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HUMAN RIGHTS: A SECULAR RELIGION WITH LEGAL CROWBARS. FROM EUROPE WITH HESITATIONS

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HUMAN RIGHTS: A SECULAR RELIGION WITH LEGAL CROWBARS. FROM EUROPE WITH HESITATIONS

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Abstract — *This contribution offers to steer a discussion on the constitutive stance of fundamental rights in Western legal systems. The story of the democratic constitutional state, a story of rule of law and human rights, is an already 250 years old utopia, which strangely persists despite long-standing patterns of slavery, war, torture, poverty, hunger, deportations, racism, and other unfavorable matters to human rights. This paper aims at questioning this perpetual paradox. After an historical assessment of human rights, we maintain that the traditional narrative emerges as the result of an interchangeable religious process: human rights as the gospel of a secular religion. Despite this, our perspectives on the rights apparatus can be adjusted by a more realistic vision of legal practices. Under certain conditions, human rights can function as legal crowbars in courts. With the crowbar metaphor, we adopt a constructive and pragmatic approach to human rights. Yet, what stands out is an expectation to move beyond the human rights axioms, rather than an endeavor to fix them. Ultimately, we suggest that other less toxic frameworks could replace traditional human rights narratives as constructs that may better realize our hopes.*

"Crowbar: an iron or steel bar that is usually wedge-shaped at the working end for use as a pry or lever."

– Merriam-Webster Dictionary.

"The master's tools will never dismantle the master's house."

– Audre Lorde's clarification on crowbars.[1]

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1 Audre Lorde, *Sister Outsider: Essays and Speeches* (Penguin 2019) 103.

> "There is a crack in everything, that's where the light gets in."
>
> – Leonard Cohen's clarification on crowbars.

I. INTRODUCTION

This contribution presents several leads for a discussion on the importance of fundamental rights. The ease with which fundamental rights are 'declared',when it is convenient, or laboriously (re)implemented, along with the clear grip of state politics on regional human rights courts, raise questions about the constitutive importance and continuity of fundamental rights in Western legal systems.

The traditional narrative of human rights in constitutional democracies constitutes the starting point of this contribution. As European academics, we can but strongly hesitate in promoting a success story to our students and throughout the world. The story of the democratic constitutional state is an already 250-year-oldutopia, which persists despite slavery, war, torture, poverty, hunger, deportations, racism, and even more discouraging matters to human rights concerns. In this view, this paper aims at questioning what is perpetuating that contradiction. It attempts to understand the role of human rights in upholding the belief against the contrast of its harsh factual negation – that is the "religion" part. Subsequently, we try to argue that beyond the abstract rhetoric, human rights are, even if local and modest, interesting legal arms – that is the "crowbar" part.

In our opening section we discuss the dominant liberal doctrine of states protecting human rights (Part II). We then review the development of the doctrine's foundational pillars– ownership, individual freedom, state's self-restriction, and democracy –in the historical context of early industrialization and capitalism (Part III). That is followed by a description of the codification of the doctrine and its pillars in constitutions and international human rights treaties (Part IV). In the following section, we discuss several well-known objections and open issues concerning the traditional doctrine: internal contradictions and the wake-up call of reality (Part V). These positions offer us good reasons to go back to some of the foundational moments in the history of the traditional narrative. Among these,the rediscovery of universal human rights after the Second World War (Part VI) and the translation of (some of) the ideas taken from the Universal Declaration of Human Rights into the American and European regional human rights systems (Part VII). Subsequently, we test the performance of the European system with its 1950 Convention on Human Rights and its European Court of Human Rights ('ECtHR') (Part VIII).

The outcome of this itinerary varies and does certainly not provide reasons to claim global authority even for the performant European human

rights regime. Modesty imposes itself. There is no universal truth in the classic human rights story, even if, conjugated with democracy, it is imposed and nudged globally as an objective benchmark. In this respect, it is argued that the traditional narrative appears as the outcome of an interchangeable religious process (Part IX). A way forward might be not to do away with the legacy and use it for what it's worth in the political arena, especially as regards the formulation of alternative political frameworks (Part X). But next to this, and *in concreto*, the legal practices do permit us to tune our expectations about the rights language and apparatus more realistically: indeed, in courts, human rights can function as legal crowbars under certain circumstances, partly dictated by the (locally-embedded) methods and constraints of law (Parts XI and XII). Going back to presenting human rights as a religion –or ideology –in our final section (Part XIII), we take stock of less-toxic alternatives within (Part XIV) and outside human rights studies (Part XV).

The crowbar metaphor in our title suggests a constructive and pragmatic approach to human rights. We rely on a large body of (self-)critical human rights literature that discusses overstretched human rights genealogies, universalist pretentions, blind reliance on individualism, inability and unwillingness to correct market forces, dubious interpenetration by economic agendas, disrespect for enabling rights, and local cultural and democratic forces.[2] However, our historical opening sections and final discussion clearly express our willingness to go beyond the human rights axioms, rather than to fix their system. We conclude that more time and thought are needed to seek out better narratives to make this world a better one.

II. THE TRADITIONAL WESTERN NARRATIVE OF STATES AND INDIVIDUAL RIGHTS

Western constitutional democracies preserve and cherish deeply rooted founding stories. These founding narratives are not only entrenched in their constitutions but have also been successfully exported everywhere through political colonisation and further-ongoing economic exploitation or neo-colonialism. Human rights, usually regarded as higher standards, are also anchored in the treaties of present-day international and supranational organizations. Within these frameworks, the Western state concept has been elevated to an axiom, representing a universal benchmark of political organization and institutionalisation. Indeed, the founding story is frequently naturalised to the point that for some authors it even 'ends history'.Moreover, its basic concepts – rule of law, democracy, human rights –have often been turned into sacred cows and overarching standards, around which one has to walk very cautiously. The underlying tagline that 'democracies, and constitutional democracies in

[2] The inventory we take is personal. Not all standard references in (Anglo-Saxon) literature will be discussed.

particular,are the least bad systems' and, indeed, the most feasible ones, only increases the feeling of inevitability: the tag line immediately dismisses any alternative as an unrealistic utopia.[3]

Of all the versions of the founding story, the one including a 'social contract' is the most widespread and best-known. In between the chaos of 'every man for himself' and the absolute power of the sovereign, a middle course unfolds in an interplay between political movements and the development of philosophical ideas. Here, state power is constructed to ensure that individuals can enjoy their fundamental ('natural') freedoms and rights, perhaps not limitlessly, but substantially and to the maximum. Because of this premise ('individuals keep as much prerogatives as possible'), state power can call itself legitimate, for the 'primeval sovereignty' belongs– and that idea is the primordial assumption– to the individual human being with his freedom and his property.

For Locke and Beccaria, individuals decide, by means of a social contract, to surrender a minimal part of their sovereignty to the state, which in turn must protect the maximum (the remainder) of their liberties. To protect themselves, individuals voluntarily sacrifice some of their freedoms to become part of a political community, which must then secure those rights. Such state administers police and punishes in order to protect the freedom of endangered individuals against others (i.e.,the 'night watchman state'). In other words, an order is established that both enables and guarantees freedom.

For Hobbes, Rousseau, and Kant, something as the public/general interest or *res publica* also needs to be negotiated and considered when 'signing' the contract. This more elaborated version of the social contract idea has deeply influenced the common understanding of the role of the state in today's political Western self-representation. Although there are many hybrid forms of social contracts, there is a constant feature that, in order to legitimize and introduce limits on individual basic freedom/sovereignty, states can invoke not only the rights of other individuals but also,to a greater or lesser extent, the general interest (which make possible more authority but welfare-states as well).[4]

For social scientists, such foundational stories are a construct that has no empirical basis. Nevertheless, it is a convenient way for lawyers to establish

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[3] Of course – and fortunately, as far as we are concerned – there are also iconoclasts, but they are a minority. G. Deleuze and F. Guattari, to name but a few, writeunequivocally, "*L'européanisation ne constitue pas un devenir, elle constitue seulement l'histoire du capitalisme qui empêche le devenir des peuples assujettis*". *See*, Gilles Deleuze and Felix Guattari, *What is Philosophy?* (Columbia University Press 1996). We'll come back to that other story later on.

[4] For social scientists, such a founding story is evidently a construct that has no empirical basis, as no one has ever concluded a contract with everybody else. Nevertheless, the theoretical foundation story sustains very real institutions and also provides legitimacy and reference in the practices that result from them (political and legal practices, for example).

bridges between a pre-legal and a legal story. Unlike political philosophy, yet, the law seldom recognizes 'freedom', or 'a right to liberty', but prefers the language of human 'rights' (in plural).[5]

III. OWNERSHIP, FREEDOM,STATE RESTRICTION AND DEMOCRACY: THE NEW CORNERSTONES

This liberal founding story, with its historical creation of institutions, mechanisms of representation, rights and freedoms, blends seamlessly with the interests of the developing merchant class in the 17th-18th century. Through the wealth acquired by means of trade and production, these stakeholders– or *tiers état* in Abbé Sieyès' famous 1789 pamphlet– were able to put pressure on the power and influence of the two other 'estates' (nobility and clergy) through their claims: freedom of trade(s), security of property and investment, protection and legal certainty against the arbitrariness of those in power, and against the violence of the unpredictable plebs.

In England, this proto-capitalist process started with the brutal dismantling of the commons and the rise of Protestant traders in the wake of Thomas Cromwell.[6] Locke dare dacrucial additional move in the justification of this development by linking his property right[7] to the requirement of productivity and thus to general prosperity. Ownership must be enforced to the maximum because this will increase productivity, which in turn is good for everyone

[5] Under the influence of Locke, many framers of the American Constitution believed that individuals are free in a state of nature, but when they form a government, rights and powers are delegated to that government unless reserved by the people. Many others– amongst others Madison – opposed this view and felt that any attempt to enumerate all rights retained by the people would result in the unintended exclusion of some, resulting in a construction that they had been delegated to the central government, or that the rights of individuals were too numerous to enumerate. The Ninth Amendment was written to answer Madison's initial opposition to enumeration of rights but has no impressive track record. *See*, David Helscher, '*Griswold v. Connecticut* and the Unenumerated Right of Privacy' (1994) 15(1) Northern Illinois University Law Review 33.

[6] About these developments, see the beautiful historical novels by – Hilary Mantell, *Wolf Hall* (HarperCollins 2009); *Bring Up the Bodies* (HarperCollins 2012); *The Mirror and the Light* (HarperCollins 2020).

[7] For Locke, ownership is individual and exclusive. It is part of the basic set of natural rights where everything originates and begins– *life, liberty and estate*: "Man being born, as has been proved, with a title to perfect freedom and an uncontrolled enjoyment of all the rights and privileges of the law of Nature, equally with any other man, or number of men in the world, hath by nature a power not only to preserve his property—that is, his life, liberty, and estate, against the injuries and attempts of other men, but to judge of and punish the breaches of that law in others."*See*, John Locke, *Two Treatises of Government* (Peter Laslett ed, first published 1689, CUP 1988) ch 7. For the American revolutionaries in 1776, this basic set of natural rights became, under the influence of Bentham's utilitarianism, 'life, liberty and the pursuit of happiness', whereas Article 2 of the French Declaration of 1789 elevates '*la liberté, la propriété, la sûreté, et la résistance à l'oppression*' to '*droits naturels et imprescriptibles*'. Let it be clear that these declarations are not the work of political philosophers but of revolutionaries who adapt philosophical work to suit their own purposes, according to the constellation and needs of the place, the moment, the situation.

(nowadays, this is called the 'trickle down' doctrine: the rich become so rich that just the crumbs would suffice to satisfy the others). Locke's argument also worked extremely well outside Europe. The native peoples in North America were so stupid as to just 'enjoy' the harvest of the land without exploiting it by extraction or making it productive. Therefore, they indeed couldn't claim ownership of it. Thus, according to the Locke doctrine, that land was immediately declared *terra nullius*. Consequently, it was bloodily but legitimately appropriated by the newcomers who had been smart enough to invent the right of ownership and,together with themselves, imported it there, no doubt with the common good in mind.[8]

In all versions of the Western founding story, two must-haves are invariably insisted upon: fundamental freedoms (fundamental rights) and the idea of checks and balances or 'the rule of law'. Both are buffers against the exaggerated exercise of state power, understood as a destroyer of freedom.[9] Fundamental rights and freedoms operate not only as shields against the power exercised upon individuals (this is their 'negative' or defensive/disabling side) but also as a basis for the participation and emancipation of individuals in collective and political events (this is their 'positive' or emancipatory/enabling side).[10] In turn, the requirement of checks and balances ensures that legitimate exercise of power is only acceptable when it is pluri-centric or when, as Montesquieu put it, *par la disposition des choses, le pouvoirarrête le pouvoir*or, freely translated,when as a result of the arrangement of things, there is always a power to stop another power. Connected to this, is the requirement that government should be bound by its own rules and can only remain politically legitimate if its deeds can be reconstructed as the proverbial 'emanation of the will of the people' or popular sovereignty (elections, representation, etc.).

A third must-have was added in the twentieth century, giving the story of the superiority of the Western political system its present form: a form of

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8 S Gutwirthand I Stengers, 'Le droit à l'épreuve de la résurgence des commons' (2016) 1 Chronique: Théorie de droit, Revue Juridique de l'Environnement306-43.

9 Both elements, balance of powers and fundamental rights, can already be found in Locke's *Two Treatises*, which describes the establishment and functioning of the legislative and executive branches, and contains the explicit message that the established political community doesn't just exist for its own sake, but aims to ensure the observance of fundamental rights ('the mutual preservation of their lives, liberties and estates').

10 On the disabling and enabling functions of human rights, (a distinction that can be traced back to Benjamin Constant and Isaiah Berlin) in the work of Habermas and Dworkin, *see*, Cornelia Schneider, 'The Constitutional Protection of Rights in Dworkin's and Habermas' Theories of Democracy' [2000] UCL Jurisprudence Review101–21. As mentioned above, property is given the main role, especially by Locke, who uses both a narrow ('estate') and a broad ('property') concept of ownership. The broad concept also includes the right to self-preservation and, to a greater or lesser extent, the right to individual freedom. The first chapter of the second Treatise states that the political powers (legislative and executive) must regulate and preserve ownership. The ninth chapter ('Of the Ends of Political Society and Government') states unequivocally that 'the great and chief end, therefore, of men uniting into commonwealth, and putting themselves under governments, is the preservation of their property'.

consensus grew on democracy as the optimal framework for shaping political structures that guard the fundamental rights of citizens.[11] With this coupling, Western democratic constitutional states gladly presented (and still present) themselves as the inventors and guardians of the form of government that banished dictators and autocrats.[12] Armed with the rhetorical power of 'universal' human rights – those that don't abide by the same standards are 'illegitimate' - liberal universalism took the right and duty on itself to impose its order on the rest of the world.[13]

The story did not stop there: it also claims to run counter fears the 'tyranny of the majority', as J.S. Mill called it. This is because constitutional democracy recognizes fundamental rights and freedoms that are actually protected against governmental intrusions via independent judges that form the third pillar of power.[14] Accordingly, we see how the three must-haves interact: balance of powers prevents majoritarian domination and becomes a guarantee for the respect of the 'recognized' or 'confirmed' natural rights of the individual[15] by governmental actors and by(the other) citizen.[16]

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[11] On the role of thinkers such as Habermas (on rational grounds) and Rorty (on pragmatic grounds) in creating this 'inevitable connection' between rule of law, human rights and democracy, *see*, ChantalMouffe, *On the Political* (Routledge 2005)ch 4.

