswick – London: Transaction Publishers, 2009, p. 7.

[41] For the discussion on the numbers see SPIEGELHALTER, D. *Sex by Numbers. What Statistics Can Tell Us About Sexual Behaviour*. London: Profile Books, 2015, chapter 5.

"Justification is not a logical or mathematical demonstration to be conducted indiscriminately on every assumption or belief. Justification is instead an act of responding to another who expresses an objection and as such is a form of dialogue. Justification as a dialogue does not involve demonstrating the soundness of our belief system as a whole, in such a way that every logically possible objection from every rational agent is a priori resolved, but to respond to a particular person who raises a concrete objection to a specific part of our belief system by providing reasons for our holding this particular belief that she can understand and accept."[42]

It is curious how the cultural relativists depict the human rights consensus as something unreal, almost as a made-up thing, though only at the expense of keeping unrealistic demands on the consistency of the human rights justification and application. For example, Dufek insists that the idea of the overlapping consensus on human rights is a product of an overly expansive idealization in which the dialogue participants are modelled as always having good reasons to join the consensus.[43] According to Dufek, this approach *"is not compatible with the fact of a deep moral pluralism"* because *"any idealization, a fortiori the strong one, is essentially equivalent to the elimination of the dissenting perspectives*". Thus, the overlapping consensus on human rights is not concluded between *"non-idealized real agents*".[44] In other words, this consensus is a fiction.

Nevertheless, how does this "idealization" look like in a particular case? Let us take as an example the consensus on the Universal Declaration of Human Rights. Glendon, in her already a classic book *A World Made New* describes in detail how painstakingly this document was drafted and passed.[45] The representatives of the participating states in the Third Committee of the UN General Assembly were discussing almost a whole week only the Article 1 which read *"All human beings are born free and equal in dignity and rights. They are endowed by nature with reasons and conscience, and should act one another in a spirit of brotherhood."*

The representative of South Africa wanted to replace the phrase "dignity and rights" with "fundamental rights and freedoms"; the Belgian representative wanted to remove words "by nature" while the Brazilian delegation wanted to add the reference to the God. The representative of the Chinese tradition opposed by the enumeration of the Chinese ideals which he had refrained from proposing to keep the Declaration acceptable for everybody. According to him, the idea of God could be derived from the assertion that all human beings are born free and equal and endowed with reason and conscience. This position was supported by the American, Indian and French delegations reminding the recommendation that *"the nations should and could reach practical agreement on basic principles of human rights without achieving a consensus on their foundations"*. Moreover, the

[42] INOUE, T. *Reinstating the Universal in the Discourse of Human Rights and Justice.* Cham: Springer International Publishing, 2004, p. 137.

[43] DUFEK, P. Lidská práva, ideologie a veřejné ospravedlnění: co obnáší brát pluralismus vážně. *Právník*. 2018, Vol. 157, No. 1, p. 67.

[44] Ibid., p. 70.

[45] GLENDON, M. A. *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights.* New York: Random House Trade Paperbacks, 2002, chapter 9.

representative of the Soviet Union did not like the brotherhood language; the representative of Saudi Arabia cast doubt about the reference to reason and conscience and finally, the delegation from Iraq questioned the compatibility of freedom with equality. After six long days of contentious discussion, the participants concluded they would accept the original proposal but without the words "by nature".[46]

Keeping the vividness of this discussion in mind we can ask in what sense were their participants – Mr C. T. Te Water (South Africa), Count Carton de Wiart (Belgium), Mr. de Athayde (Brazil), Mr P. C. Chang (China), Mrs Eleonor Roosevelt (USA), Mrs Lakshmi Menon (India), Mr Salomon Grumbach (France), Mr Pavlov (USSR), Mr Jamil Baroody (Saudi Arabia), Mr A. Abadi (Iraq) – "idealized" or "unreal". Obviously, states, nations or cultures as collective, complex and heterogenous entities cannot act in another way than through their representatives.[47] To ascribe an individual's action to a culture, we need to idealize her first, and that always brings along a slight distortion of reality. However, without this idealization, no collective action would be possible, let alone the intercultural dialogue.

Interestingly, the idealization works hard also during picturing "the fact of a deep moral pluralism". Many authors have noticed cultural relativism is often voiced by the authoritarian regimes and conservative elites which thereby justify their position of power and oppression against those who wish to live in a free society.[48] For instance, Ann Elizabeth Mayer investigated Iran's attitude towards the universality of human rights and compared it to that of China. Although the former is an Islamic theocracy, while the latter is an atheistic communist regime, there are some striking similarities which led Mayer to the conclusion that Islam in itself is not an obstacle to the universality of human rights. Religion as one of many significant cultural features *"merely offers a repertory of ideas and precepts that are selectively and opportunistically used by governments in reaction to mutations in domestic politics and broad global trends, which actually determine governmental responses to human rights"*.[49]

Cultures are neither coherent, homogenous, unambiguous, nor free of conflicts.[50] Each culture has its internal diversity which may exceed the rate of external diversity among different cultures. Therefore, we have to recourse to the idealization not only when we are looking for a representative of a culture but also when we are trying to describe the culture's typical features. On both occasions, the idealization can be strategically misused for a political agenda. The tension between the universality of human rights and the cultural relativism is not an opposition between a fiction and reality, between subjective ideals and objective facts.

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[46] Ibid. The list of meeting records is available at <https://research.un.org/en/undhr/ga/thirdcommittee>.

[47] Cf. URBINATI, N. *Representative Democracy. Principles & Genealogy*. Chicago – London: The University of Chicago Press, 2008, pp. 20–25.

