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#### RESEARCH PAPER

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### *'Shooting into the Dark': towards a pragmatic theory of human rights (activism)*

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#### I. Uneasy times: human rights between scepticism and (counter-)terrorism

After the seeming triumph of human rights discourse in the 1990s, when the unprecedented expansion of international human rights instruments and national Bills of Rights, and the apparent emergence of a global cosmopolitan superculture seemed to augur in a new world order of universally shared values, the vogue of human rights has come, off late, under considerable pressure. It is tempting to attribute that pressure solely to an external cause, namely to the very real competition now faced by human rights from an ever wider-ranging (human) security discourse that has constantly been expanding since the September 11 attacks. The danger of this particular competition does not so much consist of the deliberate curtailment of the enjoyment of various human rights in the name of counter-terrorism,<sup>2</sup> but rather in the gradual and somewhat concealed replacement of human rights as the defining concept of late modern societies by that of (human) security. For terrorism and counter-terrorism, by cruelly manifesting the practical limits of multicultural cosmopolitanism and intercultural understanding, seem to put into question the very foundations upon which the

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

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

idea of universal human rights is premised. The human rights community has certainly had difficulties in finding an appropriate response to an ever more abrasive security discourse that appears better attuned to the current mood of fear and loathing. Indeed, it has largely confined itself to documenting whatever limitations of constitutionally or internationally protected (human) rights have occurred, and to legalistically pointing to the breach of governmental or state obligations in that respect. It has, in other words, largely treated the threat of (counter)terrorism as a standard human rights violation issue, almost as if nothing has happened and as if an overarching consensus over human rights could still be readily assumed. It has, thus, not taken up the real challenge of the (counter-)terrorist predicament, namely its exposition of the inherent precariousness of the underlying assumptions on rationality and inter-cultural translatability upon which human rights (activism) have/has been constructed. Indeed, contemporary human rights discourse is, arguably, premised on the fact that its foundations are only hazily assumed, rather than clearly articulated. Only by concealing the fact that the basic questions underlying the concept of human rights have never been answered could the international human rights 'movement' acquire and maintain its self-righteous aura of untouchable 'do-goodness' upon which it has thriven. It is this shakiness of the ground of human rights which the (counter-)terrorist challenge has brought to the fore, and which anyone pretending to come to the rescue of human rights (activism) must address.

It is, of course, not a new question, and long before the clamours of 9/11, post-Wittgensteinian and poststructuralist critics had begun to deconstruct some of that assumed ground. And (neo-)pragmatist commentators following in their wake had already pointed to the implications of that critique for the 'usefulness' and practical legitimacy of human rights (activism). Both this epistemological critique, and the pragmatist reflection on post-foundationalist discourse will be taken up here, with a view to explore a new way of (un-)grounding human rights and their promotion.

## **II. On Shaky Ground: cultural incommensurability, (un)translatability, and human rights**

At its deepest level, the ground of human rights has been premised on two epistemological assumptions: a singular and, hence, universal rationality, and the intercultural translatability of concepts such as human rights. Only if all human beings are presumed to be imbued with the same form of reason, and only if concepts like human rights can, in principle, assume the same meaning for everyone, only then is there the kind of ground required by the currently prevalent discourse and praxis of human rights. However, both assumptions have, for long, been challenged in both analytical and continental philosophy, and a brief *excursus* into some of the debates surrounding the question of rationality, (cultural) commensurability, and

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<sup>3</sup> There is a vast literature on these lines of thought; for some indication, however, see Thomas S. Kuhn, *The Structure of Scientific Revolutions* (Chicago, 1962); Thomas S. Kuhn, *The Essential Tension: Selected Studies in Scientific Tradition and Change* (Chicago, 1977); Paul Feyerabend, *Against Method: Outline of an Anarchistic Theory of Knowledge* (London, 1975); Ruth Chang (ed.), *Incommensurability, Incompatibility, and Practical Reason* (Cambridge, Mass., 1998); Peter Winch, *The Idea of a Social Science and Its Relation to Philosophy* (London, 1958); Lawrence E. Hazelrigg, *Social Science and the Challenge of Relativism: A Wilderness of Mirrors: On Practices of Theory in a Gray Age* (Gainesville, FL, 1989); Cass R. Sunstein, 'Incommensurability and Valuation in Law' (1993-4) 92 *Michigan Law Review* 779; Jacques Derrida, 'Force de Loi: Le fondement mystique de l'autorité' (1990) 11 *Cardozo Law Review* 920; see also Drucilla Cornell, 'The Violence of the Masquerade: Law Dressed up as Justice' (1990) 11 *Cardozo Law Review* 1047; Costas Douzinas, *The End of Human Rights: Critical Legal Thought at the Turn of the Century* (Oxford, 2000); Zygmunt Bauman, *Postmodern Ethics* (Oxford, 1993); Richard Rorty, 'Human Rights, Rationality and Sentimentality' in Stephen Shute and Susan Hurley (eds.), *On Human Rights: The Oxford Amnesty Lectures* (New York, 1993), pp. #-#; Tom Campbell, K. D. Ewing and Adam Tomkins (eds.), *Sceptical Essays on Human Rights* (Oxford, 2001); on a different line, see also Michael Ignatieff's oft-cited essay 'Whose Universal Values? The Crisis in Human Rights' (The Hague, 1999); David Kennedy, 'The International Human Rights Movement: Part of the Problem?' (2002) 15 *Harvard Human Rights Journal* 101.