[12] This is notwithstanding that democracy has almost entirely been reduced to the majority rule (at 49.9% you do not emanate the will of the people, at 50.1% you do). Such majority rule has been used extensively and formed the essential feature in many modern western democracies. Despite constitutional democracies' claims of equality and fair representation, minority interests are easily susceptible of being trumped by majoritarian decisions, of which the majority rule becomes an instrument, as much as by a tyrant or despot.

[13] Mouffe (n 12) ch 4, with reference to the work of Carl Schmitt, who was the first to point out the use by liberal universalism of universalist and humanist concepts as ideological weapons for imperialist expansion.

[14] The idea can be traced back to Locke's formulation of the right of resistance and his argument that every individual should step out any political system that performs worse than what the individual should experience in the state of nature. Each individual, endowed with reason and a capacity for critical thinking, hence becomes an independent referee in judging the institutions created. All individual count in the Lockean view, and Locke leaves no doubt that a system of independent magistrates and judges is needed for that additional legal protection, a function that cannot be performed by the executive or legislature.

[15] As a necessary consequence, democratic constitutional states must in theory be colorful, because it means nothing less than that diversity of thoughts, visions, opinions, behavior, relationships, views on the 'good life' and 'philosophies of life' are an essential characteristic of it: that's what individual human rights do. Homogeneity, monophony and identity are to give way to heterogeneity, polyphony and diversity. Thoughts, words and behavior are free: the first absolutely, the second a little less absolutely, and the third maximally, until it clashes with the behavior of others or the public interest. At least, that is the case in principle, that is how it is stated in the political architecture of the human rights treaties and constitutions. This aspect of the rule of law-idea indeed leads to tensions with nationalist and identitarian movements, which are at loss about how to handle the freedom of the minority and the individuals to differ from what defines group identity. In addition, a multitude of information and communication techniques of cultural homogenization, levelling and desensitization are flourishing.

[16] On the basic ingredients of the democratic constitutional state, more in S Gutwirth, 'De polyfonie van de democratischerechtsstaat' in Mark Elchardus (ed), *Wantrouwen en onbehagen: over de vertrouwens – enlegitimiteitscrisis* (VUB Press 1998)137-93.

IV. THE CODIFICATION OF THE DEMOCRATIC CONSTITUTIONAL STATE

No one can deny that the story of the democratic constitutional state is rock solid and successful. It is, after all, the benchmark of 250 years of state theory, state building and political legitimization in precisely that part of the world that was so powerful that it could conquer or contaminate almost every other territory, together with its symbionts, the free market and productivism. It is and remains a story that belongs first and foremost to the register of political philosophy,economic thinking,balancing conflicting interests and power relations. Nonetheless, it was also codified, often in an impoverished and scattered form, into very weighty formal sources of legislation: national constitutions.

Western constitutions are the expression of the ideas both of the rule of law and representative democracy protecting individual rights.[17] With a little imagination, it can be stated that such constitutions embody the primordial 'social contract' that our founding ancestors have drafted and signed all with all, in a figurative sense. Logically, such constitutions can, in principle, only being renegotiated under exceptional conditions. From this point of view, the American Constitution is indeed *the supreme law of the land*, the ECHR is a kind of highest standard for the member states of the Council of Europe, and the WHO treaties sacralize the 'laws of the market' as a global constitution (much more so, incidentally, than the UN human rights declarations and treaties have).

Besides their enforceability,constitutions are important first and foremost because they are strong political documents: political statements that usually break with a past on the basis of affirmed power and with a view to shape and control the future. They immortalize an historical victory and the program that made it emerge. Nonetheless they are also high formal sources of law, which not only have an impact on the work that lawyers, courts and tribunals deliver, but also influence the actions of political institutions. As a matter of fact, due to their high degree of abstraction theyobviously cannot suffice on their own. Power is thus usually further delegated to institutions, which are then presumed to act under and in accordance with the constitution. A constitution thus represents a kind of fundamental axiom upon which the whole legislative system is based and from which it is supposed to result and emanate (cf. Kelsen's dream).

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[17] Beyond the liberal Enlightenment, this double grounding goes back to the *Gleichursprünglichkeit* of democracy and rule of law in the old Athenian polis.This term refers to the concept of co-originality or co-primordiality as advanced by Habermas with respect of public and private autonomy. In his view, the concepts are internally related and co-original.*See*, Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*(William Rehg tr, MIT Press 1996).

But unlike geometry, there can be no question of mathematical correctness here. Every constitutional deduction is an interpretation and not every extension of the limits drawn by the constitutions is de facto checked or disputed. The subsidiary legislation built upon the Constitutions is therefore supposed to continue the big project, but in such a way that it can live on in complex situations and new circumstances.[18]

V. COUNTER INDICATIONS FROM REALITY

For Deleuze and Guattari, human rights are only one possible axiom amongst others.[19] In their view one can have as much democracy, rule of law and human rights as he or she wants: completely unacceptable things continue to happen at national level (when demonstrations by the poor are being repressed),or at global level. After all, Western democratic constitutional states have grossly enriched themselves through a toxic combination of slavery, looting, extraction, racism and pollution embedded in a 'humanist' catechism, whether secular or not.[20] Nowadays, this practice is made painfully evident at the borders of the European Union and the USA, in the famine areas of Africa, in Yemen, in Syria. Likewise,it manifests itself in climate disruption, drought, the melting of poles and glaciers, the locust plagues, hurricanes and storms, desertification, resource depletion, the extinction of species, and yes, of course, the upcoming of zoonotic diseases... 'Brutalism' is at work everywhere.[21]

The insane gap between rich and poor (264 individuals own more than 7 billion others[22]), between hunger and shameless waste, between health and sickness/death, between perspective and despair is far from being a neat divide between safely demarcated regions of the world. Rather, it can be observed within every single democratic constitutional state. There are

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[18] As a result, open questions keep emerging, to which constitutional judges are rarely able to formulate clear and consistent answers. Exhaustive studies of specific casesdo not lend themselves to reduction of complexity; on the contrary. This will become apparent when we talk about human rights.

[19] '*Les droits de l'homme sont des axiomes : ils peuvent sur le marché coexister avec bien d'autres axiomes, notamment sur la sécurité de la propriété, qui les ignorent ou les suspendent encore plus qu'ils ne les contredisent ... Quelle social-démocratie n'a pas donné l'ordre de tirer quand la misère sort de son territoire ou ghetto*'. *See*, Deleuze and Guattari (n 4) 104.

[20] Raj Patel and Jason Moore, *A History of the World in Seven Cheap Things: A Guide to Capitalism, Nature, and the Future of the Planet* (University of California Press 2018) 328.

[21] Joseph-Achille Mbembe, *Brutalisme* (La Decouverte 2020) 246. This creates new and additional 'racial' dividing lines or specifications, wealthy people vs. impoverished people, people with private real estate that cannot be expropriated vs. collectivities whose territories can be bloodily seized and destroyed, 'mobile' (merchants, international congressional classes and tropical holidaymakers with a towering ecological footprint) vs. 'drifting' (refugees, economic and climate migrants who are going to cost money) people, filterable people that are welcome at the borders vs. returnable or deportable unfilterable people, and consequently more and more discrimination and harsh exclusion, also within the borders (asylum centers, prisons, shelters, etc.).

[22] Alain Badiou, *Trump* (Polity Press 2019) 104.

just no equal opportunities, equal starting situations, or equal liberties. Besides,discriminations due to lack of money are a dime a dozen.

Against the backdrop of these data, many human rights provisions enshrined in constitutions turn into hollow words. If individuals ideally are equal and enjoy equivalent inalienable rights by nature, the real-lifelack of equal opportunities infers the very failure of constitutional democracies to uphold the human rights they have elevated as supreme values. They seem to be the provider *and* the gravedigger of those rights at the same time. As the late David Graeber put it: 'States have a peculiar dual character. They are at the same time forms of institutionalized raiding or extortion, and utopian projects. The first certainly reflects the way states are actually experienced, by any communities that retain some degree of autonomy; the second however is how they tend to appear in the written record'.[23] So, the Western foundational story has two different faces: a story of hope versus lives in despair, a far utopia made of abstract projections versus a harshreality. Hence, the next question: what role do human rights play in upholding the utopia notwithstanding misery and suffering?

VI. THE REDISCOVERY OF UNIVERSAL HUMAN RIGHTS AFTER THE SECOND WORLD WAR

Even though human rights were solemnly proclaimed during the liberal revolutions and upheavals of the 17th and 18th century, on the grounds that they were given to each man by nature and that hence they are universal rights, *as such* they actually disappeared quite quickly from the scene. This immediately nipped the upsurge of universalism in the bud. This is very clear in France where their universal existence was solemnly proclaimed in the *1789Déclaration*, but that narrative was very quickly replaced by an opposite one, wherein they are *provided* for *citizens* through positive law. In that process things get lost indeed.[24] The French constitution of 1875 did not even contain a chapter on fundamental rights anymore, in sharp contrast with the highly proclaimed universalism in the *Déclaration* of 1789.[25] But things also get lost in the process of enumerating the individual rights. Constitutional

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[23] David Graeber, *Fragments of an Anarchist Anthropology*(Prickly Paradigm Press, 2004) 65.

[24] We already briefly pinpointedat the process of focusing on rights and liberties (plural) rather than on liberty (all). For an attempt to bring freedom or liberty 'in' via the right to privacy understood as a liberty, *see*, Serge Gutwirth and Rathenau, *Privacy and the Information Age* (Rowman & Littlefield 2002) 150. For an opposite attempt to undo privacy from all its liberty-components and to reduce it to 'a right', *see*,Amitai Etzioni, *The Limits of Privacy* (Basic Books 2000) 288. For a discussion of the right to privacy as an unenumerated or 'penumbral' right that could be found via the Ninth Amendment, *see*,Helscher (n 6).

[25] Yannick Bosc, *La Terreur Des Droits De l'Homme* (Editions Kime2016) 297. This 'empty' constitution has one merit: its limited aspirations corresponded much better to the harsh reality of slavery and slave trade, institutional racism, women without rights, poverty, disease, hunger.

chapters on human or fundamental rights along the world tend to vary in length. While some texts are longer, those enacted in the early days of modernity were particularly short.

These shifts are no accident: if natural and inalienable rights and freedoms constituted a particularly welcome and strong argument of legitimacy in the fight against the despotic, absolute and arbitrary power of the former monarchs, it quickly turned out they could also be invoked *against* the liberal bourgeoisie itself,especially if dissociated from property and wealth.[26] Therefore,human rights quickly fell into disfavor with some important liberal thinkers, as diverse as Burke, Bentham ('nonsense upon stilts') and Emmanuel-Joseph Sieyès, who like Locke see the protection of individual property as a condition and guarantee for general prosperity. The 'terror of the human rights' was ended in 1795 - their non-bourgeois liberal interpretation (by Robespierre amongst others) was blamed for the chaos and bloodshed - and from then on, after the end of the revolution (Napoleon is on the rise), the French state's further development was marked by that very *defeat* of the *droits de l'homme*.[27]

Consequently, from 1795 onwards, human rights become something quite different. No great quasi-Biblical proclamations derived from nature or God, but civil and political prerogatives recognized by national legislation that make human rights conditional and restrict them in all kinds of ways. 'Natural law' and political philosophy lose out to legal positivism and *realpolitik*.[28] *Ergo*: for a long time, they will mean very little or even nothing at all to non-owners and impecunious people. Marx was unequivocal and viewed the proclaimed human rights merely as the legitimation of the self-centered and selfish bourgeois owners' privileges: to him they are ideological mystification, mock equality and empty words.

In the mid-twentieth century universal human rights seem to resurrect with an important shift from national citizen's rights protection to international human rights protection. Only after the shock of the Second World War, in other words after a century and a half, human rights make a comeback as universal values, and they do so in the very weak realm of international law. Concretely, however, this reconversion took place in the cenacles of the newly founded United Nations which then only consisted of forty-nine states instead

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[26] This is also what Robespierre and his people intended and indeed translated into what went down in history as 'the terror'.

[27] The 1789 *Déclaration* disappears for almost two hundred years in the French freezer, only to reappear in 1971 in the 'bloc de constitutionnalité' at the initiative of the French *Conseil Constitutionnel.*

[28] On the importance of reading constitutions thoroughly, without being blinded by liberal democracies' fairy tale, *see*, Gunter Frankenberg, *Comparative Constitutional Studies Between Magic and Deceit* (Edward Elgar 2018) 360.

of today's 193.It is in this far from ideal and trust-inspiring setting[29] that the 1948 Universal Declaration of Human Rights (UDHR) saw the light.

Three years after the end of World War II, the agreement reached was in fact a shameful failure. Instead of the announced globally binding treaty as the international community's great reaction to the 'barbaric acts' and 'contempt for human rights' of the Second World War,it was no more than a half-hearted compromise. Because a binding treaty proved impossible,the UN opted for a *Universal Declaration*, a non-binding resolution of the General Assembly.

This Universal Declaration sets out the 'minimum standards' that should guide humanity and that were intended to become a global benchmark.[30] It recognizes 65 rights including not only the more or less traditional liberty rights (conscience, religion, freedom of opinion, privacy...) but also fundamental social rights and rights for specific categories such as prisoners and refugees.[31] Its preamble is drafted in universalist terms,[32] with a revival of natural law terminology, although without reference to God.[33]

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[29] The reasons are lack of credibility of the superpowers of the time, lack of legal mechanisms in international law to protect individuals against their states, and conflicting views on the kind of human rights that should be protected. First of all, the superpowers of the time have no credibility at all (perhaps much less than the revolutionaries of the 17th-18th century) when they pay lip service to human rights' universality: the European states are world champions of their violation in the colonies, the USSR is systematically riding roughshod over them and treats large sections of the population as cattle, and the USA has its hands full with violent segregation and apartheid. Next, international law doesn't know what to do with universalism: it's all very nice to pretend that from now on each individual person has become a 'subject' of international law, but legally it makes no sense, since there is no legal mechanism to guarantee any legal international enforceability of their rights and freedoms to the nationals of states that do not enter into and ratify treaties on the matter. This point is still problematic today, despite the many attempts to mobilize international custom and *ius cogens* to do so. And finally, it appears that some people think of 'human rights' in terms of liberal freedom rights, civil and political rights, and others of equality rights, or social, economic and cultural rights, and still others of the right to decolonization and the self-determination of peoples. The discourse is empty and the consensus is superficial. Everybody believes in human rights, or pretends to believe, many speak of their indivisibility, but in practice it's mostly just discourse, and even before any action can be taken, schisms and schools appear.

[30] Universalism is flawed from the get-go as the Eastern Bloc, Saudi Arabia and South Africa abstain from voting.

[31] Sometimes it defies all imagination, such as Article 24: 'Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay'. Article 17 for its part contains a compromise between Western and socialist visions of productivism by giving everyone a right to property, alone as well as in association with others', coupled with a ban on arbitrary deprivation of this property.

