Translating Human Rights: Universalism versus Inter-cultural Dialogue

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In the Western theoretical-political debate there is a tendency to see human rights as a kind of universal ethical and legal code, of 'secular religion' (Höffe 1997). Such a secular religion, because of a sort of deontic short circuit bypassing the delicate mediations among ethics, politics and law, is immediately referred to when dealing with and managing crisis and conflict situations, in particular at the international level. There has been a tendency, especially in recent years, to see the human rights code as sort of ethical absolute, capable of providing the only normative framework within which problems may be dealt with and managed.

This has been conspicuous in the recent war of the Atlantic Alliance against the Yugoslav Federation (Mazzarese 1999). The blatant breach of international law (Bovero 1999; Ferrajoli 1999; Zolo 2000) has been justified by appealing to the higher demand of punishing and preventing the reiteration of the violation of Kosovo citizens' human rights. This view has been argued for by authorities including Antonio Cassese, former president of the International Tribunal for crimes in the former Yugoslavia. Cassese did acknowledge that the intervention in Kosovo was a violation of the UN Chart. However – he claimed – international law is changing: a new legitimisation is being worked out for 'humanitarian' interventions when there is an 'extremely serious, massive and repeated' violation of basic human rights (Cassese 1999). It is clear that on this view human rights become a kind of first principle of international law; they are placed in a position axiologically superior to the very repudiation of war at the beginning of the UN Chart (cp. Also Habermas 1999).

It has been objected against these theses that they end up with turning human rights into a fundamentalist ideology. Thus they risk debasing rights 'as the last Western cheat' and 'rebuilding the wall' between East and West forcefully imposing democracies and respect for human rights the same way as socialism was once forcefully imposed (Ferrajoli 1999).

These critiques are not made by authors questioning the universalism of rights. On their view there is a major inconsistency between the appeal to universal rights used to legitimise 'humanitarian war', and the gross violation of war victims' human rights – beginning with the basic right to life. My contention is that the very universalist approach runs the risk of being an argument for 'rights fundamentalism' and making intercultural dialogue problematic.

1. Two kinds of universalism

A point must be made clear beforehand. The phrase 'rights universalism' can refer to at least two different questions. Some rights may be taken to be 'universal' because they pertain to 'all' members of a given class. In the case of human rights, such class is the whole of mankind[1]. But 'universalism' usually implies a second dimension: rights are said to be universal because they are an ethical or legal code universally acknowledged, resting on such grounds as to provide it with universal validity; moreover, it would be a universally intelligible code, expressing values shared by all mankind. While in the classical modern conception of natural law the two universalisms –

[1] According to Luigi Ferrajoli it is the very universalism of entitlement that defines basic rights, the latter being "those *rights* the *rules* of a given legal order bestow upon *everybody* either *qua person*, or *qua citizen* and/or *qua* a person endowed with the *capacity to make valid legal deeds*" (Ferrajoli 2000). Human rights would be the basic rights bestowed upon everybody *qua* person.

universalism of entitlement and universalism of foundation – are conflated, it is always possible and convenient to make an analytical distinction.

1.1. *Universalism of entitlement* is a modern achievement. As is well known, the very notion of rights seems alien to the two main sources of Western culture, the Greek and the Jewish. And an explicit conceptualisation of 'human' rights qua rights pertaining to all human beings can hardly be found in classical Roman law (Weber 1922).

The modern emerging of the concept of rights is connected with Medieval legal experience and is marked by particularism: in the Middle Age there was an eruption of demands of liberties, privileges, immunities made by individuals and groups asking for acknowledgement and legal protection. For a long time the holders of 'rights' remained specific groups, communities, corporations, orders, estates. With respect to this situation, the political and legal developments in the Kingdom of England take on a special significance. The social and political structure of the country, the technical features of the common law, the relative independence of the judiciary facilitated the establishing of rights enforceable even against the government. But, chiefly, rights underwent a process of 'domestic universalisation': the 1215 Magna Charta already protected a wide range of social sectors, which will eventually include all English subjects. The process of universalisation, however, is strictly limited within the borders of the Kingdom. The 1689 Bill of Rights was still supposed to 'declare' «the true, ancient, and indubitable rights and liberties of the people of this kingdom» only.