[48] Cf. OSIATYŃSKI, W. *Human Rights and Their Limits*. Cambridge: Cambridge University Press, 2009, p. 157ff. DONNELLY, J. *Universal Human Rights in Theory and Practice*. New York: Cornell University Press, 2013, p. 110.

[49] MAYER, A. E. Shifting Grounds for Challenging the Authority of International Human Rights Law: Religion as a Malleable and Politicized Pretext for Governmental Noncompliance with Human Rights. In: A. Sajó (ed.). *Human Rights with Modesty: The Problem of Universalism*. Dordrecht: Springer, 2004, p. 349ff.

[50] FAY, B. *Contemporary philosophy of social science: a multicultural approach*. Cambridge (Mass.) – Oxford: Blackwell, 1996, p. 66.

2.2.3 The limited role of rationality

As we have mentioned before, sceptics object that the overlapping consensus on human rights is not a sufficient ground to claim that there is a shared universal morality between cultures. However, this kind of pragmatic consensus is much better than no consensus at all because, in a comparative perspective, it can serve at least as a starting point of the intercultural dialogue.

Firstly, as Donald Davidson puts it *"different points of view make sense, but only if there is a common co-ordinate system on which to plot them"*[51] while their clarity can be improved *"by enlarging the basis of shared (translatable) language or of shared opinion"*.[52] Thus, the overlapping consensus on human rights enables or enlarges at least the *understanding* of other cultures. Without the consensus on human rights, we would have to look for another normative language shared by all cultures only to realize that they are different.

Secondly, the consensus might bring more rationality into the intercultural dialogue and thus increase the chance of coordinated action between its participants. It is because the consensus represents at least a minimum of the shared premises, so the participants can rely on this common ground and ask their opponents to justify any demand or assertion that seems to contradict it. This dialogue setting is definitely better compared to a situation in which the participants' utterances completely miss each other and where no request for consistency can be made. In this situation, there is no dialogue, but a negotiation between participants with (sometimes immensely) unequal bargaining power.

Thirdly, since human rights are norms of conduct recognized by all participants of the dialogue, the requirement for consistency has logical as well as practical dimension. The participants should adapt to human rights not only their utterances presented in dialogue but also their action performed outside the dialogue. It is because to recognize the validity of a norm while ignoring or supporting its violation is a performative contradiction, an irrationality which should be minimized.[53] Interestingly, the same sort of fallacy might be committed by the one who denies the universality of human rights while enjoying the benefits they grant. Here is an edifying example:

In 1998 Harvard University held a symposium on the fiftieth anniversary of the Universal Declaration where professor Mutua presented his relativistic view according to which human rights were a means of the moral and political dominance of the West over the rest of the world. To this accusation a Chinese dissident Xiao Quiang responded by the question whether professor Mutua had considered what a luxury it was to be allowed to voice his critique so freely: *"If you were to voice dissent from the prevailing view in China, you*

[51] DAVIDSON, D. On the Very Idea of a Conceptual Scheme. In: D. Davidson. *Inquiries into Truth and Interpretation*. Oxford: Clarendon Press, 1991, p. 184.

[52] Ibid., p. 197.

[53] For the discussion on performative contradiction see JAY, M. The Debate over Performative Contradiction: Habermas versus the Poststructuralists. In: A. Honneth – T. McCarthy – C. Offe – A. Wellmer (eds.). *Philosophical Interventions in the Unfinished Project of Enlightenment*. Cambridge (Mass.) – London: MIT Press, 1992, pp. 265–279.

would end up in jail, and there you would soon be asking for your rights, without worrying about whether they were 'American' or 'Chinese.'"[54]

CONCLUSION

Today, more than nine states out of ten – representatives of all dominant cultures – participate in the universal consensus according to which the protection of human rights is an integral component of international law. Cultural relativists are inclined to believe that this consensus is rather nominal than real, that it is consensus on words, not on practices. Referring to the human rights violations, inconsistency in balancing between rights, political and value conflicts between different cultures as well within them, they try to demonstrate the universality of human rights is a fiction situated in the reality of cultural particularism. This conclusion is, however, too harsh because:

a) The consensus relates to the norms of conduct, the ideal state of affairs, and therefore, the reference to actual human rights violations is not an argument against it, but an argument for its more scrupulous enforcement.

b) The consensus is about human rights, a catalogue of various values, and therefore, the reference to the collisions of rights resulting into relatively inconsistent practice, is not a sign of the system's failure, but its functioning.

c) The consensus on human rights is not absolute but overlapping. Nevertheless, it can still serve as a starting point of the intercultural dialogue. It would be too optimistic to assume that starting from the overlapping consensus on human rights, the participants of the dialogue could eliminate any moral disagreement between them. At the same time, it would be too sceptical to claim that the lack of full moral agreement proves that the dialogue has no rational basis and is merely a manipulative presentation of moral passions or concealed manifestation of political power.

d) Just as proponents of human rights use some degree of idealization to describe human rights consensus, so do cultural relativists use idealization to depict cultural diversity. No dominant culture is a uniform, consistent and unchanging whole with a clearly defined attitude toward the entire human rights catalogue. To draw the opposition between the universalism of human rights and cultural relativism as a clash between fiction and reality is simply misleading.

By subscribing to these conclusions, we do not commit ourselves to claim that human rights are the ultimate answer to the question of what unites us – humankind – into the one community of moral agents. However, we commit ourselves to endorse human rights until their opponents come up with a better set of universal rules, a system of rules that would protect people from the threats of the free market and state machinery more effectively and that would ensure dialogue between different cultures to a greater extent.

[54] GLENDON, M. A. *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights.* New York: Random House Trade Paperbacks, 2002, p. 232.