<sup>4</sup> See Kennedy, 'International Human Rights Movement'.

translatability shall illustrate the shakiness of the epistemological ground upon which human rights purportedly stand.

Rationality, (cultural) (in)commensurability and translatability have been discussed in a great number of disciplines, ranging from sociology and anthropology, to legal philosophy and comparative law. The translatability *problematique* has essentially emerged in two contexts, namely analytical philosophy and anthropology. In terms of the former, the so-called translatability *problematique* has initially been addressed by W.O. Quine and his thesis of the indeterminacy of translation<sup>7</sup>. In brief, Quine, coming from a behaviourist position and arguing against logical positivism, posits that there are no uniquely correct translations between languages because reference is ultimately inscrutable, rendering their translation always indeterminate<sup>8</sup>. One important consequence of this is that any number of what Quine calls translation manuals can be set up for the translation of terms from one language to another, all of which are compatible with the totality of speech dispositions, but, importantly, incompatible with each other<sup>9</sup>. It is this incompatibility which links up with Thomas Kuhn's very influential notion of incommensurability<sup>10</sup>, derived, in turn, from his thesis of revolutionary paradigm change<sup>11</sup>. The latter is conceived of as revolutionary precisely because, in Kuhn's view, there is no common ground between the new and the old paradigm, they represent a fundamental change not just of the scientific practices and conceptual apparatus but of the world views of their adherents<sup>12</sup>. As Sankey observes, "incommensurability thus emerges as a complex relation between paradigms consisting, at least, of standard variance, conceptual disparity, and theory dependence of observation"<sup>13</sup>.

Although there is an ongoing debate in the philosophy of science as to whether Kuhn is still a realist, or espouses some form of idealism<sup>14</sup> –and, the related question of whether he is a

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

<sup>6</sup> The notion of such conceptual 'irritation' has been inspired by the idea of 'legal irritants' as developed by Gunther Teubner; see, for example, his 'Legal Irritants: good faith in British law or how unifying law ends up in new divergences', (1998) 61 *MLR* 11.

<sup>7</sup> W.O. Quine *Word and Object*, Cambridge: The MIT Press, 1960

<sup>8</sup> He illustrated the point through the well-known example of an imagined 'native' term, 'gavagai' – denoting rabbit- the correct translation of which would, Quine demonstrates, require knowledge of the exact meaning of other terms, such as 'the same as', so as to be able to determine whether gavagai actually means rabbit, or, for instance, 'undetached rabbit part'; translation of these would, however, depend on certainty about the first term, 'gavagai'; in other words, determination of the exact translation of a term requires the exact translation of other terms, which could, however, only be obtained by referring back to the initial term, thus, involving a circularity; without the vantage point of an exact translation, which cannot, *prima facie*, be obtained, translation must remain indeterminate; see also Gregory McCulloch, "Indeterminacy of Translation", in Ted Honderich, *The Oxford Companion to Philosophy*, Oxford: Oxford University Press, 1995; and R. Kirk, *Translation Determined*, Oxford, 1986.

<sup>9</sup> H. Sankey, "Kuhn's Changing Concept of Incommensurability," 44 *British Journal for the Philosophy of Science* (1993): 759-774, p. 76; and *ibidem*, "Incommensurability, Translation, and Understanding", in 41 *Philosophical Quarterly* (1991): 414-426.