The declarations of independence and the bills of rights of American colonies, followed by the *Déclaration* of 1789, were the first legal documents conferring some rights to all men. Within them the link between natural law approach and universalism of entitlement is compelling: rights to life, property, freedom, security, and the pursuit of happiness are bestowed upon 'all' in that they correspond to human nature *qua* rational nature. This approach is continued, partly at least, in Napoleon's *Code civil*: «l'exercice des droits civils est indépendant de la qualité de citoyen» (art. 7).

Codification is a factor in the crisis of the rationalist natural law approach and the emerging of legal positivism. For nineteenth and early twentieth century legal scholars rights are 'reflections of state power' (Gerber 1852), they result from a 'self-obligation' or a 'self-limitation' of state (Jellinek 1892; Romano 1900). It might seem then that legal positivism cannot but limit the universalisation of rights to members of specific political communities. However, the experience of world wars and totalitarianism revived the universalist discourse of human rights inspiring the 1948 *Universal Declaration*. But, most importantly, in contemporary legal systems many rights are conferred to 'all', regardless of status and nationality[2]. In other words, there is a situation where a given political community confers certain rights to all human beings, even beyond its borders.

There have been well known critiques – from Olympe de Gouges's *Declaration of the rights of women and women citizens* to Marx's *Jewish Question*, to contemporary critics of the 'westernisation of the world' – claiming that the 'human' holder of human rights is actually a particular kind of human being: male, bourgeois, Western. This, however, needs not undermine the normative value of rights. If the first universalist bill of rights was drafted by Virginian slave owners and the (male) agent of the success of these demands has been a certain class in a given historical and geographical context, this does not mean that these demands lack universal value

[2] So, e.g., the Italian Constitution "recognises and protects man's inviolable rights, both as an individual and in the social formations where his personality is developed" (art. 2), and confers to "all" not only civil rights (such as freedom of religion [art. 18] or free speech [art. 21] or the right to be heard by a court [art. 24]) but also some social rights as the rights to health (art. 32), education (art. 34) and a fair wage (art. 36). Similarly, in the project of a Chart of basic rights of European Union, all individuals are entitle to rights related to dignity, freedom, equality, solidarity and justice.

(Bobbio 1992, pp. 135-6). An analytical distinction must be drawn between the question of the genesis of rights and the question of their status and legitimisation (Höffe 1997).

1.2. *Universalism of foundation* was gradually worked out by late medieval and early modern thought, starting with the works of glossarists and canon lawyers. Key contributions were made by philosophers such as William of Ockham and John Gerson with his disciples, and then by the theologians of 'Second Scholastics'. For Grotius rights are based on the law of nature, which in turn expressed *appetitus societatis*, placed "inter haec quae homini sunt propria". As the source of the law of nature expresses something 'distinctive' of all men, so all men are bound by the law of nature and entitled to natural rights. In Hobbes it is clear how in the natural law foundation of rights the two universalisms are connected and eventually conflated into each other. The *ius omnium in omnia*, typical of the state of nature, originates from the principle of self-preservation. This principle, like a mathematical theorem, holds for everybody and cannot but be recognised by everybody. And the right flowing from it belongs precisely 'to all': all men *qua* men are entitled to it.

Critiques of the natural law conception of rights – from Hume's analysis of what has later come to be defined the 'naturalistic fallacy' to Bentham's conception of natural rights as 'a nonsense upon stilts', to twentieth century corrosive critique of legal positivism – are over two centuries old. But, besides their epistemological limitations, these critiques do not account for the incorporation of 'basic' or 'inviolable' rights within contemporary constitutions[3]. There emerges a kind of paradox of thoroughgoing legal positivism: positive legal systems embody, making them positive, basic rights that are not thought to derive from state authority and thus remain, so to speak, normatively above the legal system itself (Zagrebelsky 1992; Ferrajoli 1995; Id. 2001).