[32] It concerns the 'recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family' which is a 'foundation of freedom, justice and peace in the world'. According to Article 1, all human beings are born free and equal in dignity and rights, and are endowed with reason and conscience, and should act towards one another in a spirit of brotherhood

[33] Although there is no explicit reference to God, the wording constantly suggests that the Declaration does not create rights, but rather ratifies and protects pre-existing 'natural' rights. On attempts by, among others, the Dutch representation to include a reference to God, *see*,

The value of the Universal Declaration is primarily symbolic and religious (*below*). Its inspirational power of faith is obviously great, considering the many references to the text in national constitutions, in 300 treaties and declarations on human rights at UN level alone. We will come back to these – sometimes binding- UN human rights conventions immediately. The non-binding Declaration will however gain legal force overtime: it has progressively become an instrument in a series of (more diplomatic than legal) procedures that can be conducted against UN members, including those that have not ratified specific (binding) UN human rights conventions.[34]

As such, the mid-twentieth century should not be retained as the era of rebirth of human rights. Rather, it marks the controversial lack of explicitly legally enforceable human rights mechanisms from which the individual, under the jurisdiction of a ratifying state, might benefit. In 1976 (after their ratification by 35 member states), two International UN Covenants, one on Civil and Political Rights (without the right to property!) and the other on Economic Social and Cultural Rights (with the right to paid vacations!) came into force. Both rely on unconvincing control and implementation – treaty-based- mechanisms which are always optional and will never lead to the establishment of a true international human rights court.

As already suggested, it took mankind decades to build up a more or less convincing international framework for human rights. And yet, we are still not there. Of course, the importance and weight of UN Conventions and the work of their bodies, in particular the *Human Rights Committee*, grows as

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Johannes Morsink, *The Universal Declaration of Human Rights; Origins, Drafting, and Intent* (University of Pennsylvania Press 1999) 396. Incidentally, the reference to 'human dignity' in the preamble is new with respect to the 18th-century texts we discussed above. On the natural law influences of the drafters, in particular of Jacques Maritain, *see*, E Gardner, 'Nature and Rights: The Meaning of a Universal Agreement on Human Rights' in Giuseppe Butera (ed), *Reading the Cosmos: Nature, Science, and Wisdom* (Catholic University of American Press) 215-28. *See also*, N Goetschalckx, 'The Mythic Universality of the Universal Declaration on Human Rights: Revisiting the Drafting History of the UDHR in Search of a Foundational Theory' in J Wouters and others (eds), *Can We Still Afford Human Rights? Critical Reflections on Universality, Proliferation and Costs*(Edward Elgar 2020) 27-46.

[34] Interpretation drives this development. The Declaration is regarded as a binding interpretation of the 1945 Charter of the United Nations (the foundational treaty of the United Nations) which *is* a binding treaty. The legal recognition of the 1948 Declaration and the fact that some of its provisions are invoked in relation to Member States that have not ratified the UN human rights conventions, should however not obscure the fact that the UN with its UN human rights arsenal is not ipse fact a human rights organization, but rather remains an *à la carte* device with players such as the United States and China who, for geopolitical reasons, conveniently and as much as possible, do *not* join the human rights arsenal. On the 'convenient' evasion by the United States of international obligations, also under Obama, regarding extraordinary rendition, *see*, N Kyriakou, 'The International Convention for the Protection of All Persons from Enforced Disappearance and Its Contributions to International Human Rights Law, with Specific Reference to Extraordinary Rendition' (2012) 13(1) Melbourne Journal of International Law1-38. More generally, L Hennebeland A Van Waeyenberge (eds), *Exceptionnalisme américain et droits de l'homme* (Dalloz 2009) 364.

more states sign them, with or without acceptance of the control mechanisms. Certainly, the UN is doing a great amount of work through other channels. It has set up a non-treaty-procedures (special rapporteurs and working groups mandated to work on a single human rights issue),[35] and created an additional UN body in 2006, the *Human Rights Council*, to investigate allegations of breaches of human rights in UN member states.

Political pressure of this kind certainly helps, but it does so in a piecemeal fashion, and very slowly. States are discreetly and cautiously, yet insistently asked to make efforts. Often, this dynamic unravels in a game of the 'pot calling the kettle black'. Alternatively, human rights end up being used to present and settle another account. Therefore, no matter how meaningful, those steps remain drops in the ocean, especially when it comes to social, economic and cultural rights. For the shepherd in the Kalahari-desert, the inhabitant of the favelas, Dharavi or the Brussels Marolles and so on, they mean nothing at all. And as those who have explored the world beyond the West know, the story there has still at best very little, at worst a counterproductive effect. In any case, it is a predominantly Western secular religion, just like the Judeo-Christian tradition with which it is in line and that provided for colonization and plunder as a world order.

We speak of a religion because, beyond the Universal Declaration's appeal to 'faith', human rights are claimed to be universal, inviolable, bestowed with an ultimate 'natural' authority that transcends the temporal and the real. They are raised as if they are pre-existing universal principles endowed with intrinsic moral value that, as such,pertain to the whole human species. They are properties of something bigger that the humans, be it Nature of God. Yet, this occurred within culturally specific and tradition-based contexts, as shown above. Consequently, Western culture or ideology,has been elevated and spread out through politically construed universalistic liberal individualist concepts of property, equality and freedoms, covered up as transcendental principles. That indeed denied and disrupted cultures, communities and collectives that did not at all identified with such world vision (cf. the preliminary eradication of the commons in Europe). The individual has been raised as master and sovereign of himself and the world by a nature or a deity conceived as a Western man. We might also speak of an imperialist ideology.

Notwithstanding, it is admirable how this poor balance does not make the UN capitulate, at least not some of its Member States and certainly not the UN administration. Treaties are being further refined. With every new proposed treaty, novel ideas are being incorporated to make collective and individual

[35] 'Special Procedures of the Human Rights Council' (United Nations Human Rights – Office of the High Commissioner) <www.ohchr.org/EN/HRBodies/SP/Pages/Introduction.aspx>accessed 10 November 2021. *See also*, Ingrid Nifosi, *The UN Special Procedures in the Field of Human Rights* (Intersentia 2005) 180.

monitoring more efficient.[36] But the European benchmark of a resident Court that can rule on individual complaints (see below) is not met within the UN structures, even assuming this would be an aspiration of the majority of Member States.[37]

VII. AMERICAN AND EUROPEAN HUMAN RIGHTS SYSTEMS (THE UNIVERSAL BECOMES REGIONAL)

Against the backdrop of the paper tiger that the 1948 Universal Declaration turned out to be in the days of its proclamation, regional initiatives were further developed. These projects, which aimed at a bigger step forward, mainly focus on certain human rights only.[38]

The Organization of American States ('OAS') was founded in 1948 and adopted that same year (seven months before the Universal Declaration) an *American Declaration of the Rights and Duties of Man*, with great attention to classic (first generation)rights and to certain socio-economic (second generation) rights. Monitoring was made possible in 1959 in the form of the Inter-American Commission of Human Rights, supplemented in 1978 by the Inter-American Court of Human Rights on the basis of the American Convention on Human Rights of 1969, which in 1988, by means of an additional protocol, provided not only individual freedom rights but also a broad

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[36] It suffices to compare the chapters on monitoring and enforcement of the 1976 Covenants with the 1984 Convention against Torture and the 1989 Convention on the Rights of the Child, and the 2007 Convention against Enforced Disappearances. On the innovative elements concerning the monitoring with respect to the *Committee on Enforced Disappearances* in the latter Convention.

[37] Sometimes, however, the outcome is drawing nearer. The UN has put its back into the International Criminal Court, which has ruled, since the Rome Statute (2002) came into force, on complaints of aggression, genocide, crimes against humanity or war crimes. Enforced disappearances fall within the jurisdiction of the Court but are additionally regulated in the 2007 Convention against Enforced Disappearances, which in principle obliges all signatory countries (65 out of 194) to prosecute the perpetrators of these crimes themselves or to extradite them if they fail to do so, and in Article 9 prescribes mandatory universal jurisdiction, in order to make the process completely watertight. Cf Kirsten Anderson, 'How Effective is the International Convention for the Protection of all Persons from Enforced Disappearance Likely to be in Holding Individuals Criminally Responsible for Acts of Enforced Disappearance' (2006) 7(2) Melbourne Journal of International Law245-78, 275: "This could be preferable to relying on an international tribunal to prosecute enforced disappearances as juridical norms of protection of the individual are much more effective when they are integrated into domestic law...The duty to prosecute or extradite works together with the principle of universal jurisdiction to prevent states from operating as*safe havens* for perpetrators".

[38] Especially Europe gave priority to the formulation and enforcement of classic civil and political rights ('first generation' or 'negative' or 'disabling' rights), and less to economic, social and cultural rights ('second generation', 'positive' or 'enabling' rights), although both groups figured in the Universal Declaration. *See*, J Dugard and others,*Research Handbook on Economic, Social and Cultural Rights as Human Rights* (Edward Elgar 2020) 456; Valeska David, *Cultural Difference and Economic Disadvantage in Regional Human Rights Courts* (Intersentia2020) 408.

pallet of economic, social and cultural rights (entry into force:1999). Needless to add that Canada and the United States are not parties to it.

Similarly, the Council of Europe meant to go faster and further than the divided UN. In 1950 it elaborated a binding *European Convention on Human Rights* (ECHR), -limited to some twenty or so classical civil and political rights. Aflagship function was given to a European supervisory court, the *European Court of Human Rights* (ECtHR). The success of this court in setting and maintaining human rights standards is well known and widely praised.

When the Court started to work in 1959, the mood in Europe was optimistic, a bit like flourishing welfare states preparing the golden sixties. The text of the Convention was acceptable to all Europeans, religious or not. In the preamble to the ECHR, the Council of Europe, with reference to the 1948 Universal Declaration, reaffirms its 'profound *belief* in those Fundamental Freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the Human Rights upon which they depend' (our italics). Compared to the 1948 Universal Declaration, the rhetoric is again slightly different. In line with eighteenth-century thinking, the pendulum swings back towards 'freedom' to the detriment of 'human dignity', which had briefly welled up in 1948 Declaration.[39] This time the secular profession of faith in the allegedly superior Western political system is fully explicit!

Included in this secular gospel is the idea of an 'effective political democracy'.This notion is in line with the Council of Europe's objectives, in particular the political unification of a democratic Europe governed by the rule of law. In this context, it is upsetting to observe that the social and political participation rights that can be found in the Universal Declaration (rights to take part in the government of a country, the right to elect and be elected by universal and equal suffrage and by secret vote, rights of equal access to public service, equal electoral rights for men and women and the right to a nationality) have hardly, if not at all, been adopted in the ECHR.

Europe has certainly made a quick start with its focus on liberal freedom rights and by cutting away socio-economic rights and subsequently incorporating them into toothless texts such as the *European Social Charter* of 1961.[40]

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[39] It is only in 2002, in the preamble of Protocol 13 to the abolition of the death penalty, that the 'inherent dignity of all human beings' will appear in the ECHR framework's discourse.

[40] The weakness of the Charter comes as no surprise and is, of course, a consequence of the fact that it is easier for a state to commit to respecting disabling rights and not to interfere -in principle- in recognized freedoms, than enabling rights, and to do what is necessary to ensure that people's rights to education, employment, health, housing and food are guaranteed. And presumably one could not have imagined then that Thatcher and Reagan, not to mention Trump, Johnson and Putin, would one day acquire the power to completely erode the

Despite efforts made to reform the Charter in 1991, 1995 and 1996 in order to complement a reporting system with a system of collective complaints that our country (only) sanctioned in 2003,[41] it still lacks a strong mechanism for enforcing socio-economic rights in Europe. Yet today, in an era of significantly less social justice, this appears all the more poignant. The weak enforceability of this 'Social Constitution of Europe' in today's changing socio-economic context contrast sharply with the wide range of fundamental rights in the fields of employment, housing, health, education, social protection and welfare, with a focus on vulnerable persons such as the elderly, children, people with disabilities and migrants. So many rights and such a poor enforcement! The amended Charter does retain certain historical importance,[42] as much as it retains a practical importance with actors that find their way to the *European Committee of Social Rights* responsible for monitoring compliance. Nonetheless, it is rarely a point of reference in social and socio-economic discussions: this is undoubtedly also due to the lack of legal enforceability. For example, in the 2020 Covid-debate, many discussions in Europe were framed in terms of civil and political rights, such as privacy contained in the ECHR, and much less in in terms of socio-economic rights in the Social Charter, like the rights to health, housing, food, education, and so on.

Next to ECHR, a second European regional human rights structure has been established by the European Union (EU).This organization was founded after the Second World War and entirely focused upon achieving economic integration and a single market. During the 1970s, human rightsseeped into EU law primarily through the case law of the EU Court of Justice which regarded such rights as general principles of EU law. When appropriate, the Court of Justice also referred to ECtHR judgments (which in itself can guarantee uniformity but does not exclude the possibility of contradictory rulings and rulings that are difficult to articulate).A next step towards recognition and 'constitutionalisation' of human rights in the EU was set with the Charter of Fundamental Rights of the Union (2000). Initially non-binding soft law, the Charter was incorporated into the Union Treaty (by means of Article 6.1) and became eventually binding in 2009 (despite opposition from countries such as Poland and the United Kingdom).[43]

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democratic constitutional state and hand it over to the captains of industry by brutally externalizing all the negative consequences of growth capitalism to the detriment of social welfare, social security, the environment, culture, health, and so on. Assuming the texts are still valuable, legally speaking second-generation rights are nothing more than blanks around which the states pursue policy or 'un'policy at their best discretion.

[41] 'The Charter in four steps' (*The Council of Europe*) <www.coe.int/en/web/european-social-charter/about-the-charter> accessed 11 November 2021.

[42] Its provisions have been incorporated by the European Union and, together with the first generation of rights, have been enshrined in the EU Charter of Fundamental Rights (2000), which became binding in 2009 (see below).

[43] So today, two active and overlapping human rights frameworks are at work in large parts of Europe. Next to the 1950 ECHR of the Council of Europe (47 Member States), there is the 2000 Charter in the EU (27 Member States) and next to the ECtHR (Strasbourg), there

The EU Charter is equipped with a bit more natural law-language ('human dignity')[44] and contains an update and extension of the set of rights contained in the ECHR. The document lists some 50 rights and freedoms, copy-pasting them from the ECHR, the European Social Charter of 1961 and a series of other treaties, supplemented by new rights. To the extent that this makes any sense for a regional supranational organization grown out of a project of economic unification of a regional market, the principle of universality is reaffirmed, as are the related principles of indivisibility, interdependence and interconnectedness of human rights.[45] The ease with which this 'constitutional' exercise was made doesn't cease to amaze, unless one looks carefully at the background and mental dispositions of the transnational community that drafted the text.[46] Given the

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is the EU Court of Justice (Luxemburg). The EU's accession to the Council of Europe and the ECHR is also provided for but, despite everything being prepared, was rejected on 18 December 2014 by a full and unanimous ECJ in Opinion 2/13. Of course, what is at stake here is who will now have the last word, Strasbourg or Luxembourg. This, in turn shows just how much slack and indeed how much tension there is in respect to what the abstract profession of faith could mean in concrete terms.