<sup>10</sup> See primarily Thomas Kuhn (1962), *The Structure of Scientific Revolutions*, Chicago: Chicago University Press, 1962; originally a mathematical (Pythagorean) concept denoting, in modern terms, the irrationality of the square root of 2 –contrary to earlier assumptions that everything was measurable by rational numbers and their fractions, i.e. commensurable; see David Fowler, *The Mathematics of Plato's Academy: a new reconstruction*, Oxford: Clarendon Press, 1999; and Ruth Chang, *Incommensurability, Incompatibility and Practical Reason*, Cambridge: Harvard University Press, 1998 .

<sup>11</sup> For slightly more detailed discussion of the paradigm concept, see section II.1.; a similar line is taken by Paul Feyerabend; see, for example, his *Against Method*, London: New Left Books, 1975

<sup>12</sup> Kuhn, notoriously stated that "...in a sense that I am unable to explicate further, the proponents of competing paradigms practice their trades in different worlds. . . practicing in different worlds, the two groups of scientists see different things when they look from the same point in the same direction", in Kuhn (1960), p. 142; see also Sankey (1993), p. 761f.; and Patrick Glenn, "Are Legal Traditions Incommensurable ?", in 49 *American Journal of Comparative Law*, 2001: 133-145, p. 134.

<sup>13</sup> Sankey (1993), p. 762

<sup>14</sup> As summed up in Sankey (1993), p. 764.

relativist or not<sup>15</sup>-, and to what extent his early views have been watered down by himself over time, the incommensurability concept has proved to be highly influential for conceptions of translatability and comparability. Kuhn himself made that nexus when he postulated, in specification of the incommensurability thesis, that comparability could only exist where a neutral theory language could be assumed to exist, which, however, in the case of different paradigms, could precisely not be assumed. In the absence of such a *tertium comparationis*, the only way of linking paradigms would be by translating one into the other; yet, picking up Quine's thesis, translation is seen by Kuhn as indeterminate, producing not exact correspondence, but, at best, compromises<sup>16</sup>. Later, however, he distinguished what he saw as Quine's strong indeterminacy thesis –'strong' because it involved the act of reference as such, and not just the travails of the 'correct' transference of meaning, as in translation<sup>17</sup>- from 'mere' translation failure which he takes to better explain 'what happens' in incommensurability. Importantly, if puzzlingly, Kuhn also distinguished incommensurability from incomparability by essentially introducing a difference between paradigms –inherently incommensurable- and their referents, which, insofar as they coincide, are plainly comparable. This would seem in part to confirm his realist tendencies by contradicting the world-change argument, since paradigms would, in this view, be merely different expressions of one and the same world; inter-paradigmatic comparison would, hence, be possible on the basis not of a neutral theory language, but of a conceptual meta-language through which a common reference point would be expressed. To an extent this interpretation is vindicated by Kuhn's late, or third phase<sup>18</sup>, in which he introduced the notion of local incommensurabilities; it essentially reduced incommensurability to partial translation failure as between marginal aspects of theories, while their larger parts allegedly can, in most cases, be translated homophonically, or, as he, occasionally called it, point-by-point<sup>19</sup>. Although this seems to retract from the, in any case always disputed, radicalness of Kuhn's thesis in the *Structure*, the discussion on translatability and comparability, and the question of a weak form of incommensurability, leaving room for different forms of constructivism, has been extraordinarily fruitful for the methodological self-reflection of the social sciences.

This Kuhnian set of questions, and the general question on the nature of rationality which looms in its background has subsequently been picked in a number of discussions on the epistemology of the social sciences, and, perhaps most self-consciously so in anthropology, where such questions as the translatability of cultures, or the nature of rationality in light of a culturally plural world have loomed large. It has specifically come to the fore in a discussion which involved and, to an extent, is still involving, not only anthropologists, but also social theorists and philosophers. It was originally triggered by Peter Winch's influential arrack on the scientific approach to anthropological knowledge, as, in his view, exemplified by the British social anthropologist E.E. Evans-Pritchard and his classic study of magical rites among the Azande<sup>20</sup>. Winch was, of course, inspired by the second Wittgenstein and his para-structuralist ordinary language philosophy, which holds that that all knowledge is ultimately grounded in language. The latter is not conceived as mediating between a Cartesian subject and a 'real' world of objects, but as predetermining the way in which the object world is perceived. Understanding the world –with understanding not denoting the hermeneutic *Verstehen* here- is not derivative of some perception of the real object, but the precondition for such perception. It is, hence, quite independent of any real world, and self-contained within the language in which it occurs. Meaning is, consequently, not conceived as representational but as pragmatic, namely constituted by the specific use to which linguistic expressions are put –notoriously called 'language games' by Wittgenstein. Language is, therefore, not just instrumental to social action, but, since it is inseparable from its use, it is a social action itself. Yet language use is bound to follow certain rules which Wittgenstein

<sup>15</sup> See, inter alia, I. Scheffler, *Science and Subjectivity*, Indianapolis: Bobbs-Merrill, 1967, D. Shapere, *Reason and the Search for Knowledge*, Dordrecht: Reidel, 1984.