2. Imaginary universalists

Many contemporary legal philosophers try to account for this situation by connecting again universalism of entitlement and universalism of foundation. But I think that contemporary proposed justifications of rights themselves imply the political and legal experience of Western modernity. Neither John Finnis's basic values and 'requirements of practical reasonableness', nor Rawls's theory of justice can be thought of outside the cultural development which originated in Roman law, was rediscovered in the Christian Middle Age and was accomplished in the modern age. Indeed a rights theory as well known as Dworkin's is openly contextualist, or even communitarian (Baccelli 1999). Rather, Jürgen Habermas has recently tried to provide human rights with a foundation wider than the reference to an individual political and legal culture (Habermas 1992a, p. 163). In *Faktizität und Geltung* basic rights turn out to be not simply the modern, 'post-conventional' and formalised, reformulation of the principles of justice worked out by modern natural law theory, but the functional condition for the constitution of the code of law, requiring public and private autonomy. On the other hand, basic rights express the implementation, through a 'logical genesis of rights', of the general normative principle of discourse theory – the 'D principle'– in the political-legal field. This ultimately brings human basic rights back within the 'quasi-transcendental' structures of discourse. Thus, on the one hand, basic rights are the condition of every legal system

[3] Take for instance art. 2 of the Italian Constitution: «the Republic recognises and protects man's inviolable rights, both as an individual and in the social formations where his personality is developed». Or the Ninth Amendment to the United States Constitution: «the enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people».

and must be accepted by everyone using the medium of 'law'. On the other hand, Habermas claims that, under the presupposed ideal conditions, a justification of rights can meet a universal consensus.

In my view, however, even Habermas's argument depends on a quite specific historical, social and cultural context. It is in the West that the 'co-original genesis' of basic rights, popular sovereignty, rule of law and democracy, alluded to by Habermas, is achieved. And in his view of rights as the necessary condition of the legal code he is actually referring not to *every* legal system as such, but to Western modern *positive* law. Indeed, wherever Habermas argues for the universal character of the inescapable presuppositions of discourse, he adds a qualification such as 'to all willing to understand each other'. But 'agreeing', the commitment to communicative interaction, making one's truth available to one's interlocutor, is *the* decisive act. Agreeing to discuss and dialogue is already almost everything; something which cannot be taken for granted. Western culture has only arrived to this attitude gradually, in a troublesome and incomplete way.

In the post-metaphysic age any attempt to revive a universalism of foundation seems doomed to failure. On the other hand it is worth asking whether universalism of foundation is so desirable after all. An overview of the genealogy of the natural law conception of rights shows that a theory drawing an analytical distinction between law and rights can hardly be said to be *pro tanto* more suitable to ground the legal protection of individuals. Nor can universalism be praised without qualifications. Just a few examples.

In the fourteenth century 'poverty controversy' between the Franciscans and pope John XXII – that many authors consider to be the birthplace of the modern conception of rights – Franciscan theologians put forward a notion of rights meant to theorise the possibility of *waiving* them, whereas the pope put forward another notion of rights, meant to justify imposing an entitlement upon certain subjects. On the other hand the first universalist theory of 'human rights', by Francisco de Vitoria, legitimised the Spanish colonisation of Western Indies (Ferrajoli 1995). It is Hobbes who first proposed a paradigmatic definition of rights as opposed to law (*ius* versus *lex*), bestowing them upon all human beings as such and theorising natural equality. But his theory was meant to ground subjects *waiving* their rights – *qua* owning them – and to legitimise absolute government. On the contrary, Locke could only revive the traditional function of rights as guarantees within the English constitutional framework by referring again to the natural law of God, with its duty of self-preservation (see Baccelli 1999, pp. 15-72).

Today the position of such an undoubtedly democratic author as Habermas seem to put forward again these ambivalences and paradoxes. Not only in some recent writings does Habermas legitimise military action to enforce human rights, but he connects the spread of human rights to the processes of economic globalisation (Habermas 1999). Two unwanted effects may result. First, the 'foundationalist' universalist approach might be an argument for widespread resistances against the attempt to extend international spheres of liberty and individual guarantees. So it might paradoxically result in uniting the authoritarian theorists of Asian values to movements opposing the perverse effects of globalisation and defending cultural pluralism. Second, today the principle of human rights can be an ideological justification of the projects of a new global order and hegemonic stability (Zolo 1995). Keeping alive the consciousness that the language of rights, even basic rights, is marked by the culture where it originated seems to me an effective remedy against a new 'rights fundamentalism'.

3. Rights without foundation

Universalism of entitlement too has undergone heavy criticism in contemporary theoretical debate. It is mainly multiculturalists, difference feminists, critical legal scholars that question the

universalising and abstracting method characteristic of the legal medium, in particular of human rights.

I will not deal with such critiques here. I will take it for granted that attributing to 'all' persons a certain set of human rights is an important achievement of modern legal civilisation. The crisis of universalism of foundation, however, is relevant for using human rights in dealing with conflicts international controversies.