44 The Charter picks up the natural law story again, but, along the lines of German constitutionalism, 'human dignity', rather than 'liberty' is installed as the basic right and general starting point. Indeed, the EU is 'conscious of its spiritual and moral heritage (and) (…) is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity' (2nd recital). But an 'innovative' art. 1 is drafted that contains the following message: 'Human dignity is inviolable. It must be respected and protected'. In our view, there is still too little documentation on what is happening here. Freedom, equality, dignity... these are all core values on which human rights could be based. In order to counter the German criticism of a Union without fundamental rights, the opening article of the German Constitution, which chooses human dignity as the mother of all human rights, was copied in the draft. *See*, P De Hert, 'John Rawls on Constitutionalism and the Charter of Fundamental Rights of the European Union' in WP Heere (ed), *From Government to Governance. The Growing Impact of Non-State Actors on the International and European Legal System* (TCM Asser Press2004) 443-53. The added value of this founding element in the EU order is still not clear, but the fact that one must be able to define dignity, as opposed to freedom, in a positive way (what is dignified, what is not?), poses the prospect of fine theological disputes in which the original liberal freedom comes under pressure from conservative (or even 'left-wing politically correct') moralism and paternalism that are smuggled in via 'Human Dignity'. The experience with personality rights, a kind of private-law competitor of public-law human rights, in Germany, France and Italy leaves little room for illusions, as was showed in F. Rigaux, *La protection de la vie privée et des autresbiens de la personnalité* (Bruylant/LGDJ1990) 849.

45 cf the 1993 United Nations Vienna Declaration, which, inter alia, affirms and reiterates that social rights are human rights on an equal footing with civil and political rights.

46 On this 'transnational community of politico-legal experts–entrepreneurs', *see*, Antonin Cohen, 'Legal Professionals or Political Entrepreneurs? Constitution Making as a Process of Social Construction and Political Mobilization' (2010) 4 International Political Sociology 107,119: 'In the light of this prosopographical data, it can be hypothesized that the much-commented consensus method at the Convention may have had, as an unspoken prerequisite, a coalition of pre-existing social dispositions that went far beyond the formal institutional divides (widely transcended by a set of trajectories crossing the boarders of the national and the supranational), and traditional political cleavages (considerably reduced by the concentration of party representation), both constrained by the fact that the Praesidium and particularly the President succeeded in exercising a firm control over the agenda'.

EU's genealogy,[47] it should not surprise that the Charter includes some carefully elaborated (new) rights, such as the right to entrepreneurship and property, which are much less visible in the ECHR and its protocols.

VIII. TESTING SELF-CONFIDENCE: PERFORMANCE MEASURING OF THE COUNCIL OF EUROPE'S ECTHR

In Europe, experts of all sorts have praised the Council of Europe human rights apparatus, spearheaded by its Strasbourg-based ECtHR. Its contribution, for example, to improving detention regimes in Europe is beyond discussion. The judgements are rich, insightful and innovating,[48] and have profoundly inspired European academics in their theoretical work on this issue.[49]

Equally impressive is the Council of Europe-apparatus' track record with regard to policing. Resources are invested by the Council of Europe to develophuman rights guidelines on the issue and to translate these, together with relevant ECtHR' judgments, in all European languages.[50] A 2002 *European Code of Police Ethics* enshrined the basic principles that should apply to police services in democratic societies governed by the rule of law.[51] The police are featured in many ECtHR rulings,[52] central in the Council of Europe's view on

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[47] cf Article 16 Freedom to conduct a business ('The freedom to conduct a business in accordance with Community law and national laws and practices is recognised'); Article 17 Right to property (1. 'Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest. 2. Intellectual property shall be protected'). On the prudently drafted protection of property in the ECHR, *see*, J Frowein, 'The Protection of Property', in R Macdonald, Fr Matscher, and H Petzold (eds), *The European System for the Protection of Human Rights* (Nijhoff 1993) 515-30.

[48] Of course, one of the reasons for this is the fact that the Court is gradually drawing more inspiration from the preventive fieldwork done by the Committee for the Prevention of Torture, which draws from experience regarding fundamental rights and freedoms in places of detention to give mainly targeted and sometimes more general recommendations.

[49] D van Zyl Smit and S Snacken, *Principles of European Prison Law and Policy Penology and Human Rights* (OUP 2009) 496; P De Hert and others, 'La montée de l'Etat pénal: que peuvent les droits de l'homme?' in Y Cartuvels and others (eds), '*Les droits de l'homme: bouclier ou épée du droit pénal*?' (FUSL/Bruylant2007) 235-90; S Snacken and others, 'Demandes d'euthanasie en prison. Souffrance psychique entre dignité humaine et peine de mort?' (2015) 48(1) Criminologie, Justice et Santé Mentale102-22. On basis of the Strasbourg *acquis* these authors developed a human rights framework on detention and penology that is believed to be superior to most classical penological theories.

[50] *See*, by way of example the translation of all relevant documents to assist Georgia in meeting the Organization's standards on policing<www.coe.int/en/web/tbilisi/police-and-human-rights> accessed 12 November 2021.

[51] Council of Europe, *The European Code of Police Ethics - Recommendation Rec10 and explanatory memorandum*, Strasbourg (2002) 73.

[52] On close inspection, the actions of law enforcement and police forces impinge upon several individual human rights protected by the ECHR. For example, the use of (potentially) lethal force by the police must be able to stand the test of Article 2 ECHR (right to life). Police acts

this topic. These judgments have indeed broad structural implications for policing in Europe, often beyond the individual case at hand.[53] Moreover, use of violence is strictly monitored by the ECtHR and many judgments find violations of human rights where national courts and monitoring bodies have not found them (or have refused to find them).[54] How the police maintain order during (political and other) demonstrations or public gatherings must also be able to stand the ECtHR test,[55] cleverly designed to test not only the use of police power but also the use of administrative powers to police the streets.[56]

Other powerful illustrations of the structural impact are ECtHR judgments like *Salduz*[57] and *Brusco*.[58] These judgments on the necessary assistance by a lawyer during preliminary criminal investigations and the right to remain silent, led to profound changes in national law, Remarkably, these changes are still on-going[59] and forced about half of the European Member States to amend their laws to make possible the presence of a lawyer during police interrogations. Investigative measures such as surveillance, searches and seizing also need to stand the Strasbourg test with its insistence on a foreseeable legal basis and proportional powers.[60]

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may also relate to Article 3 of the ECHR (prohibition of torture, inhuman or degrading treatment or punishment). Art. 6 ECHR (right to a fair trial) also has consequences for police with an effect that reaches beyond the mere proceedings in court.

53 This explains equally why *The European Code of Police Ethics* referred to in the previous footnote is more than a traditional code of ethics. This code is presented as 'a general organisational framework for the police, their place in the criminal justice system, their objectives, performance and accountability' and 'parts of the text are intended to serve as model provisions for national legislation and codes of conduct as well as principles for ethical policing';*See,* <https://book.coe.int/en/legal-instruments/2409-the-european-code-of-police-ethics-recommendation-rec10-and-explanatory-memorandum.html>accessed 12 November 2021.

54 ECtHR 28 September 2015 (GC), no 23380/09, Bouyid/Belgium. Belgium was reprimanded in 2015 by the Grand Chamber of the European Court in *Bouyid*following allegations that individuals in a Brussels police station had been hit in the face by agents

55 ECtHR 22 October 2018 (GC), nos 35553/12, 36678/12 and 36711/12, S., V., and A./Denmark. *S., V., and A./Denmark* examines police action at football events in the light of Article 5 ECHR (right to liberty and security) and the prohibition of unlawful deprivation of liberty. In this ruling the Court altered its case law on Article 5(1)(c) ECHR and held that the use of a temporary preventive police cordon around football supporters was considered a lawful deprivation of liberty.

56 A ban by authorities on demonstrating must also meet the European conditions. Dispersing demonstrations simply because authorization for the gathering was not requested in advance, for instance, might not meet the Strasbourg criteria.

57 ECtHR 27 November 2008 (GC) No 36391/02, Salduz/Turkey.

58 ECtHR 14 October 2010, No 1466/07, Brusco/France.

59 *See*, recently ECtHR 9 November 2018 (GC), no 71409/10, Beuze/Belgium - *Infringement of art. 6(1) and 3(c) ECHR*. *See*, MA Beernaert, 'Droit d'accès à un avocat et relativité toujours plus grande des garanties du droit à un procès équitable' (2019) 118 RTDH519-28.

60 Article 8 ECHR (respect for private and family life, home and correspondence) plays a prominent but non-exclusive role in this respect. *See*, G Malgieriand P De Hert, 'European Human Rights, Criminal Surveillance, and Intelligence Surveillance: Towards "Good Enough" Oversight, Preferably But Not Necessarily by Judges'in David CGrayand Stephen Henderson (eds)*, The Cambridge Handbook on Surveillance* (CUP 2017) 509-32; P De Hertand G Malgieri, 'Article 8 ECHR compliant and foreseeable surveillance: the ECTHR's expanded

The rule of law idea is firmly imposed on policing via art. 13 ECHR that foresees an effective remedy in all situations that have human rights implications.[61] Conceptually more intriguing is the ECtHR's view that people have a right to be protected by the police. States can therefore be held liable when concrete cases show a lack of (good) policing.[62] This occurs for example in cases of domestic violence or when the police do not stop demonstrators from attacking persons they are protesting against or counter demonstrators from attacking demonstrators.[63]

The foregoing European hooray-analysis about the human rights impact in the criminal sphere is perfectly applicable to many other human rights-relevant issues. The ECHR and the ECtHR are without a doubt the expression of the world's most effective legal mechanism for enforcing fundamental freedoms and rights in certain situations, generic or otherwise. At the same time the Council of Europe is the political watchdog for its follow-up by treaty states. In 2007, the American Michael Goldhaber wrote a booklet about the Court for the benefit of the American public in which he discusses this 'legal arm of the Council of Europe'.[64] This author wonders why everyone is familiar with the U.S. Supreme Court's 1960s-1970s human rights-case law, but much less with the ambitious and comparable ECtHR's case law. This obscure tribunal in Strasbourg, France, has hardly been covered by the mass media, Goldhaber observes, while it has become a Supreme Court of Europe that dares to pull Member States back into line, even on very delicate matters.[65]

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legality requirement copied by the CJEU. A discussion of European surveillance case law' (2020) 6(21) Brussels Privacy Hub Working Paper40<> accessed 12 November 2021. Police actions may further conflict with art. 9 (freedom of thought, conscience and religion), art. 10 (freedom of expression), and art. 11 ECHR (freedom of assembly and association), insisting on the same proportionality requirement and the presence of a foreseeable detailed legal basis for these actions.

61 If governments use restrictions permitted by the treaty to pursue an illegitimate goal (for example, to silence political protests), this may raise questions in the light of art. 13 ECHR in conjunction with one or more of the aforementioned treaty provisions.

62 For the ECtHR disabling rights like the ones in the ECHR (imposing negative obligations or obligations of restraint on State authorities) also have a positive side and impose States to take steps to actively protect and ensure the ECHR rights. *See*, L Lavrysen, *Human Rights in a Positive State: Rethinking the Relationship Between Positive and Negative Obligations Under the European Convention on Human Rights* (CUP 2016) 428. Applied to policing this explains why non-intervention by law enforcement services can also trigger the provisions of the ECHR. *See*, L Lavrysenand N Mavronicola (eds), *Coercive Human Rights. Positive Duties to Mobilise the Criminal Law Under the ECHR* (Hart Publication 2020) 328.

63 Compare, for example, ECHR 12 May 2015, no 73235/12, Identoba and others /Georgia (violation of arts. 3, 11 and 14 ECHR) with ECHR 24 February 2015, no 30587/13, Karaahmed/Bulgaria (violation of art. 9 ECHR).

64 M Goldhaber, *A People's History of the European Court of Human Rights*(Rutgers University Press 2007) 210.

65 The book illustrates this with numerous examples such as the abortion law that hurt Ireland, the religious law that hurt Greece and its loyalty to Greek Orthodoxy, Turkey on Kurdish separatism; Austria on Nazism; and Great Britain on gay rights and corporal punishment. The book opens with a chapter about a 'bastard' child, Alexandra Marckx, represented by unmarried mother Paula Marckx, who have shaken the Catholic conservative civil code of

Although we could give many counterexamples of questionable and mutually incompatible decisions, we understand Goldhaber's observation. Indeed, we would be inclined to accept the place of honor he has in mind for the Strasbourg Court in 'the competition to be the conscience of the world' in the light of the evidence that this Court has made existing problems and issues evolve in the right direction. Still, in our view a reality check is warranted here.[66]

The Strasbourg Court is fundamentally different from international courts based on interstate processes.[67] Yet, it is not a constitutional court[68] but (only) a subsidiary human rights court(cases are admissible only after the exhaustion of all domestic remedies)with a scope limited to negative rights. It has no power of annulment and its place in the hierarchy of national norms varies among Member States[69]; the enforceability of its judgments by the Council of Europe is substandard.[70] Moreover, following the collapse of the Eastern bloc, the number of ECHR States doubled[71] and currently consists of forty-seven countries, twenty-seven of which are members of the European Union. Due to this expansion, there has been an increase in the Court's workload. Moreover, in light of human rights problem cases such as Russia and Turkey,[72] there has

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Belgium and paved the way for a family law in which non-marriage is a recognized freedom. About the courage of the recently deceased Paula Marckx, *see*, L Lavrysen, 'Remembering Paula Marckx' (1 July 2020) <https://strasbourgobservers.com/2020/07/01/remembering-paula-marckx/> accessed 12 November 2021.

66 From our radical democratic point of view (see *below*), we do not care too much about the Court's role as a 'conscience of the world'. Futures are always open, and there is no need for a conscience to shape or define it.

67 D Anagnostou, 'Untangling the domestic implementation of the European Court of Human Rights' judgments' in D Anagnostou (ed.), *The European Court of Human Rights: Implementing Strasbourg's Judgments on Domestic Policy*(Edinburgh University Press 2013) 1-24.

68 cf with the more evolutionary perspective of D. Anagnostou, 'Politics, Courts and Society in the National Implementation and Practice of European Court of Human Rights Case Law', 211-231. This author sees an evolution from a Convention regime created and controlled by state governments towards a 'constitutional instrument of European public order'.

69 About the variable patterns of implementation within and across states, see the various country and thematic chapters in D Anagnostou (n 68) 256.

70 cf 'Scrutiny yes, consequences no' in Kl Brummer, 'Enhancing Intergovernmentalism. The Council of Europe and Human Rights' (2020) 14(2) The International Journal of Human Rights280, 282.

71 This with a little (unwanted) help of the European Union. The European Union – with all its resources and economic promises – was plagued by a long list of candidate countries that wanted to be part of it. These countries were or are kept on hold with a series of arguments and conditions, one being that ratification of the ECHR is a necessary pre-requisite for accessing the European Union.

72 On Turkey's decision in 1987 to give its citizens the right to petition the ECHR as a strategic move in its application for membership to the European Union (then the European Community) and the use of the ECHR mechanism by the Kurds, *see*, D Kurbanand H Gülalp, 'A Complicated Affair: Turkey's Kurds and the European Court of Human Rights' in D Anagnostou(n 68) 167-87. On Russia, A Matta and A. Mazmanyan, 'Russia: In Quest for a European Identity' in P Popelierand others (eds), *Criticism of the European Court of Human*

been an upsurge of resistance against its 'activism' and liberalism.[73] This leads the Court to adopt conservative decisions,[74] and, for instance,to easily accept domestic measures restricting freedoms.[75]

At the same time, the ongoing series of treaty reforms of the ECHR,[76] are presented as needed to 'improve and strengthen the control machinery'. However, the ECtHR will neatly be put back in its place by these protocols. This is not only because they reinforce a message of subsidiarity for the Court, but also one of a stronger margin for the Member States' discretion according to the argument that States should have more voice in human rights conflicts insofar as they are, as opposed to the Strasbourg Court,deemed more closely and better placed to assess the local or national situation, mentality and customs.[77]

Some have tried to temper certain expectations about courts like the US Supreme Court and the ECtHR as spearheads of strong human rights policies. Others, like Michael Donnelly, point at tensions between human rights and democracy. Respect for 'universal, indivisible and interdependent and

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Rights: Shifting the Convention System: Counter-Dynamics at the National and EU Level (Intersentia2016) 481-503.