<sup>16</sup> Thomas Kuhn, "Theory-Change as Structure-Change: Comments on the Sneed Formalism" 10 *Erkenntnis*. (1976): 179-99, p. 191

<sup>17</sup> Ibid.

<sup>18</sup> Sankey (1993), p. 771

<sup>19</sup> Kuhn (1962), p. 266.

<sup>20</sup> Peter Winch, *The Idea of a Social Science*, London: Routledge, 1958; see also William Brandon, "Fact' and 'Value' in the Thought of Peter Winch: linguistic analysis broaches metaphysical questions", in 10 *Political Theory* (1982): 215-244.

situates on the structural level -though without calling it so-: they do not depend on individual consciousness, but provide the very condition for language to constitute the world as a meaningful totality in the speaker's mind. Yet, unlike in continental structuralism, the rules of language use are not absolute and, in that sense, objective, but they are configured by the specific context within which they operate. It is important to note that Wittgenstein, unlike the pragmatist tradition to which his thought is sometimes likened- does not derive this insight from any empirical account of semantic pluralism, but from the logical postulate that no criteria independent of context-dependent use can be established by which any particular set of rules could be held to be truer than another; for any given set of rules, an unlimited number of alternative sets can be imagined. These sets of rules, Wittgenstein calls 'forms of life', and insofar as meaning is always 'form of life'-specific it is not strictly speaking the same as, but at least similar to, what is normally referred to as culture<sup>21</sup>.

This, then, is the starting point for Winch, who applies Wittgenstein's epistemological concept of the 'form of life' to sociological and anthropological method. For Winch, it is the form of life which determines the meaning of the world for each individual within it:

"reality is not what gives language sense. What is real and what is unreal shows itself in the sense that language has. Further, both the distinction between the real and the unreal and the concept of agreement with reality, themselves belong to language [...] if we wish to understand the significance of these concepts, we must examine the use they actually do have - in the language."<sup>22</sup>

Importantly, 'understanding the significance of concepts' is seen by Winch as premised upon the rule-following character of language use. Rule-following, however, is 'form of life'-specific, i.e. it is not reducible to an externally observable, 'objective' regularity of behaviour, but depends on the specific internal action of the language user within a particular 'form of life'; it is, hence, not pre-determined, but contingent upon the language user's concrete choices, including the possibility of his/her not following a particular rule. Yet, the language user is not conceived by Winch as a rational monad reconstructing the particular rules of language within his/her consciousness, but he/she grasps the adequacy of his/her language use -i.e., general behaviour- by means of communicative interaction. Only if his/her behaviour is understood by other members of the same 'form of life', and only if it can, in principle, be discovered by others, can he/she be said to have followed a rule; rule-following is, thus, characterised by intersubjectivity<sup>23</sup>. This, however, entails both that it does not depend on a rationalisation of the rules by individual actors, and, indeed, the latter need not be able to formulate the rules he/she follows; and it entails that understanding, insofar as it is based on such internal rule-following, is only possible from within a particular 'form of life'. With this, Winch, following Collingwood's inside/outside distinction<sup>24</sup>, seeks to refute scientific positivism and its application to social facts by the Durkheimian tradition<sup>25</sup>, and he, thereby, finds himself in close proximity to the phenomenological approach; as Alfred Schütz had stated,

"[understanding] is, thus, primarily not a method used by the social scientist, but the particular experiential form in which commonsense thinking takes cognisance of the social cultural world. It has nothing to do with introspection; it is a result of learning or acculturation in the same way as the commonsense experience of the so-called natural world. [Understanding] is, moreover, by no means a private affair of the

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<sup>21</sup> I.C. Jarvie, *Rationality and Relativism*, London: Routledge, 1984, p. 88

<sup>22</sup> Winch (1958).

<sup>23</sup> See Jürgen Habermas, *Theorie des kommunikativen Handelns*, 4th ed., Suhrkamp: Frankfurt a.M., 1987, p. 254.

<sup>24</sup> R.G. Collingwood, *The Idea of History*, Oxford: Oxford University Press, 1956.