An alternative to the quest for a universalistic foundation might have been suggested by Norberto Bobbio: the problem of foundation may have been superseded by the *consensus omnium gentium* to the 1948 *Universal Declaration* (Bobbio 1992). The distinctively Western traits of the content of the *Declaration* already emerged in the debate of 1946-48 within the United Nations (Cassese 1988). However, subsequent Bills of rights, promoted by international organisations relating to geographical areas which have long stayed untouched by the Enlightenment-liberal culture, might be seen as the mark that the language of rights has a powerful capacity for expansion. But a reading of such Bills shows a significant influence of cultural tradition on the use of the language of rights. This use can hardly be reconciled with classical liberal individualism[4].

In my view, we cannot but acknowledge that in modern law and philosophy universalism of entitlement and universalism of foundation have divorced. From this standpoint Ferrajoli's position is paradigmatic: he claims that the universalism of their holders is the defining character of basic rights, and on the other hand he is critic of the "confusion between universalism of rights as legal convention and the same universalism as moral doctrine" (Ferrajoli 2001, p. 341), and the confusion "between 'universalism' of basic rights, concerning their holders […], and the universal consensus supporting them or at any rate the intercultural sharing of the values they express" (ivi, p. 50).

But the problem with a universalistic foundation is not limited to the consensus about human rights or the values they express. There is a problem of *translating* the language of rights. Metaphors aside, the very deontic nature of rights and the universalistic attribution of certain basic rights to all human beings express an ethical and legal approach typical of modern Western culture, with its Hellenic-Jewish-Christian tradition, its individualist anthropology and its Enlightenment legacy. Similar concepts can hardly be found in traditional Indian culture, pervaded by the notion of *dharma* (whose meaning includes what we consider to be concepts as different as justice, morality, law, religion, rite, fate, truth), in the Chinese ethical-legal tradition dominated by Confucius's teaching, or in Islamic *Sharia*, let alone African traditional legal systems (Panikkar 1982; Augé 1994; Rouland 1998). In the light of this universalising the concept of human rights would mean universalising the culture that expressed it, and this would threaten other cultures' identities. Does this mean that the language of rights, with its inescapable cultural origin, cannot be made to serve the supranational protection of individuals and groups and the management of conflicts across the borders of cultural areas?

I do not think we need to arrive at such a negative conclusion. I think that the widespread use of the language of rights beyond its original cultural context indicate its significant potential for expansion and its having a normative value irreducible to the cultural imperialism of the West. But the problems of 'translating' the language of rights, of intercultural dialogue, of cross-fertilisation across civilisations and anthropologies, should be taken seriously: which the West presently does not.

In an often quoted paper, Raimundo Panikkar claimed that 'translating' such language into other normative idioms should start with the search of 'homeomorphic equivalents' in other

[4] The *African Chart of Human and People's Rights*, enacted by African Unity Organisation in 1981, provides for the protection of traditional morality and values, and of family as the 'guardian' of such values. The *Islamic Universal Declaration* holds that rights stem from the ancestral covenant between God and men, whereas freedom of religion can only be enjoyed within the divine law. Translation difficulties also emerge within other major legal traditions, such as the Hindu or the Confucian one. Cp. Zolo1997, Belvisi 1996, Rouland, 1998

cultures. Underlying this proposal there is the idea that the language of rights presupposes a normative order, some higher notion of justice and the common good (Panikkar 1982, pp. 89-90). Otfried Höffe has made a thorough philosophical analysis of the problem of intercultural dialogue proposing the solution of 'transcendental exchange'. On Höffe's view, two inescapable characters of human nature should be acknowledged: vulnerability and the capacity for doing violence. Man is "from time to time a possible aggressor and a possible victim" (ivi, p. 480) and his capacity for violence endangers the very necessary conditions of his existence. This possibility of conflict is dealt with by the mutual renounce to the use of violence. This renounce is coterminous with the ethics of reciprocity or distributive justice; ultimately with the morals of the golden rule that comes out in a wide range of ethical traditions, from Confucianism to philosophy, from Hinduism to Judaism and Christianity. Thus the capacity for mutual threat is the anthropological foundation of human rights: "one's capacity for doing violence is swapped with one's interest in not being a victim of others' violence" (ivi, pp. 484-85). This approach is clearly rooted in Kant's moral and legal philosophy; here another element need be emphasised: the close link in Höffe's approach between human rights and 'human duties'[5].