73 P Popelierand others (n 73)570; F de Londrasand K. Dzehtsiarou, *Great Debates on the European Convention on Human Rights*(Palgrave 2018) 220. *See*, very nuanced, on the historical link with the rise of cases in 2010 and the pushbacks by states against the Court, E Yildiz, 'A Court with Many Faces: Judicial Characters and Modes of Norm Development in the European Court of Human Rights' (2020) 31(1) European Journal of International Law73.

74 For a methodology to measure conservative setbacks and for the results of the analysis based on this methodology, *see*, L R Helfer and E Voeten, 'Walking Back Human Rights in Europe?' (2020) 31(3) European Journal of International Law797.

75 On the weakening by the ECtHR of its general principles on irreducible life sentences, and applying them more leniently to the United Kingdom, *see*, E Celiksoy, 'UK exceptionalism in the ECtHR's jurisprudence on irreducible life sentences' (2020) 24(10) The International Journal of Human Rights1594.

76 *See*, <www.echr.coe.int/Pages/home.aspx?p=basictexts/reform> and in particular the document 'History of the ECHR's Reforms' by the ECtHR on the respective protocols. A system of single judge procedures and a requirement of 'significant disadvantage' to start the Strasbourg machinery were introduced by Protocol No.14 to limit the high number of applications. Protocol No. 15, not in force yet on 13/1/2021, will shorten the time limit for launching an application from six to four months following the date of a final domestic decision. An explicit reference to the principle of subsidiarity and the 'margin of appreciation' doctrine, developed by the ECtHR in the past, will be inserted in the Preamble to the Convention through the same Protocol No.15. Protocol No. 16 strengthens the dialogue between the ECtHR and the national courts by setting up a 'preliminary ruling' procedure comparable to the already existing and successful preliminary ruling' systems under EU law. For a short literature overview and a discussion of the last Protocol, *see*, K Lemmens, 'Protocol No 16 to the ECHR: Managing Backlog through Complex Judicial Dialogue?' (2019) 15European Constitutional Law Review691.

77 This development can evidently be seen as another blow to the universalist faith, because it implies that headscarves in Turkey are different from headscarves in the Netherlands, not to mention an issue like abortion or the respect of fundamental rights in places of detention .... From a strict human rights perspective this might be a pluralist bridge too far in the light of the sensitivity of these issues and the need for certain minimum standards.

interrelated rights' must co-exist with democracy and its related requirements and principles (equal rights, self-determination of peoples, principle of sovereign equality of states).[78] Techniques developed by the ECtHR, such as the margin of appreciation doctrine, are intelligent tools to address this tension between two grand values. Whereas this contextualization is not wrong in itself (see *below*)and neither is the intention of the Strasbourg reformers to insist on subsidiarity, yet it may very well mean apolitical *retour en force*– return to strength - of state sovereignty, rather than a fine-tuning of the jurisdictions.

IX. HUMAN RIGHTS AT THE HEART OF AN INTERCHANGEABLE RELIGION?

According to Samuel Moyn's famous and crushing deconstruction of that *Last Utopia*,[79] it is mere rhetoric to situate the official birth of human rights back in the Greekgolden age or in the era of the American or French Revolution. What happened back then had little connection with our contemporary understanding of human rights Even in response to the Holocaust, there was hardly any discussion in terms of human rights. Likewise, the Second World War, still according to Moyn, was a false start. The contemporary human rights story only started at the end of the sixties when more and more people turned to it once they lost faith in alternative belief systems, such as Marxism and Maoism. It was in that period that human rights organizations such as Amnesty International flourished, and politicians such as American president Carter (1977-1981) started picking up the story and making human rights a pillar of their policy.[80] Therefore, 250 years of fundamental rights turn out to be only 50. For Porter, Dugardet al. the era of human rights is of an even younger date,at least conceptually. According to them, human rights will never deliver their promise as long as they do not integrate social, economic and cultural rights (ESCR), which 'is still an emerging field of knowledge and practice'.[81] Institutionally it has been neglected or scraped from the priority list.[82] This disregard has important conceptual consequences for the human

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78 M Donnelly, 'Democracy and Sovereignty vs International Human Rights: Reconciling the Irreconcilable?' (2020) 24(10) The International Journal of Human Rights1429.

79 S Moyn, *The Last Utopia. Human Rights in History* (HUP2010) 352.

80 About the Australian Gough Whitlam Labor government's (1972–1975) 'visionary' support for the idea of universal human rights, see A Henry, 'Gough Whitlam and the Politics of Universal Human Rights' (2020) 24(6) The International Journal of Human Rights796.

81 Br Porter and others, 'Introduction to the Research Handbook on Economic, Social and Cultural Rights as Human Rights' in J Dugard and others (n 21).

82 We discussed the1976 International Covenant on Civil and Political Rights and the 1976 International Covenant on Economic Social and Cultural Rights. Complaints of rights violations under the latter have only been possible since 2013 (with 24 ratifications). By comparison, individual cases have been adjudicated under the Optional Protocol to the International Covenant on Civil and Political Rights for more than 40 years and 116 states have ratified the protocol.

rights agenda that is thus deprived of the second generation's focus on positive obligations that could serve as a model for a more effective and transformative application of civil and political rights.[83]

Such new human rights historiography has the merit of setting the count (and starting date) more objectively, be it long after the Second World War (Moyn's 'breakthrough' decade of the 1970s) or, with the growth of the ESCR-framework, at its infancy. But whatever the count may be, it is undeniable that in the past fifty years,human rights have been called upon as an important final arbitrator. This is probably for lack of better, but also because of the post-war establishment of constitutional courts in the many states where they did not yet exist. This fact has a two-fold meaning. On the one side, the positivism of the law lost its supremacy. After years of Nazi legislation, positivism unsurprisingly took a firm hit as it had turned out to be completely manipulable. In the eyes of legal positivism, the validity of law is directly linked to its source of authority, absent of other considerations. Positive law transcends morality and, whether the law is good or bad, individuals must comply with it. In this sense, then, laws properly enacted by the state are legitimate and must not be rendered invalid, even if they are immoral. The law, as imposed from the 'institutional above', becomes a dangerous tool of(disrupted and sick)majorities. On the other side, thus, something *even more important,*to which even sovereign legislators must submit, must exist beyond the law. The Judeo-Christian tradition and the liberal political philosophy, both Western, signed up jointly fora new alternative and positioned the doctrine of inalienable human natural rights and freedoms right there on that spot. Unlike positivism, natural law is more than the result of individuals' conventions or agreements. Rather, it must correspond to some long-lasting, higher norm of justice and morality. This respect to a higher standard of justice and morality seem to offer a better alternative safeguard to the unjust and unequal laws advanced by man. Natural (human) rights thus become the shield from unjust (positive) laws emanated from above.

This is a fine example of plural ancestry: human rights can be derived both from the biblical 'man as an image of God' (or the other way round) and from the political-philosophical parable of the 'state of nature', albeit with an emphasis on 'human dignity' or on 'freedom', respectively. For François Rigaux we

[83] Recently, this has changed. It is now common understanding in the work of human rights bodies like the UN Human Rights Committee, the ECtHR, the African and Inter-American Commissions and domestic courts, to give a positive dimension to the right to life; not only avoiding that people are killed by public actors (negative obligation), but also an obligation on governments to address threats to life private actors and those linked to socio-economic deprivation. Comp. Br. Porter et al., xx: "ESCR practice fundamentally rejects the restrictions and exclusions implicit in 'negative rights' paradigms, according to which human rights claims are conceived primarily as limits and restraints on governments rather than as claims to positive measures required to realize rights. 'Negative rights' paradigms have, predictably, proven to be inadequate as a basis to challenge human rights violations resulting from the retreat under neoliberalism from social programs and regulatory measures and the systemic neglect of the needs of marginalized groups."

could witness the birth of a new secular religion, replacing the cult of the law.[84] Calling something a religion is hardly neutral. It then becomes connected to ideas about the sacred and deeply felt guiding norms, but also with faith as opposed to objective existence and with interchangeability (since there are about 10,000 distinct religions worldwide). Human rights as a religion enshrine individualist humanist principles deeply believed by Western individuals, proclaimed as overarching standards throughout the world.

Kant was perhaps the last great Western thinker who saw God as the protector of the fundamental ethical principles and trusted social rules of play.[85] Today, after attempts to substitute God for 'reason' or a 'scientific world view' (with *evidence-based politics* as a tail),they are mainly the 'laws of the market', 'growth' and 'productivity' that have taken over that part. Which, by the way, is entirely logical in view of the historical development of capitalism. Similarly, in *Sapiens,* Harari does not hesitate to consider human rights and humanist theories as modern religions that can wear out and be replaced by other stories.[86] Individualism, so central to human rights, has historically been an alliance of states and markets to break the disruptive power of family, community and the commons, and everything else that could make bottom-up politics possible.[87] Although citizens still have a lot of faith in the story of human rights, -according to counts of institutions involved-,[88] political support for it is crumbling. By acting only sparingly on the functioning of politics and leaving the market untouched, a position of inviolability and supremacy for human rights is not at all realistic.

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[84] "L'idéologie libérale des rapports entre le juge et le législateur a ramené ceux-ci dans le giron d'une religiosité séculière dont les témoins les plus véridiques, parce que les plus naïfs, doivent être cherchés dans le XIXe siècle triomphant, tels Francis Lieber qui affirme: « Un pouvoir judiciaire qui est placé sous la loi… est un membre d'une immense Église, l'Église de la loi» ou le procureur général Mesdach de Ter Kiele qui ouvre les travaux de la Cour de cassation de Belgique à l'audience solennelle de rentrée du 15 octobre 1886 par cette déclaration : « La loi est la vérité suprême par excellence et se confond avec elle […]. La méconnaître serait une impiété. » *À pareille sacralité de la loi, jointe à la sainteté conférée aux prêtres du culte nouveau, a succédé aujourd'hui la religion des droits de l'homme*", Fr Rigaux, *La loi des juges*(Odile Jacob 1997) 284 (our italics).

[85] cf F Rigaux (n 85) 320.

[86] YN Harari, *Sapiens: A Brief History of Humankind* (Penguin2011) 256-58. This author identifies three rival cults within humanism, all emanating from man's unique nature: the individualism-oriented liberal humanists, the more collectivist-oriented socialist humanists, and the evolutionary humanists with the Nazis and their belief in a superior race at the forefront. Harari notes that the latter tendency was more or less commonplace in the West of the 1930s and had to give way 'for a while' after 1945 because of the discredit built up by the Nazis but could play a first-rate role again in the near future, especially in the light of our obsession with genome improvement and our striving for intelligent machines which raise questions about the concept of 'man'.

[87] ibid 401-03. This analysis should be read together with pages 410-412 where Harari, argues, based on data, that states have brought forth much less violence and more peace than societies based on family and community alliances.

[88] EU Agency for Fundamental Rights, *Many Europeans Believe Human Rights can Build a Fairer Society but Challenges Remain* (press release 24 June 2020).

There is something to be said for human rights as a constructed story that can be dumped when more appealing stories emerge. The fact that centuries of history of slavery, colonization, exploitation, racism and discrimination have led to a West-sponsored surge of belief in human rights may have to do with the fact that the loud discourse makes experienced practices hard to see. Foucault convincingly showed that from the very beginning on the Enlightenment story was accompanied by power-driven practices of discipline, control and surveillance,[89] which eroded it to the bone, unless you were born on the Bezos-Zuckerberg side of society or 'climbed up' to it. What to think of the depth and reality of a human rights awareness that remains unhindered by the endless economic pursuit of colonization, structural racism rooted in it, hunger (while we are dying of fat), destruction of the habitat of millions, drowned children in the Mediterranean and deaths of heaps of people who could actually easily be healed because patent holders and big pharma are primarily concerned about their profits. Apparently, in the Western human rights religion, -dominated by a reliance on disabling or negative rather than enabling or positive rights-, these things do not weight significantly.[90] In a few words, West-sponsored human rights religion does uphold humanistic and individualist abstract premises. Yet, the same religion does not look as much concerned about achieving the same level of greatness in practice.

But, to leave it there would also do injustice to the human rights tradition. The human rights gospel, -still attracting many-, is anyhow upheld by an ecosystem or network of actors, laws, norms and practices in which human rights are being exercised. A 'concrete' church has been built around the belief-system. In the lawyers' reference apparatus or formal sources, a new layer of inter- and supranational norms, weighty and deemed hierarchically predominant, has found its place, activated by treaty law or invoking the 'principles of law recognized by civilized nations' (art. 38 Statute of the International Court of Justice, still in force in these terms!). In other words, States are expected to transform human rights into a hard and binding law through their political systems, either by incorporation of international treaty law or *jus cogens* claims, or with their own constitutional formulations thereof. That would make it possible for judges to enforce those.

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89 M Foucault, *Surveiller Et Punir. Naissance De La Prison* (Gallimard1975) 318;*Histoire de la sexualité 1. La volonté de savoir*(Gallimard1976) 211; G Deleuze, 'Contrôle et devenir' and 'Post-scriptum sur les sociétés de contrôle' in *Pourparlers. 1972-1990* (Minuit) 227-47.

90 There is no need for confession after sin, you just carry on. States that grossly flout human rights (such as China or Russia, for example) remain important trading partners when it comes down to it. "Admittedly, governments have demonstrated a propensity to sign on to commitments such as these without any real intention of meeting them, and the economic consequences of the COVID-19 pandemic makes these goals harder to achieve".