<sup>25</sup> Keith Dixon, "Is Cultural Relativism Self-Refuting ?", in 28 *British Journal of Sociology*, Issue 1, (March 1977), pp. 75-88, p. 76f.

observer which cannot be controlled by the experiences of other observers.<sup>26</sup>

Hence, like Schütz, Winch assumes that understanding is premised on the participation in a particular form of life –or, in phenomenological parlance, life-word-, and can also only be expressed by means of the particular (ordinary) language use of the latter. In other words, it is non-sensical to Winch to purport to relate social meaning from any perspective other than that of the participant of a form of life<sup>27</sup>.

This gives rise to far-reaching and much debated conclusions on rationality and comparability. As to the former, the corollary of the form of life specificity of meaning is that each form of life constitutes its own world, following its own rationality, and establishing its own, particular kind of truth. It is important to see that Winch is not just saying that each form of life *expresses* social reality in its own way, but that, in fact, it *constitutes* that reality. For that reason, no standard of thinking, and not even the basic precepts of logic are form of life independent, and, thus, cannot be assumed to hold true for any form of life other than that in which they are internally valid. Hence, there are multiple rationalities for Winch, which are, at least on a theoretical level, incommensurable with each other. This, however, has important implications on the question of whether and how the internal logic of a specific form of life can be reconstructed for comparative purposes. For this reason Winch engages with a standard example of 'scientific' cultural comparison, namely Evans-Pritchard's attempt to 'explain' the magical world view of the Azande. Based on the functionalist, and ultimately positivist, assumptions of British social anthropology<sup>28</sup>, Evans-Pritchard, in order to describe and assess the Azande's world view, distinguished between criteria of logical coherence and empirical fit.

Through this distinction, he, *prima facie*, aspires to combine a hermeneutic interest in understanding the other's world view in its otherness, with an objectivist classification of Azande thought in terms of universal standards of cultural development. Evans-Pritchard sees the observational criterion of logical coherence as independent of the objective truth of any world-view; to him, as an external observer, such coherence simply presents itself in the form of observable regularities of behaviour and internal explanations by the actors involved, from which the anthropologist can reconstruct stable patterns and rules. Evans-Pritchard hypostasise these observations into a correspondence with the basic precepts of formal logic, which he considers to be universally applicable. Hence, his hermeneutic endeavour exhausts itself in the attribution of logical standards to what he takes to be the Azande belief system. His second interpretive operation consists of assessing that belief system in terms of its empirical adequacy, i.e. viz. the 'real' world. Here, Evans-Pritchard reveals his realist world view in which there is one objective world 'out there' which can only be truthfully understood through the continuously optimised method of modern science. Hence, even where the Azande's believe in witchcraft may display some form of rational consistency, it can still be held to be incorrect where it offers a non-scientific -and, thus, 'false'- account of the facts; or, paraphrasing Evans-Pritchard, I.C. Jarvie, 'there are no witches'.<sup>29</sup> Hence, in this scientific, realist view of anthropology, there is not only one world, one logic and one truth, but it is also taken as a given that it is the modern 'scientific' world view which is closer to it than the Azande's belief in magic. Yet, not only is the former superior to the latter, but the logic and rationality underlying the former is assumed to be universal, making both world-views potentially commensurable. In other words, the Azande could, if pressed by a 'scientific' observer, very well be made to see both inconsistencies within their belief system, as well as

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<sup>26</sup> Alfred Schütz, "Concept and Theory Foundation in the Social Sciences", in Maurice Natanson, *Philosophy of the Social Sciences*, New York: Random House, 1963, p. 239

<sup>27</sup> This may, to an extent, correspond, as McDaniel has pointed out, to the inseparable connection between what Husserl called noesis and noema; the former refers, in essence, to the act of perceiving, and the latter to that which is perceived; by postulating their linkedness, phenomenologists come to a similar methodological insight as Winch, namely that the essence, i.e. meaning of a social fact cannot be established independently from the way it is known, or in other words, the act of knowing constitutes that which is known; see Timothy McDaniel, "Meaning and Comparative Concepts", in *6 Theory and Society*, (1978): 93-117.

<sup>28</sup> See, *inter alia*, E.E. Evans-Pritchard, *Social Anthropology*, London: Faber and Faber, 1951.

<sup>29</sup> Jarvie (1984), p. 105.

the plausibility of alternative, notably 'scientific' descriptions of the 'real' world. Azande thought is, therefore, not a universe of its own, but represents simply a lower stage of cognitive development, and, in that sense, provides an image of pre-scientific societies.