In my view such approaches should be credited for 'taking the problem of intercultural dialogue seriously' (cp. also Taylor 1999) but they meet with significant difficulties. There is no reason for thinking that duties and obligations can be universalised more easily than individuals' rights, nor that a non-merely formal notion of justice and the common good can be agreed upon more easily than an account of human rights. The quest for anthropological constants is likely to lead to recognise some invariant characters of the species *homo sapiens* over a long stage of its evolution: the link between sociability and aggressiveness, vulnerability, potentially inexhaustible desires faced with scarce resources, and so on. The problem is whether recognising such invariant characters can ground a set of human rights which are not merely formal, significant and useful for individuals' protection.

Moreover, the quest for 'homeomorphic equivalents' or the strategy of 'transcendental exchange' risk obfuscating what is specific in the language of rights. If rights are simply a translation into another lexicon of the higher demands of justice, or if they are simply the converse of duties, the significance of the emerging of rights as the distinctive deontic modality of ethical and legal modernity is lost. The priority of the deontic modality of rights over duties has been viewed as the mark of a deep ethical and political transformation: namely, the evolution of 'subjects' into 'citizens' (Bobbio 1992).

4. The struggle for rights

Perhaps another approach to intercultural dialogue may be thought of. Such an approach should be characterised by two elements: (a) an open avowed acknowledgement of the irreducible 'ethnocentrism' of the language of rights and (b) a valuing of its peculiar 'activist' character.

a) Acknowledging the contextual origin of the language of rights and contesting universalism of foundation does not commit one to value relativism (if 'relativism' is to mean moral unresponsiveness and accepting any moral culture, however criminal or oppressive [2001]).

[5] "Les droits de l'homme se légitiment à partir d'une réciprocité *pars pro toto*, à partir d'une échange Or celui qui recourt réellement aux prestations d'autres personnes qui ont lieu uniquement à condition qu'il y ait une contrepartie et tenu à un *devoir* de l'homme. A l'inverse, il possède un *droit* de l'homme, dans la mesure où il fournit réellement une prestation qui n'a lieu qu'à condition qu'il y ait contrepartie" (Höffe 1997, pp. 482-83).

From this standpoint Richard Rorty's 'frankly ethnocentric' position is interesting. On Rorty's view conferring certain rights 'to men' is not itself decisive, for violators of human rights think that those (blacks, women, members of other religions or other ethnic group, homosexuals and so on) whose rights are being denies are precisely 'not human'. Security of rights is only increased as moral sentiments change, over a gradual process where increase in group security and the overcoming of indigence are especially significant (Rorty 1993). On Rorty's view the attitude less favourable to intercultural dialogue is precisely that of labelling as 'irrational' those cultures that have not developed a liberal democratic conception of rights (Rorty 1996, pp. 63-4). Rorty emphasises that the very readiness to interchange with other cultures is a precious discovery of 'recent liberal culture". The latter is to be conceived of as «an *ethnos* which prides itself on its suspicion of ethnocentrism – on its ability to increase the freedom and openness of encounters, rather than on its possession of truth» (Rorty 1991, p. 2).

Thus Rorty's 'frank ethnocentrism' values the language of rights without attaching universalist value to it. However, in Rorty's conception of a gentle intercultural dialogue, the West, and the United States in particular, remain in the paternalistic position of having a ready normative recipe; on the contrary, in the evolution of Western society referred to by Rorty, rights have not been granted paternalistically; they emerged 'from below', they were born out of demands of recognition, claiming, social conflict.

b) Precisely this aspect determines the distinctive character of the language of rights with respect to other deontological codes. Many nineteenth and twentieth century formalistic legal positivists tend to reduce rights to law, claiming the priority of state law over rights. But authors as diverse as Alf Ross, Herbert Hart and Neil MacCormick have criticised the reduction of rights to the counterparts of duties (Ross 1958; Hart 1984; MacCormick 1977). There is a semantic surplus of the language of rights over the language of duties, and there is, I think, a corresponding symbolic surplus (la Torre 1996, p. 338). The picture of a society without the notion of rights is the dystopic metaphor through which Joel Feinberg connected the notion of a right to "the activity of claiming". For Feinberg the distinctive use of rights is "to be claimed, demanded, affirmed, insisted upon"; most of all, "it is claiming that gives rights their special moral significance": "having rights enables us to 'stand up like men', to look others in the eye" (Feinberg 1980, p. 151). In my view this feature makes the language of rights especially suitable to take up the *ex parte populi* perspective, to express, in Ferrajoli's insightful words, "the reasons of below against the reasons of above".