X. HUMAN RIGHTS AS PART OF ACCOUNTABILITY PROCESSES (POLITICAL CROWBARS)

The previous section shows that there is plenty of room for bargaining over human rights. The story is about individualizing and makes the 'ecological' interdependence with the other, both human and non-human, entirely dependent on an imaginary individual sovereignty as the absolute starting point. The narrative is indeed embedded in a powerful liberal-capitalist current that pretends to be humanistic but merrily and cynically blows life to smithereens, leaving wide traces of blood and destruction behind. Market, growth, production and ownership make us rulers and masters of everything that surrounds us. To those who are being deprived and everything that is being destroyed, we merrily externalize the damage and make it invisible using the tricks of the economy or State borders.[91] Instead of a locus of resilience and resistance human rights turn out to be a *dispositive or a device* that supports the neoliberal agenda through its reliance on a negative rights construct that privileges legal challenges to governmental interference, while denying access to justice for violations resulting from government neglect, inaction or failure to regulate private actors.[92]

Are we therefore against Amnesty International, Human Rights Watch or other human rights NGOs? Of course not, quite the contrary. The world is what it is, and action must be taken *here and now*. Grand abstract reflections and religious benchmarks stemming from the (inglorious) past will not help us. Action must be concrete, embedded in the present, realistic-speculative and pragmatic with a view to the consequences, with care and precaution for life in the future. And of course, such action must use the crowbars and

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[91] Europe, paradise of human rights. But we look away from the people dying on little boats or we outsource this problem to our great friends in Turkey and Libya. On the invisibility of economic violence and questions of economic justice in international human rights issues, and the link with implicit value in the dominant Western human rights discourse, D Sharp, 'Addressing Economic Violence in Times of Transition; Toward a Positive-Peace Paradigm for Transitional Justice' (2012) 35Fordham International Law Journal780, 796-801. For an alternative explanation on why, in transitional justice processes, rectifying justice could prevail over legal and distributive justice, mainly neglecting the latter, *see*, R Mani, *Beyond Retribution: Seeking Justice in the Shadow of War*(Polity Press 2002) 256; P Lundy and M McGovern, 'Whose Justice? Rethinking transitional justice from the bottom up' (2008) 35(2)Journal of Law and Society274-275. More generally on the inability of human rights to deliver social justice, *see*, SMoyn, *Not Enough: Human Rights in an Unequal World*(HUP 2018) 220; P Alston, 'The Populist Challenge to Human Rights' (2017) 9 Journal of Human Rights Practice 1.

[92] *See also*,Jessica Whyte, *The Morals of the Market: Human Rights and the Rise of Neoliberalism* (Verso 2019) 278. Along the lines of what has been said *above* about the genesis of human rights in early modernity, Whyte brings to the fore the complicity between mid-twentieth century neoliberalism and (the 'breakthrough' of) human rights around that same period. Neoliberalism as a moral project needed a set of norms for its economic project. Its ideologist like Hayek found in human rights (law) useful concepts and principles to foster their agenda. Human rights (as selected by this movement) became 'the moral language of the competitive market', Whyte argues.

levers that are available and that can make a difference. Such action must use available crowbars and levers that can make a difference. Organizations such as Amnesty and Human Rights Watch have tried to steer specific situations in a certain and desired direction by mobilizing the human rights discourse. Together with local civil society organizations, they teach us to use human rights as crowbars in order to increase our impact upon certain issues, irrespective of whether they also strive for abstract humanistic world view.

Crowbars act on weak spots and the cracks they create let in new light,[93] so that other possibilities can pragmatically be generated and taken advantage of, always locally and situation related. This way, human rights can become means to set up new and better relations and situations, which, in turn, gradually might contribute to the construction of a more decent world.[94]

The local and topical action of organizations such as Amnesty is situated also outside the law. Such broad approach should not surprise. Political and ethical accountability mechanisms (such as shaming) can contribute to get our representatives and captains to hesitate and even become responsive. These organizations will -based on human right declarations and agreements-formulate concrete policy proposals, systematically subject authorities to human rights monitoring and take action on concrete human rights issues. They can prioritize actions for the determination of legal accountability (like calls to prosecute human rights violators) or actions for non-legal accountability (like putting pressure on a human rights violator to step down from his functions). The accountability movement led by the said organizations developed precisely to uplift the struggle for human rights to a concrete and not idealistic level. More specifically, to uplift this struggle to a level of practice, close to people who are in conflict. In this approach, requesting and enforcing accountability is a process[95] of relying on legal and non-legal accountability mechanisms, which can coexist and complement each other. If human rights arguments can be useful in this process and add strength, they shall be included as long as they are relieved of absolutist universalist notions and do not emphasize the role of the state as its (sole) guardian.[96]

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[93] *See*, the Leonard Cohen quote opening our contribution

[94] We repeat, there are but few indications that this better future is embodied in today's secular realization of the human rights religion: in the light of the last 250 years of world history, this is indeed questionable and anything but hopeful.

[95] T Destrooper, 'Accountability for Human Rights Violations in Cambodia: Mapping the Indirect Effects of Transitional Justice Mechanisms' (2018) 19(2) Asia-Pacific Journal on Human Rights and the Law113, 116.

[96] cf A Sen, *The Idea of Justice* (Penguin2009) 467. Sen shines a light on Western and non-Western voices that start from practice, not from a transcendental understanding of what a right society is, but from practice. Although institutional reform and tinkering with 'right institutions' are and remain important, people will make more progress if they focus on concrete social realizations. Sen sees the focus on states as a tyranny for our way of thinking that makes us overlook countless different local groups, identities and actors. Utilitarians, economic egalitarians, Marxists, libertarians all have their own views on perfect institutions

XI. THE NEED FOR LEGAL DECONSTRUCTION OF HUMAN RIGHTS RHETORIC

Against these frameworks, lawyers play an important role in molding human rights discussions and in assessing the dominant human rights rhetoric. Indeed, things can be regularly turned upside down from a legal perspective. Unlike philosophers, ethicists and political scientists keen on discussing the universal, the abstract and the detail of values that they identify as grounding human rights, lawyers can help deconstructing such abstract human rights theories.

Joseph Raz, in 2010, helpfully dusted off some naïve universalist value-based accounts of human rights.[97] Point of departure is his insistence on a strong connection between values and duties. The values behind human rights *might* be universal, Raz contends, as long as the set of duties they entail are universal too, but that is not the case. It is often hard to identify a unique set of legal duties flowing from these values.[98] Without uniform duties, there can be no universal human rights even if we would assume that 'the value' is universal. Raz, not exactly a lawyer, became himself the object of further deconstructions, this time on legal grounds, in particular because his strong juncture between values (rights) and duties.[99]

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and on the ideal list of fundamental rights, and they never coincide. Without resorting to relativism, Sen proposes a quest for just solutions based on empiricism, bottom-up information gathering, evaluation on the basis of assessment criteria (capabilities, human rights envisaged as freedoms, ...) and comparison of concrete alternatives (which are always at hand). In this approach, Universalism or full consensus is not necessary: 'For the emergence of a shared and useful understanding of many substantive issues of rights and duties (and also of rights and wrongs) there is no need to insist that we must have agreed complete orderings or universally accepted full partitions of the just, strictly separated from the unjust; for example, a common resolve to fight for the abolition of famines, or genocide, or terrorism, or slavery, or untouchability, or illiteracy, or epidemics, etc. does not require that there be a similarly extensive agreement on the appropriate formulae for inheritance rights, or income tax schedules, or levels of minimum wages, or copyright laws. The basic relevance of the distinct perspectives – some congruent, some divergent – of the people of the world (diversely diverse as we human beings are) is part of the understanding that open impartiality tends to generate. There is nothing defeatist in this recognition'.

97 J Raz, 'Human Rights in the Emerging World Order' (2010) 1(1) Legal Theory31–47.

98 The hard part is to move from abstract moral values to concrete legal constraints. Human rights are culturally sensitive ('what is a high health standard?'). Therefore, they cannot apply across cultures as global benchmarks, for instance set by the United Nations. Raz illustrates this with the right to health. He argues that when it comes to fixing the relative importance or priority of health relative to other policies 'there is no single way of drawing the balance between health and other concerns'. As a consequence, the content of any duties associated with human rights values will always remain vague and their enforcement will not be possible.

99 P Eleftheriadis, 'Human Rights as Legal Rights' (2010) 1(3) Transnational Legal Theory371–92.

Moral rights and legal rights differ, Eleftheriadis observes, and so do moral and legal reasoning. Contrary to what Raz holds, moral rights understood as reasons that justify actions do not demand uniformity. While they can guide us and justify different outcomes in courts, crucially, they are *not identical* to legal duties. Indeed, the latter should be meant to be specific to a set of facts and to be categorical or conclusive.[100] Hence, a (moral) right is not a set of duties, as Raz contends. One can have a moral right without it being a legal right enforceable in court (for instance when you failed to challenge a government decision that violates your right because you missed a deadline as required by the relevant rules). There is a difference between rights and the legal relations that flow from them. Debating moral rights is an activity on its own (be it purely abstract and probably always more or less reducible to one's deepest feelings). Viewing rights as teleological tools instrumental for the achievement of values 'behind' human rights, takes rights outside their context. As if the practice of property law would express property theories, rather than solutions to new issues. As if law is dependent on and derived from ethics.

Analyzing the function of human rights in (inter)national law and in their institutional context tempers overstretched expectations about universalist rights. Eleftheriad is illustrates this with a discussion of the role of (legal) human rights in international law. Violation of these rights can trigger international remedies and, exceptionally, justify interventions into domestic legal systems. However, they are not based on a deep moral consensus about good life: rather, they rely on the acceptance on some minimal rules of behavior by states and on relations among states.[101] In the light of our short genealogy of human rights, we clearly support this understanding: legal human rights are no spearheads of a universal morality. From a legal point of view, they exist because they were politically agreed upon in constitutions, international treaties, in

[100] ibid 375: 'The judgments made by citizens as well as courts in the process of being guided by the law are not to be confused with the rights (or other reasons) that guide and justify those judgments. Legal reasoning is analogous to moral reasoning in that, when deliberation comes to an end, we have established a conclusive 'ought', which is distinct from other types of 'ought''.

[101] Asking a body of wise men to define their content on the basis of a moral theory on the good life, is the last thing we should do, since this is 'certain to undermine their very stability and legitimacy, their very *raison d'être'* (P Eleftheriadis (n 100) 389). "In the domain of international law, rights have a distinct role. They bring about secondary international remedies, i.e., standards for institutional intervention (persuasive or even coercive) into the domestic affairs of a state whenever that state is responsible for the most serious violations of human dignity and has not been willing or able to remedy the violations within its own legal system. By virtue of the diversity of states and societies that make up the international system, human rights must furthermore address the problem of international justice in ways that may be acceptable to both liberal and illiberal societies. This means that international human rights cannot be the same thing as basic political rights within a national polity, although they share a common form of institutional expression and a common form of justification, namely the idea of rights as recognitions of equal moral status".

statutes and courts, or in other words: in the 'formal sources of law'.[102] In fact, they only acquire legal substance in judicial decisions about concrete conflicts and issues.

Williams' dissection of the European Union's status as a global human rights regime offers another welcome legal contribution to the human rights-debate. The EU takes pride in its fundamental rights policy, but how does that play out in the pragmatics of daily political life?[103] Mapping the EU's work through the lens of four legitimacy-criteria (conceptualization, competence, coherence, and consistency)allows Williams to see through the mixed messages issued by this European super state and to point at practical political and juridical points for improvement.[104] More legal support to complement Williams' analysis is given by Elspeth Berry who adds the perspective of a litigator that tries to make sense of EU fundamental rights and procedures.[105] These skeptical findings are echoed by Erwin Chemerinsky who in *The Case against the Supreme Court* identifies a stock of US Supreme Court failures to uphold constitutional rights.[106] The list of historical failures is impressive and there is lit-

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[102] We are well aware of the limits of the political conception of human rights, that falsely avoids reliance on moral conceptions can be avoided. On the weakness of exclusively political conceptions, *see*, AS Horn, 'Moral and political conceptions of human rights: rethinking the distinction' (2016) 20(6) The International Journal of Human Rights724-43; LValentini, 'In What Sense are Human Rights Political? A Preliminary Exploration' (2012) 60(1) Political Studies180-94.

[103] A Williams, 'The (im)possibility of the European Union as a Global Human Rights Regime' inR Brownsword (ed), *Global Governance and the Quest for Justice* (Hart Publishing 2004)69-87, 82-86.

[104] Williams illustrates the first C (conceptualization of EU rights) by looking at the questionable commitment of this organization to tackle racism and also highlights the more fundamental defect in the conceptualization of EU human rights: "The EU Charter of Fundamental Rights may well provide for the right not to be discriminated against (supported to some extent by Article 13 EC Treaty) but it fails to take into account the wider context that makes such a right socially meaningful. So, the EU Charter's failure to incorporate any group rights focused upon minorities suggests that the EU concept of rights related to racism and discrimination (invariably a minority related issue) are steadfastly individualistic rather than collective. In the area of language rights in particular the EU has failed to establish any kind of internal understanding beyond a highly limited conception. This flies in the face of not only the international attempts to give support to group rights of minorities but also the EU's own position when dealing with external matters. For instance, in the accession process the EU has self-consciously promoted the rights of minorities, making them a pre-conditional concern".

[105] E Berry, 'The EU and human rights: never the twain shall meet?' in R Brownsword(n 104) 89-105. Why are so many of the rights in fact not really rights but statements, often not enforceable and not free standing? What are the many obstacles in national courts for applicants seeking to enforce Charter rights? Berry clearly questions the usefulness of the EU fundamental rights regime. Has that regime even started? Would we, today, be able to give more and better examples of cases won in court using the Charter?

[106] E Chemerinsky, *The Case against the Supreme Court*(Penguin2014) 400. No, the Constitution and the Supreme Court did not make a difference realizing these goals, especially after the romantic dust created by the liberal Warren Court (1953-1969) has settled. Chemerinsky's handling of the Supreme Court's performance before and after Chief Justice Warren and his microscopic analysis of the Court under Chief Justice Burger hardly confirms the existence of such thing as judicial activism.

tle evidence that the Court's judgments were ever able to make a difference for those in need of protection against repressive desires and political majorities. Surprisingly, the book does not say we would be better off without the Supreme Court. Why? Because, once in a while there is a victory in Court or a useful paragraph in the reasoning of its judges. Chemerinsky is too much of a litigator to give it all away. Rights and judicial review do not often make a difference, but, now and then, they might.[107]

XII. HUMAN RIGHTS AS LEGAL CROWBARS THAT MIGHT NOW AND THEN MAKE A DIFFERENCE

The last observation in the previous section is crucial to us, since it eventually shifts the analytical and retroactive stance, obsessed by 'reasons', towards the practical and pragmatic position of doing law on the ground, with a view towards solutions and consequences. The observation about the eventuality of success (no more, no less) also permits to strip the legal work of an astonishing overload and burden of ethical, philosophical and socio-economic expectations from which the legal practice has to hold respectful distance to protect itself.

The idea of human rights as legal crowbars that *might* now and then make a difference, should be understood in the light of our past work calling the attention to the practice of the courts and their settlement of conflicts and to the constraints of legal reasoning.[108] Understanding law in the courts necessitates a comprehension of the hermeneutic legal practice that ensures that judges – and anyone else who practices law - do not arbitrarily settle cases as they see fit but do so strictly according to the constraints of legal practice.

What then is the role of abstract and axiomatically formulated human rights in constitutions and international treaties? What do abstract norms mean in court?[109] The legal practice (and *a fortiori* the judicial practice) is first characterized by its constraints, -the interpretative methods and the obligations

[107] See for a similar account, M Klarman, 'Civil Rights and Civil Liberties - United States' (2004) University of Virginia Law School Public Law and Legal Theory Working Paper Series17. The paper contains interesting sections on the personal dispositions of judges, but also on the type of rights that courts like to protect: "Over the course of American history, the Supreme Court has frequently checked legislative efforts to redistribute wealth; on the very rare occasions when it has mandated redistribution, it has done so only in the mildest of forms".

[108] For the main publications in English, *see*, S Gutwirth, 'Providing the Missing Link: Law After Latour's Passage' in K McGee (ed), *Latour and the Passage of Law* (Edinburgh University Press 2015) 122-159; S Gutwirth, P. De Hert, and L. De Sutter, 'The Trouble with Technology Regulation: Why Lessig's Optimal Mix Will not Work', in R Brownsword and K. Yeung (eds), *Regulating Technologies: Legal Futures, Regulatory Frames and Technological Fixes*(OUP 2008) 193-218.