This view is, of course, unacceptable to Winch, since it is to commit a category mistake; for the incommensurability of forms of life is, as was indicated, not just a difference of expression, but a wholly different way of organising language and thought. Hence, it is not only incorrect to attempt to assess the truthfulness of the Azande world view from the perspective of a different one, but it is also already wrong to assume that it would internally be organised according to the same standards of rationality as the scientific world view. Azande thought may simply not perceive as inconsistent certain aspects of the belief-system which, to the European 'scientific' observer are clearly so. In general, the expression of Azande beliefs may simply not correspond to a 'theory' of the world with a view to produce 'true' knowledge and its technical application<sup>30</sup>. As a consequence, it is, for Winch, "the European [scientific realist Evans-Pritchard-type comparativist], obsessed with pressing Azande thought where it would not naturally go -to a contradiction- who is guilty of misunderstanding, not the Azande."<sup>31</sup> On a strict interpretation, this amounts to a denial of the possibility of any cross-cultural comparison, for even if an anthropologist was, hypothetically able to enter a form of life as a full participant, he/she could not translate the belief-system he/she shared into the very different belief-system of modern Western forms of life; in particular, he/she could not use any specialised theoretical terminology to describe his/her understanding of the other's beliefs. It is this alleged denial of comparability which has attracted the fiercest criticism, not least as it has been interpreted as an espousal of extreme relativism.<sup>32</sup> Strictly speaking, Winch can, of course, be charged with proposing all three of Wong's incommensurability theses in logical succession<sup>33</sup>; he denies the possibility of cross-cultural translation -i.e. he defends the incommensurability of translation-, therefore he has to assume the plurality of rationality and truth -i.e. he finds an incommensurability of justification-, and, as a consequence, he is bound to reject cross-cultural comparison according to any neutral *tertium comparationis* -i.e. he concludes the incommensurability of evaluation-. Responses to Winch have largely focussed on the evaluative incommensurability thesis, not least since it directly challenges the comparative enterprise and, thus, precisely the idea of a social *science* as such.

The positivist repique to Winch has largely based itself on the apparent inability of the justificatory incommensurability thesis to account for internal social change. To these critics, the plurality of forms of life does not imply a plurality of equivalent rationalities, but, under the positivist assumption of one single rationality and truth, the co-existence of different stages of that rationality.<sup>34</sup> Here, the modern scientific mindset is seen as an objectively more sophisticated way of human beings to account for the 'real world' than is its mythical counterpart. The two are related through a continuous process of cognitive evolution which is explained both by intra-form of life developments, as well as, and more crucially, a permanent cross-form of life exchange. As a result of this apparent dissolution of the incommensurability of justification, evaluation, too, is not only possible, but becomes the central task of the social scientist insofar as he/she elaborates categories through which the evolutionary difference between different forms of life can be explained. Following Popperian critical rationalism, positivist authors like Gellner, Horton, or Jarvie use the concept of open vs. closed mentalities to argue that different forms of life can be evaluated by their respective openness to learning experiences. The underlying premise is, of course, that the modern scientific mindset -being based, in the Popperian view, on the continuous adjustment of general theoretical explanations by means of falsification- is the most advanced form of cognitive openness, and,

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<sup>30</sup> Habermas (1987), p. 94.

<sup>31</sup> Winch "Understanding a Primitive Society", in B. Wilson (ed.), *Rationality*, Oxford: Oxford University Press, 1970, p. 93; see also Habermas (1987), p. 95.

<sup>32</sup> See, for example, Jarvie (1984), Dixon (1977), p. 78

<sup>33</sup> D. Wong, "Three Kinds of Incommensurability," in M. Krausz, ed., *Relativism: Interpretation and Confrontation*, Notre Dame: University of Notre Dame Press, 1989.

<sup>34</sup> Jarvie, for example, affirms that anthropology is an encounter of the self (of anthropologists) with its former incarnation (as observed in the 'savage' mind); see Jarvie (1984), p. 117

thus, superior to less open, belief-based mentalities<sup>35</sup>. This thoroughly realist position is, of course, prone to the same critique of a category mistake as is Evans-Pritchard's, namely of evaluating other forms of life according to criteria which these themselves do not have.