If a 'claiming' element, related to the concept of human dignity, is characteristic of rights, it should also be emphasised that the very origin and development of rights is connected with claiming and conflict. In Frank Michelman's 'republican' theory of the constitution rights are conceived of as "a relationship and a social practice" (Michelman 1986). Basic rights emerge from and are grounded on the process of elaborating and transforming legal principles: a process Michelman calls political jurisgenesis. Michelman attaches special value to the legal order and the social and economic conditions enabling *active citizenry*, watchfulness against domination. Hence «a republican attachment to rights» (Michelman 1988, pp. 1505-6). On the one hand people's political activity is seen as "the sole source of right and guarantor of rights"; on the other hand law in general and rights in particular are seen as "the preconditions of good politics":

> republican thought thus demands some way of understanding how laws and rights can be both the free creations of citizens and, at the same time, the normative givens that constitute and underwrite a political process capable of creating constitutive law (Michelman 1988, pp. 1404-05)

Basic rights are thus on the one hand a precondition of citizenship – in the sense of active membership of the legal and political community, of a capacity for mobilisation within a wider communication process – and on the other hand its product. The actors in the process of *political jurisgenesis* are institutionalised deliberative bodies, adjudication (*in primis* constitutional) and all arenas of public debate open to citizens that achieve a "potentially transformative dialogue".

An important thesis of Norberto Bobbio can be mentioned in this connection. With an insightful oxymoron, Bobbio says that "natural rights are historical rights" (Bobbio 1992, p. VIII; cp. *ibid.*, pp. XII-XV; Ferrajoli 2001, pp. 148-49), i.e., "they were born in given circumstances, characterised by struggles for new liberties against old powers, gradually, not all together and not once for ever"[6].

The idea of rights originating from conflict has significant historical roots. Here some members of early modern republican tradition could be referred to. Such authors as Algernon Sidney, Baruch Spinoza and Adam Ferguson connect a Machiavellian positive evaluation of conflict with the language of rights. In Ferguson's *Essay on the History of Civil Society* social conflict drives the development of new institutions and constitutional innovation. This apology of social conflict is linked to Ferguson's use of the language of rights. Like Hobbes, he sees human nature as the foundation of rights, but not in the rationalist meaning of modern natural law theory. Rather, rights express a general human feeling of self-affirmation and dignity:

> Every peasant will tell us that a man hath his rights; and that to trespass on those rights is injustice. If we ask him farther, what he means by the term *right*? we probably force him to substitute a less significant, or less proper term, in the place of this; or require him to account for what is our original mode of his mind, and a sentiment to which he ultimately refers, when he would explain himself upon any particular application of his language (Ferguson 1789, p. 5).

Such an idea seems to express something similar to the feeling of hostility to domination which is, for Philip Pettit, the root of the republican conception of "freedom as non domination". In Ferguson's *Essay* there is a recurrent apology of what might be called, after the title of a well known essay by Rudolf von Ihering, the "struggle for rights". While moderation and a disposition to adjustment may turn into political indifference, civic virtue shows an ineffaceable feature of activism and expresses itself through the capacity for mobilisation: being content with established rights jeopardises liberty Freedom is a right to be claimed; seeing it as an *octroyé* privilege is to lose its meaning; institutions are not enough to defend freedom: what is required is a ceaseless disposition by the members of communities to "insist on their rights"(*ibid.*, pp. 302-3).

My hypothesis is that a deeper consciousness of the importance of this apology of conflict in much of the republican tradition might advance original theorising. Precisely the recognition of this conflictual trait seems to me to help grasp what in the language of rights tends to go ahead of its peculiarly Western legacy. I think that this element, even though it is itself a distinctive expression of Western culture, is more likely to be recognised and valued within other cultures.