[109] To practice law or act as a legally trained professional is far removed from brandishing abstract political ideals or economic dogmas. 'To make do with what you have' is the clearest possible statement when acting as a lawyer.

lawyers have to live by (qualification, imputation, the obligation to decide, etc.).[110] A second characteristic is the omnipresence of legal creativity as an essential feature of legal practice: for every problem, an appropriate legal solution must be invented or created. This creativity corresponds to the judicial duty to bring about the best possible legally sound final decision in a given concrete situation. The fact that statutory dispositions, precedents, legal doctrine, customary rules, general principles of law and equity might be pertinent for the unique and multi-interpretable facts of the case at hand, turns any case into a new or hard case.

It is clear that human rights play a role in the process of constructing such 'best' legal solution, but often circumstantially. Since human rights are part of the hierarchically highest formal sources of law, they are part of the set of norms that matter for judges.[111] But it is especially their abstract (principled rather than rule based) nature that intensifies the need for legal creativity.[112] The judicial duty to bring about the best possible legally sound final decision in a given concrete situation can, in the context of human rights litigation, nurture the hope that this decision might improve a situation locally. It is even less likely that it could obtain a somewhat broader effect, as a precedent or through legal doctrine, so that ideally legislators would consecutively respond to it.[113] This is, in our view, the most that can be hoped for when reflecting about human rights in legal litigation. The law, as such, as a practice, is a crucial, but *modest* player. It is with good reason that Stanley Fish called the judiciary 'the least dangerous branch'.Judges produce *trèves*[114] - 'truces'- that are always local, even if they have to be recognized by all, *ergaomnes*. The executive and the legislative power can always intervene to make almost sure that no other judge will ever be able to decide something like this again.

In short, a realistic and pragmatic legal creativity that engages in existing problems and embodies a search for solutions without preachy general/abstract ideals can certainly make use of the possibilities offered by human rights as a high formal source of law. Normative axiomatic law most probably contains and 'offers' cracks and possibilities: it is up to the lawyers to wring crowbars in them and pull and drag and hope that some light comes through. No more

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[110] Axiomatic law contains an enormous amount of general and less general norms. One only knows with 100% certainty the outcome of a concrete court procedure when it is over and the judge has decided (and never before that), which means that, given a certain problem, a jurist has to tenaciously set his or her mind on the legal interpretative steps that a judge may, can and could take within the constraints of legal practice in order to make a decision. Doing law is anticipating what a judge would do in the same situation.

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[112] Describing cases of legal creativity as 'legal activism' says something about the state of legal practice.

[113] On this subject: S. Gutwirth, 'Providing the Missing Link: Law After Latour's Passage' in K McGee (ed), *Latour and the Passage of Law* (University of Edinburgh Press 2015) 122-59.

[114] Rigaux, *La loi des juges*, 137 et seq.

and no less, for sure, but it is definitely worth a try.[115] Every event is a rearrangement that contains possibilities of further changes.

XIII. HUMAN RIGHTS AS A SECULAR, BUT DEVALUATINGBELIEF

In the past we belonged to the ranks of human rights believers. Like many others, we defended the liberal Western constitutional story of the rule of law and human rights(be it because it is 'the best possible one').We pitched the story as one about the 'polyphonic democratic constitutional state' to incorporate the more recent emphasis on respect for individual differences,minorities and pluralism.[116] This story, in its classical or more modern version is one

[115] Whether invoking human rights will be beneficial is far from certain. Indeed, the ECHR contains many possibilities for restrictions, which allow states to seriously restrict the meaning of fundamental rights. We already talked about the 'subsidiarity' of the treaty and the 'margin of appreciation', but it goes a lot further. Under Art. 15, virtually all rights can be put on the back burner if there is a situation that threatens 'the survival of the country' (terrorism or the corona crisis), while for other rights (freedom of expression, private life, freedom of assembly and freedom of conscience) the conditions for restriction are explicitly included. While in the 1990's we were still concerned about the placement of cameras or the tapping of phone calls, today, due to the possibilities of restriction, such forms of surveillance have become commonplace, and big data and the use that is made of it are eluding any control, if only because they are processed and traded beyond the control power of the state. It even goes so far that respectable institutions acquire data processing systems that, to everyone's knowledge, do not comply with human rights or data protection. Incidentally, measures taken during a 'crisis' are perpetuated for much longer than is necessary to solve the crisis. Rigaux was already anything but optimistic about the role of the judge: « (C)ertains instruments normatifs qui expriment les aspirations fondamentales des hommes et des femmes de leur temps et proclament un message clair et même exaltant se révèlent dans la pratique d'un maniement beaucoup plus complexe. Tel est notamment le cas de la Déclaration des droits de l'homme et du citoyen du 26 août 1789, dont les principes ont été réitérés dans le préambule de la Constitution de la Ve République et dont le langage a aussi inspiré la Convention de sauvegarde des droits de l'homme et des libertés fondamentales du 4 novembre 1950. Ces instruments paraissent découper des plages aérées, ils promettent en des termes accessibles à tous, la liberté d'expression, la liberté d'association, l'égalité devant la loi, la protection contre l'arbitraire. Toutefois, dès que les juges s'emparent de la violation alléguée d'une liberté fondamentale, ils développent un discours qui laisse voir combien sont incertaines les frontières des espaces protégés : la religion des droits de l'homme se transforme en culte savant » (F. Rigaux, *La loi des juges*, 8). And it is certainly true that judges, and especially those from the Strasbourg Court, however honorable they may be, very often come up against considerations of proportionality and balancing of interests, in which they decide for themselves and arbitrarily, even within their obligations as jurists, on the weights assigned, the calibration and the direction the balance will tip.

[116] SGutwirth, 'De polyfonie van de democratische rechtsstaat' in M Elchardus (ed), *Wantrouwen en onbehagen:over de vertrouwens- en legitimiteitscrisis* (VUBPress1998); PDe Hert and S Gutwirth, 'Privacy, Data Protection and Law Enforcement. Opacity of the Individual and Transparency of Power' in E Claes, A Duff and S Gutwirth (eds), *Privacy and the Criminal Law* (Intersentia 2006) 61-104; S Gutwirth, 'Beyond identity' in *The Future ofIdentity in the Information Society: Challenges and Opportunities*, vol 1 (Springer 2009) 122-33. These writings were notably influenced by R Foquéand AC 't Hart, *Instrumentaliteit en rechtsbescherming. Grondslagen van een strafrechtelijke waardendiscussie* (Gouda Quint/Kluwer 1990) 501.

that can still do something in the current political constellation. Its emphasis on fundamental rights and checks and balances, harks back to that which has shaped the foundations of Western political thought for 250 years, and can actually more or less be considered a political philosophical constitution. It provides acceptable and strong arguments within the system, which can make violators of its basic principles falter and hesitate. Also, claiming human rights is generically a way of resisting disproportionate exercise of power. No need, however, to convert to the religion in order to pragmatically use the legal tools it makes available.

Hence,we from our part will not refrain from using and mobilizing legal human rights, should it come in handy in topical law or legal practice. We will keep telling the narrative to our students because it is strongly supported and hastangible and forceful consequences for the structuring and organization not only of our society but also of others. Human rights are part of that story. As a formal source of law, they are a real and an unavoidable means for those seeking a judicial decision, as well as for legal practitioners and judges.[117] One may call such stance a progressive or resurgent insight.

Nevertheless, after the Western euphoria of the Golden Sixties and the successes of the Western European welfare state (if, for the sake of our argument we forget Foucault for a moment), we and many others became more prudent with reiterating the gospel of the polyphonic democratic constitutional state and universal human rights. In the face of neoliberal capitalism, with its increasingly authoritarian excesses (even against the so highly praised 'individual freedom') as well as the growing awareness of the vicious brutality with which the West has subjected the rest of the world (life and atmosphere) to its destructive greed, the narrative now seems more like a secular faith that has become far too powerful and toxic. Fukuyama's 'end of history' puts it nicely: only an all-encompassing self-satisfied and blind monotheism can support such an unrealistic and dogmatic thesis. Human rights are part of a story that, in the face of what it covers up, may soon lose its power of persuasion. It thus seems that embracing the Western individualistic and market-oriented story of universalism is the wrong strategy, as much as it is a wrong strategy to consider it the only legitimate story. It is indeed anything but 'evidence based' if not cynical, to keep believing that we are all equal, free and sovereign individuals.

[117] If you can challenge a ban on demonstrating with an appeal to freedom of expression laid down in a constitution or an international human rights treaty, then you should definitely do so; if you don't want GAFAM to you closely follow and map out your every move, you should certainly not refrain from challenging this through legal proceedings concerning the protection of your freedom, your private life and your personal data.

XIV. LESS TOXICALTERNATIVES IN HUMAN RIGHTS THEORY

Our main messages are far from unperceived by others. The classical genealogy of human rights and its universalist, individualist and economy friendly policy agenda together with its disrespect for local cultural and democratic forces… are actively discussed and contested by human rights scholars and activists.[118] Many attempts to alternative understandings of the philosophical and historical foundations of human rights can be found in their writings.[119] Likewise, we find attempts to alternative readings of the moral and ontological justification of rights,[120] of the rights themselves in the light of new problems such as terrorism, surveillance or globalization, or to capture social injustices that so far stayed below the human rights radar.[121] Within the legal discussion about the global context of human rights, two fairly new directions are opened.

The first direction is that of 'holistic' human rights approaches based on concepts such as intersectionality, indivisibility and normative interdependence. These concepts allow for a flexibility that bridges divides between generations of rights and would guarantee more complete assessments of complex situations[122] and real-life injustices.[123] Preferred methods to grasp the detail in its fullness are a decentralized interpretation of rights (argumentative

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[118] A good entry to these discussions is given by D Shelton (ed), *The Oxford Handbook of International Human Rights Law* (OUP 2013) 839. About the amount of critical ink spilt over the last three to four decades on the relationship between human rights and neoliberalism, and the seminal writings of Wendy Brown, Susan Marks, Sam Moyn, Quinn Slobodian, Melinda Cooper, and many more, *see*, B Golder, 'Review of *The Morals of the Market: Human Rights and the Rise of Neoliberalism* (Jessica Whyte)' (2020) Contemporary Political Theory<https://doi.org/10.1057/s41296-020-00383-8> accessed 12 November 2021.

[119] For an attempt to rewrite the Lockean infused history of human rights, *see*, I Turner, 'Conceptualizing a protection of liberal constitutionalism post 9/11: an emphasis upon rights in the social contract philosophy of Thomas Hobbes' (2020) 24(10) The International Journal of Human Rights1475-98. For a critique on the conceptual difference between negative rights (disabling) and positive rights (enabling), *see*, St Holmes and C Sunstein, *The Cost of Rights: Why Liberty Depends on Taxes* (Norton 1999) 255. See the critical review: D Klein in (2001) 39 Journal of Economic Literature1262-63.

[120] A classic is MH Dembour, 'What Are Human Rights? Four Schools of Thought' (2010) 32(1) Human Rights Quarterly1. For attempts to better balance moral and political conceptions of human rights, taking into account the criticisms of the latter on the former, AS Horn, 'Moral and Political Conceptions of Human Rights: Rethinking the Distinction' (2016) 20(6) The International Journal of Human Rights724-43.

[121] For an attempt to find a new privacy vocabulary to deal with surveillance, *see*, M Richardson, *Advanced Introduction to Privacy Law* (Edward Elgar 2020) 112. For an attempt to redefine anti-discrimination law to better address stigmatization practices, *see*, I Solanke, *Discrimination as Stigma: A Theory of Anti-discrimination Law* (Hart Publishing 2016) 256; P Quinn, *Stigma, State Expressions and the Law. Implications of Freedom of Speech*, (Routledge 2019) 316.

[122] V David, *Cultural Difference and Economic Disadvantage in Regional Human Rights Courts: An Integrated View*(Intersentia 2020) 404.

[123] E Brems, 'Foreword' in V. David, vi-xi.

non-universality)[124] and full integration of all possible human rights and human rights sources relevant for a concrete case. Ideally,a multi-actor perspective or person-oriented discourse would be added, with a maximum inclusion of human rights holders whose rights are affected by a particular situation.[125] This holistic and inclusive human rights take that engages 'the lived realities of rights claimants'[126] is presented as an antidote to prevailing perspectives of universal rights rooted in political dominance and colonization.[127] However, it must be stressed that this angledoesn't really escape the trap of metaphysical abstraction. Universal(ising) human rights norms and values are still needed as pre-existing philosophic benchmarks and supposedly shared norms to which states can be held accountable. Yet, their interpretation would be nurtured, nuanced, transformed or redefined via stakeholder analysis, in particular of the views and claims of the rights holder.[128] While 'universalism' still needs to be applied, it is now done with some sensitivity to differences, particularities and situations injected in the legal processes downstream.[129]

The second direction is towards human rights minimalism. In *Law of Peoples*, Rawls searches for objectivity. He distinguishes between liberal democratic societies, non-liberal but decenthierarchical societies and outlaw societies. Hefamously proposed a set of eight principles that states ('peoples') would choose to co-exist. Central principles are that states are equal and independent and should observe treaties and undertakings. The sixth Rawlsian principle embodies the duty to respect human rights ('Peoples are to honour human

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[124] T Altwicker, 'Non-Universal Arguments under the European Convention on Human Rights' (2020) 31(1) The European Journal of International Law101-26.

[125] E Brems, 'Should Pluriform Human Rights Become One? Exploring the Benefits of Human Rights Integration' (2014) 4 European Journal of Human Rights447-70; E Desmet, 'Analysing Users' Trajectories in Human Rights: AConceptual Exploration and Research Agenda' (2014) 8(2) Human Rights & International Legal Discourse121-41. Comp. on the 'person discourse in human rights analysis', G Curcio, 'Preface' in L Di Donato and E Grimi (eds), *Metaphysics of Human Rights. 1948-2018. On the Occasion of the 70th Anniversary of the UDHR* (Vernon Press2019) xv-xvii, xvi.

[126] Br. Porter et al., xx.

[127] See the concept of inclusive universality, elaborated by E Brems, *Human Rights: Universality and Diversity* (M Nijhoff2001) 574; E Brems, 'Reconciling Universality and Diversity in International Human Rights: A Theoretical and Methodological Framework and Its Application in the Context of Islam' (2004) 5 Human Rights Review 1.

[128] Br. Porter et al., xx. G. Curcio,xvi: "Attention to detail leads to consider the person in the concreteness of her existence. Equality, in the new reconfiguration of rights, is not secured by universality but by differences: therefore, having rights means to receive, from society, the approval of goodness in our life. In this way, the universality of rights is an aim to achieve and not a starting principle or the preliminary condition of validity. A sensitive universalism which cares about differences and particularities as an assumption for the codification of non-absolute but relative rights referred to human needs".