On a different string of thought, Alasdair MacIntyre reinterprets Winch's incommensurability thesis hermeneutically, though, ultimately, to argue against the relativism which Winch's position allegedly implies<sup>36</sup>. To him, the incommensurability of translation is not the end, but the starting point of his hermeneutic endeavour; though he admits to the at least partial intranslatability of languages, he nonetheless believes that advances in cross-linguistic, and cross-cultural understanding can be made, at least insofar as the difference of different forms of life can be extrapolated. To MacIntyre, it is precisely such an understanding of the substantive plurality of forms of life, rather than the *a priori* non-translatability postulated by Winch, that leads to an acceptance of the impossibility of objective evaluation. As Wong puts it, "the possibility of evaluative incommensurability arises precisely when non-translatability is overcome."<sup>37</sup> Yet, this evaluative incommensurability does not imply, to MacIntyre, an impossibility to conceptualise social change from an internal perspective. Even if one does not posit a unidirectional evolutionary process as the positivists do, the fundamental contingency of social reality entails that human beings are permanently in the need to understand this reality anew. They do this, of course, according to their form of life-specific criteria, which thereby come to be modified. While, on one hand, cognitive development cannot be described according to the external adequacy viz. the scientific world-view, it is, to MacIntyre, neither completely idiosyncratic, since it is based on the relevant actors making specific judgements in concrete situations; the fact that actors are able to make such judgements and, thus, deal with new situations, means that the rationality behind these cannot be entirely shaped by the form of life actors are in, but must, in fact, include some independent evaluative criteria –otherwise actors would simply be unable to rationalise, in any way, any new situation.

Winch himself has himself qualified the apparently relativistic implications of *a priori* non-translatability by introducing what could be termed second order, or meta-translatability. If the understanding of concepts can necessarily only occur from within the horizon of their 'native' form of life, and if they are, as a consequence, incomparable in substance, their basic type, form or function, may, in fact, be discerned across forms of life. Here Winch picks up Wittgenstein's idea of family resemblances to develop the idea of 'formal analogies'. These represent universal premises of language use, an idea not dissimilar to the structuralist identification of the 'grammar' of social reality. For Winch, rationality and truth are themselves such analogies, since rule-bound language use necessarily implies a certain logic, and a certain assumption of truthfulness, even if it is entirely implicit and may not be rationalised by the language users as such. These general features of language use are, in Winch's view, commensurable, and hence, in theory also comparable. The question which arises here is, however, with what language such comparison could be made; after all, both the Wittgensteinian and the phenomenological premise is that the ordinary language of the life-world cannot be transcended, and that no theoretical meta-language is possible. Yet the concept of formal analogies seems to assume that ordinary language does have the potential to at least recognise these even in 'alien' forms of life.

What both Kuhn's and Winch's self-relativization of the (alleged) relativism inherent in the incommensurability thesis brings to the fore is the question to what extent understanding, and, in a wider sense, communication, is still a possible and worthwhile category. As was already partly seen, the question can be addressed either in a 'small' or in a 'big' way; the former essentially involves playing around with the central concepts, namely incommensurability, incompatibility, incomparability and translation, so as to qualify, but not fundamentally deny the possibility of some form of understanding and communication. The latter, in turn, seeks to take incommensurability seriously, and, thus, deals with the more fundamental dichotomy between relativism and objectivism, and its epistemological and

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<sup>35</sup> Habermas (1987), p. 85f.

<sup>36</sup> Alasdair MacIntyre, *Against the Self-Images of the Age: essays on ideology and philosophy*, Notre Dame: University of Notre Dame Press, 1999.

<sup>37</sup> Wong (1989), p. 142

further consequences. The 'small' answer, hence, retains some form of however 'softly' conceived realism<sup>38</sup>, whereas the 'big' one tries to explore what lies beyond it. Both Kuhn and Winch have, as was seen, posed the 'big' question, but have then preferred to address it in an exceedingly 'small' way by re-introducing conceptions of cross-cultural (or cross-theory) understanding despite and on top of inter-cultural incommensurability. In relation to the inter-theoretical incommensurability of Kuhn and Feyerabend, Sankey has pointed out that translatability and understandability have to be seen as strictly separate; hence, incommensurable theories are, by definition, non-translatable into each other, but may, nonetheless be understood by extra-paradigmatic observers<sup>39</sup>. The reason is, according to Sankey, that translation is a purely semantic relation between (theory) languages, whereas understanding is a cognitive relation between a speaker and a language<sup>40</sup>; the latter can, hence, potentially be learned by any prospective speaker, and incommensurability can, thus, not apply to understanding, but only to translation. Even though this would seem to represent already a considerable watering down of the more radical incommensurability (of understanding) implied in Kuhn's earlier work, non-translatability would still imply incomparability, since no common meta-language would be supposed to exist. Yet, as is evident from Kuhn's later notion of local incommensurabilities [see *infra*], he came to consider most incommensurabilities as occurring between theoretical sub-languages embedded within a shared natural language serving, effectively as a meta-language; hence, in this scenario, understanding does not require the actual or imagined 'learning from scratch' of the object language, nor, for that matter, are the theoretical sub-languages incomparable, as there is now, in fact, a common linguistic reservoir. This then represents one of the 'small' ways out of the consequences of incommensurability, notably the postulation of the fundamental understandability of different theories by the same types of actors, and the assumption of some common linguistic elements between all theories. Some would claim that this scheme also applies to inter-cultural understanding, since with a 'correct' methodology and some shared components –not necessarily linguistic, but, generally, of cultural significance-, genuine cross-cultural understanding can be attained. Most would, however, consider such cross-'form of life understanding' to be fundamentally different from the understanding of a language; and, indeed, even if it were analogous, the case of language is itself problematic, as, in the absence of a shared meta-language, the only way to gain understanding would be to learn it like a child, which, evidently, does not represent the kind of synchronic cross-cultural understanding that is sought.