As we have seen, dealing with the problem of 'translating' the language of rights, some authors have proposed the solution of searching for shared demands of justice or transcendent normative codes. An alternative solution seems to me to be much more viable: valuing the ideas of claiming, of demanding recognition, of opposing domination and oppression. I do not think that the ultimately universalist element of basic rights is to be sought in their content, so much as in the

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[6] "They were born in given circumstances, characterised by struggles for new liberties against old powers, gradually, not all together and not once for ever. [...] freedom of religion results from the wars of religion, civil liberties form the struggles of parliaments against absolute sovereigns, political and social liberties from the raise, growth and maturity of movements: of waged workers, of peasants with little land or no property, of the poor asking government not only the recognition of personal and negative liberties, but also protection against unemployment and the first essentials of education against illiteracy, and then help for disability and ageing [...] rights are not born all together. They are born when they must or may. They are born as the increase in the power of man over man, which invariably follows technical progress, i.e. the progress in men's capacity for dominating nature and the other men, creates new threats to individuals' liberty or makes new remedies against their destitution possible (Bobbio 1992, pp. XIII-XV). Ferrajoli too claims that the law "is the outcome […] of different generations of struggles and revolutions which historically shaped it, building corresponding generations of basic rights into it" (Ferrajoli, 1999, p. 70).

commitment to assert, claim, mobilise to get them. In many situations individuals and groups tend, more or less spontaneously, to wish to acquiesce, to be reassured by dependency. What the 'other' cultures – better: the oppressed within the 'other' cultures – are likely to recognise in the Western language of rights is precisely the valuation of the act, at least as distinctively human, of standing up and reacting, of asserting one's dignity: something similar to Kant's "exit from minority". Moreover, they recognise the flexibility and the possibility to conceptualise needs, interests and expectations, so as to find out legal techniques to protect them.

That is, the language of rights is one of the most versatile devices for "transforming" values, demands and claims as they are worked out within a given society into legal principles and norms, which in turn require the development of techniques of protection and enforcement. This holds true, *mutatis mutandis*, in the supranational dimension too. There is no talking of a world civil society, nor Kelsen's idea of a – albeit embryonic – *civitas maxima* can be credited (see Zolo 1998). Even at the supranational level, however, a circulation is produced of issues, questions, values, principles that react upon the domestic processes of jurisgenesis. A circulation – incidentally – that some actions of Western powers risk compromising.

I can now turn back to my initial remarks concerning the use of human rights as a higher normative code in managing international conflicts and controversies. I have already mentioned critiques of 'wars for rights' based on *universalism of entitlement*: a massive military action will end up with a violation of the human rights – first of all the right to life – of those whose human rights are allegedly being protected. Moreover, it has been argued that modern war is a phenomenon outside the control of law and is by its very nature inadequate as a means of protecting rights (Zolo 2000, pp. 111-17). These views can be supported by arguing *against universalism of foundation.* Acknowledging the historical and cultural connotation of human rights and, most importantly, admitting that there is no universalist foundation available demotes rights from their status as first absolute principles, as higher unquestionable requirements. What is in question is rather the universalisation of human rights and this requires a painstaking, difficult and calm work of dialogue and translation. On this view human rights express principles –human dignity to begin with – that are of the highest value, but need be balanced and weighed against other principles, *in primis* the defence of peace: *fiant iura, pereat mundus* is untenable as a position. Finally, acknowledging the – genetic and conceptual – link between rights and the activity of claiming them, conflict, the establishing of individuals' and groups' liberties against forms of public and private domination rules out any attempt to impose rights. Exporting rights under the wings of NATO bombers would result in a failure similar to that of Red Army exported socialism: the spread of human rights cannot go without a difficult and conflictual process of collective learning.

The only way to a prospective universalisation of the language of rights is interchange and dialogue among different cultures, always depending on a previous *decision*: a willingness to engage in dialogue. On this view the language of rights should be presented, so to speak, as one tribe's contribution to a debate with other tribes. It is a valuable contribution, that achieved remarkable successes. It is expressed in a language that turned out to be especially adaptable, and has already been adopted by many actual or potential interlocutors, in some form at least. On the other hand it is the idiom of a tribe that should always be aware that in the past it wielded a ruthless economic, political and military domination over other tribes (even capitalising on this language). To present 'human' rights as natural, absolute and universal is not the best way of introducing them as reference values in intercultural dialogue. Starting with an awareness of their irreducibly contextual character, and engaging in dialogue on this basis, seems much more promising.

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