[129] This approach should just be what good judges do: making an optimal decision taking into account the specificity of the case at hand within the lines drawn by the pertinent legal norms (stemming from legislation, case law and legal doctrine) guided by the (hermeneutic) constraints of the legal practice. The plea then, becomes a plea for more pinpointed and embedded jurisprudence.

rights')[130] and is far from politically innocent, since it allows well-ordered liberal and decent states to intervene in outlaw states on the grounds that they violated human rights.[131] Equally political is its minimalism or reductionism. The list of rights that allow states to intervene in each other's businesses is short: it is *not* based on liberty nor on classical rights or broader political programs such as *sustainable development goals* but merely on the need to be acceptable to liberal and decent non-liberalstates.[132] Human rights literature has not been impermeable to this minimalist *less will do*-message to advocate (only) core rights,[133] to accept partial opt-outs and treaty-reservations (rather than no treaties),[134] and to advocate prudence with recognizing new rights.[135]

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[130] J Rawls, *The Law of Peoples* (HUP 1999). The human rights principle is discussed on p. 79-84.

[131] Rawls assumes – and that is a clear political option - that liberal societies are legitimate, while a look upon today's world (cf. paragraphs 2-4, above) actually doesn't show much convincing evidence for such an assumption. It also remains a question how this story may be pertinent to lawyers at work. The same debate about which human rights would apply even if the states implied are not parties to binding human right treaties, is already far less metaphysical and abstract when it reaches out to concrete legal arguments, as is showed by the debate between Louis Henkin and Anthony d'Amato about how and which human rights might or might not be considered binding beyond the state's acceptance as customary international law or *ius cogens*: L Henkin, "Human rights and state 'sovereignty'" and AD'Amato, "Human rights as a part of customary international law: a plea for change of paradigms" in *Customary International Human Rights Law: Evolution, Status and Future* and RB Lillich, GM Wilner GM, and SA Hodge (eds), Special Issue of the Georgia Journal of International and Comparative Law, 1995/1996, vol. 25/1-2, 31-46 and 47-98.

[132] "Human rights in the Law of Peoples, by contrast, express a special class of urgent rights, such as freedom from slavery and serfdom, liberty (but not equal liberty) of conscience, and security of ethnic groups from mass murder and genocide. The violation of this class of rights is equally condemned by both reasonable liberal peoples and decent hierarchical peoples" (Rawls). Note that these are, not surprisingly, those rights that legally most qualify as being part of *ius cogens* (cf Louis Henkin) or international custom (Anthony D'Amato) as said in the former footnote.

[133] Compare Seth Kaplan who advocates 'flexible yet universal approach to human rights' taking the form of a new global treaty on a narrow set of core rights. See chapter 8 ('A return to Basics') in S Kaplan, *Human Rights in Thick and Thin Societies: Universality without Uniformity* (CUP 2018) 250. The arguments of Kaplan are deeply imprinted by the Rawlsian vocabulary ('basic decency', 'overlapping consensus', the distinction between categories of societies, ….). See for a similar return to the core, KD Maglive, 'The case for a Comprehensive Global Human Rights Treaty under UN Auspices' in J Woutersand others 47-68. On Kaplans universalism, *see*, ThVan Poecke and others, 'The Interdependence of Issues Relating to the Universality, Proliferation and Costs of Human Rights', in J Woutersand others, 6-9

[134] K McCall-Smith, 'The Proliferation of Human Rights: Between Devotion and Calculation', in J Woutersand others, 114-43

[135] Van Poecke(2020) in their excellent literature discussion of the universality debate, draw a link between this debate and the debate in human rights law on the creation of new rights and rights inflation. Their discussion of authors like Clément, Alston, Posner and others adds a series of voices that connect a greater variety of rights through rights creation with the failing effectiveness of the human rights system.ThVan Poecke, 6-9 with a discussion of D Clément, 'Human Rights or Social Justice? The Problem of Rights Inflation' (2018) 22 The International Journal of Human Rights156; TC Pocklington, 'Against Inflating Human Rights' (1982) 2 Windsor Yearbook of Access to Justice77; Ph Alston, 'Conjuring Up New Human Rights: A Proposal for Quality Control' (1984) 78 The American Journal of International Law607, 614;

Common to both directions in human rights theory is that they make the political (human made) dimension of human rights-law more visible.[136] In addition, they each insert their specific added values. The holistic and inclusive approach shifts the human right focus to the level of 'detail' and to the level of rights holders faced with concrete problems in a particular situation. This invites us to apply a flexible human rights lens.[137] The minimalist approach reminds us of the political diversity amongst states and warns for liberalist self-indulgence by recognizing 'decency' outside Western borders. Although we have a bit more sympathy for the openness of holism as opposed to the cold calculations of the minimalist approach, neither one will do for us.[138] Both, in fact, in one way or another, undertake to save the original liberal categories of the gospel: individualism, liberty, property, equality and universalism.

XV. ALTERNATIVES OUTSIDE THE HUMAN RIGHTS GOSPEL

A more interesting alternative move, proposed by non-European authors, is to push away human rights rhetoric, to stop referring to the Universal Declaration of Human Rights adopted under colonial times as an 'overlapping' consensus-document and to prioritizean increased cross-fertilization between

A Gutmann, 'Introduction' in M Ignatieff, *Human Rights as Politics and Idolatry* (Princeton University Press 2001) 12; J Griffin, *On Human Rights* (OUP2008) 92–93; J Mchangamaand G. Verdirame, 'The Danger of Human Rights Proliferation: When Defending Liberty, Less Is More'(*Foreign Affairs*, 24 July 2013) <www.foreignaffairs.com/articles/europe/2013-07-24/danger-human-rights-proliferation> accessed 12 November 2021.

[136] Political insights drive some to a core-approach, others to a more inclusive, intercultural approach. Political concerns about the power, legitimacy and effectiveness are shared amongst all parties, whatever might be their approach.

[137] This position seems to point in the direction of a plea for a broader 'margin of appreciation' for the states, which however generally is not seen as a move towards a stronger human rights protection

[138] The holistic approach has the merit of addressing criticisms levelled against human rights universality (rather than minimalizing it as the second approach does). Without giving up all sense of direction towards universalism, holism attempts to better respond to diversity, pluralism andindividual freedom that is always socially and politically conditioned (T Altwicker,101-126). There is also a risk with the second approach since its core idea 'less (rights or universality) is more' will most probably end up by re-imposing some of the Western individualist and first generation-obsessions. Equally we are distrustful of those (especially 'states', be they found 'liberal' or just 'decent' by a Rawlsian oracle) that in a Godlike manner would be capable of distinguishing between core problems and trivial interests' that should not be protected by rights. Liberty suffers when it is replaced by a bundle of rights, and it suffers even more when the bundle is restricted to a narrow set of rights. On the impossibility of reaching an agreement on a narrow set of rights, *see*, E Posner, *The Twilight of Human Rights Law* (OUP 2014) 137–38. More critical on minimalism, *see*, Joshua Cohen, 'Minimalism About Human Rights: The Most we can Hope For' (2004) 12(2) The Journal of Political Philosophy190-213. Useful clarity in this discussion is brought by Beitz's two level model - Ch Beitz, *The Idea of Human Rights*, (OUP 2011) 256. and Horn's fourfold distinction (abstract and specific) human rights and (abstract and specific) cosmopolitan rights to untangle different conceptions of human rights and to save human rights from the shortcomings of minimalism and its strategic instrumentalism (AS Horn, 724-43).

cultures and regions.[139] Equally, political are attempts to set up human right frameworks or reforms by using political benchmarks such as conceptualization, competence, coherence, and consistency,[140] or governance criteria such as transparency, accountability and participation.[141] More radical political steps are taken by those that seek to replace the language of human rights by alternative frameworks and languages (such as 'decolonization',[142] 'law and development',[143] 'sustainable development'[144]; 'capabilities and social participation'[145]) in an attempt to avoid the defects of the former with its Western biases. Judging the enthusiasm with regard to the UN's Sustainable Development Goals (SDGs)-Agenda, and its promise for real benefit to non-Western countries, one wonders whether this policy(that actually omits almost all references to human rights) has not already taken over the role of human rights.[146]

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[139] M Mutua, *Human Rights: A Political and Cultural Critique*(University of Pennsylvania Press 2002) 264. To avoid further indoctrination about universal truths, Makau Mutua proposes to force those that refer to the classical (Western, liberal) understanding of human rights, to self-identify and present their European-developed human rights notions as an option the non-Western world is free to accept or reject.

[140] We already discussed Andrew Williams' analytical grid for human rights regimes (such as the EU) based on whether they conceptualize 'their' rights in a complete way (conceptualisation), whether they have a clear mandate to act in human rights matters (competence), how coherent they treat third states and whether they do themselves what they preach to others (consistency). These questions have to be answered in the light of a real assessment that looks not only at pronouncements on paper, but also at political, constitutional, practical and institutional realities and transformations (A Williams, 80-82).

[141] RWeber, *Shaping Internet Governance: Regulatory Challenges*(Springer2010) 322. This governance approach with its focus on 'how' things work (are they transparent? Is there participation and by whom?) might look less substantive than human rights-assessments, but might have added value especially in areas plagued by *informalism* and lack of legal accountability and state-based public law. For an attempt to apply these criteria in (international) criminal law plagued by crime control tendencies, lack of conceptual clarity to address globalization effects and lack of clarity regarding the weight and nature of procedural rights. *See*, P De Hert, 'Globalisation, Crime and Governance. Transparency, Accountability and Participation as Principles for Global Criminal Law' in Chr Brants and S. Karstedt (eds), *Transitional Justice and its Public Spheres: Engagement, Legitimacy and Contestation* (Hart Publishing2017) 91-124. On the weak status of procedural rights, see, I Dennis, 'Instrumental Protection, Human Right or Functional Necessity - Reassessing the Privilege against Self-Incrimination' (1995) 54 Cambridge Law Journal342-76.

[142] A Cabral, *Resistance and Decolonization* (Rowman & Littlefield 2016) 204.

[143] W Vandenhole, 'Decolonising children's rights: of vernacularisation and interdisciplinarity' in R Buddeand U Markowska-Manista (eds), *Childhood and Children's Rights between Research and Activism* (Springer2020) 187-207.

[144] M Meulebrouck, 'Sustainable development in 'new generation' trade agreements of the European Union: towards integration or fragmentation of the human rights language?', in J. Wouters et al., 172-197.

[145] N Whiteside and A Mah, 'Human Rights and Ethical Reasoning: Capabilities, Conventions and Spheres of Public Action' (2012) 46(5) Sociology921–35; MC Nussbaum, *Creating Capabilities: The Human Development Approach*, (HUP 2011) 238.

[146] As a reaction to globalization, climate change and other problems identified in our contribution, the United Nations organised a UN Conference on Sustainable Development (Rio+20) in 2012, followed by a UN General Assembly approval of the "2030 Agenda for Sustainable Development" in 2015. The focus of the 7 Sustainable Development Goals (SDGs) listed in this Agenda is on economic growth, social inclusion and environmental protection. See the

But why stop there? Why not considering open borders and lift immigration restrictions? For some there is no better way to promote human freedom, foster economic prosperity, and mitigate global inequalities.[147] Is this a bridge too far for the human rights narrative and its current alternatives?

Or would real alternatives need to break radically with the modern ontology that sacralizes individuals and has forcefully installed erroneous dichotomies (subjects vs. objects, nature vs. culture) as dominant lenses through which we 'see' realities. Whereas the dominant modernist narrative abstractly opposes humans as free and property-owning individuals not only to non-humans, conceived as loose and wholly passive goods, but also to self-standing human collectives,today decisive steps are set in the direction of an 'ecological' ontology wherein interdependencies and relations are engines of creativity and generativity.[148] In the first view, the world has to be wrestled into in a number of definitions – the individually acting person with a passive world at his/her disposal - that are deemed and institutionalized as being neutral. In the other view,the world is always in the making by the ongoing action of dynamic, inter-relational and open processes of becoming, wherein interdependencies, relations and the articulation of affordances and possibilities of life are crucial.

These sharp contrasts between a modernist epistemology - which installs universality and globality as axioms to be met - and an ecological ontology - which is necessarily local, topical and pragmatically turned towards consequences- are extremely revealing. In the second perspective life unfolds in a step-by-step movement, with a permanently 'refreshed' view of a desirable future. This can only unfold ecologically, taking 'ecologies' and 'relations' seriously rather than entities assumed to be self-standing. Maybe the keys for a better world will emerge in an ontological shift wherein individuals and their property - as unique and foundational building stones- are abandoned in order

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different volumes on these SDGs, *Encyclopedia of the UN Sustainable Development Goals* (Springer Nature2020).

147 *See*, A Sager, *Against Borders Why the World Needs Free Movement of People* (Rowman & Littlefield2020) 146.

148 Such an 'ecological ontology' develops both in anthropology and in biology, *see*, SF Gilbert, J Sapp, and AI Tauber, 'A Symbiotic View of Life: We Have never been Individuals' (2012) 87 The Quarterly Review of Biology325-41; D Graeber, *Fragments of an Anarchist Anthropology* (Prickly Paradigm Press 2004)105; DJ Haraway, 'Sympoièse, SF, embrouillesmultispécifiques' in D Debaiseand I Stengers (ed),*Gestes spéculatifs*, Les presses du rée (Dijon 2015); L Margulis, *SymbioticPlanet. A new look at Evolution* (Amherst 1998); A Tsing, *The Mushroom at the End of the World: On the Possibility of Life in Capitalist Ruins* (Princeton University Press2015). Such voice was already heard in the time of Darwin – who drew a biological world based on a 'struggle of the fittest' just like a market based on competition– in the work of Peter Kropotkin, *Mutual aid. A factor of evolution*(Dover Publications2006) 336. *See also*: S Gutwirth in the cycle of Francqui conferences at the University of Namur under the title: 'Ecologies du droit' <https://works.bepress.com/serge_gutwirth/>.

to open the way for the resurgence, upsurge and resistance of the commons, commoning and the collectives they form.[149]

XVI. PUNTO PEDALE : OUR ANSWER TO 'WHAT IS YOUR ALTERNATIVE?'

Our final answer to the questions: 'what is your alternative?' and 'what are you going to replace human rights and the democratic constitutional state with?' are simple.[150] Human rights theory and law has had 250 years to establish itself as relevant. Human rights have played a role of importance by feeding dreams and inspiring hope: we have no other choice than to deal with their legacy. But that should certainly not prevent us from setting up constructs that better realises our hopes.

We discussed the possibility that human rights narratives will be replaced one day by other stories (even worse stories). We also noted that individualism and property, so central to human rights, have historically been co-produced by states and markets to break the disruptive power of community, collectives and the commons, and everything else that could make bottom-up politics possible. Well, give us 250 years, with the same means, and we will certainly, bottom up, make something better of it; not as individual calculating and uprooted egoists, but as ecological and connected beings; without armed states as powerful cops, but in mutual cooperation; without majority-minority rule but with consensual-speculative palavers, and, eventually, without externalization of damage, risk and misery.

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[149] *See* the stunningly strong: D Bollierand S Helfrich, *Free, Fair, and Alive: The Insurgent Power of the Commons* (New Society Publishers 2019); D Bollier, *Think Like a Commoner. A Short Introduction to the Life of the Commons* (New Society Publishers 2014) 196.

[150] Generally, that is a prologue to 'TINA' ("there's no alternative") and, next, to a "shut up, you naïve idiot, go back to the cavern if you don't like it ..." A good TINA argument is advanced in J Donnelly, 'The Relative Universality of Human Rights' (2007) 29(2) Human Rights Quarterly281, 291: "In principle, a great variety of social practices other than human rights might provide the basis for realizing foundational egalitarian values. In practice human rights are rapidly becoming the preferred option. I will call this overlapping consensus universality".