Here, then, Winch's backtracked notion of 'formal analogies' comes in. If no common linguistic or cultural elements exist, and, hence, a relationship of incommensurability pertains, the only way to maintain that understanding is still possible is, as was pointed out above, by referring to some shared essences that lurk behind linguistic and cultural difference. These essences must be, even if not so conceived by Winch, common structural properties either of cultural significance or of language. They correspond to what critics of Kuhn's more radical thesis have held against it, namely the alleged existence of common references between the terms of different theories. Hence, instead of simply assuming direct understandability, this line of thought seeks to establish the basis for mutual understanding in some transcendental meta-rationality. In its simplest form, it has been referred to as a covering value<sup>41</sup>, namely some shared vantage point from which aspects of different cultures can be understood and, in fact, compared. Yet, not only does this assumption simply jostle the onus of proof onto some socio-historical reality that is seen as, in principle, discoverable<sup>42</sup>, but it also does not establish any way in which the difference between real and projected communality could possibly be determined; that way, covering values will all too often function as self-fulfilling prophecies by which something in common is 'found' only after having been planted by the finder. This prefigures the general charge of inadvertent ethnocentrism that plays a prominent

<sup>38</sup> See Richard Bernstein, *Beyond Objectivism and Relativism*, Philadelphia: University of Pennsylvania Press, 1983.

<sup>39</sup> Sankey (1993), 9, p.416f.

<sup>40</sup> *Ibid.*, p. 417

<sup>41</sup> Chang (1998), p. 6; and Patrick Glenn, *Legal Traditions of the World: sustainable diversity in law*, Oxford: Oxford University Press, 2001, p. 143

<sup>42</sup> See D. Pearce's advice (within the philosophy of science) is to simply 'dig deep enough'; in *Roads to Commensurability*, Dordrecht: Reidel, 1987.

role in the 'big' response. A more subtle route has been trodden by Habermas and his argument that it is what he calls 'second-order concepts' that provide common ground between cultures: "these second order concepts fulfil necessary cognitive functions in the process whereby a culture becomes reflective, thus enabling its members to take a hypothetical stance towards their own traditions and to undertake on this basis a cultural self-realization.<sup>43</sup>" The basis for common understanding is, hence, the universal ability to learn, which, for Habermas, is, in turn, situated in the inherent properties of language<sup>44</sup>. Although this scheme is significantly more complex than the simple postulation of some shared terms, its universalist assumptions of language, and its somewhat too simplistic account of socio-historical evolution have also attracted strong criticism for allegedly reintroducing a 'post-metaphysical' foundationalism<sup>45</sup>.

Part of the forcefulness with which this epistemological debate between realists and conventionalists, positivists and hermeneuticists has been led might be explained by the alleged consequences which, in the view of either position, adherence to the respective other entails. For the positivist side, as was seen, the assumption that rationality and truth are plural amounts either, in the case of a strong incommensurability thesis, to outright nihilism, or, in the case of weaker versions based on the possibility of hermeneutic approximation, to an endorsement of some esoteric form of intuitive empathy which is indistinguishable from cognitive arbitrariness. For the hermeneutic, post-positivist side, in turn, the assumption of a singular rationality and truth, and the consequent evaluation of different forms of life according to a formalised set of criteria, comes to nothing more than to the crude imposition of one mindset onto and over another. This, then, sets the stage for the 'big' response to the question of understanding, circling around what is made out to be, by some, the black hole of relativism. The idea of the latter is probably as old as the reflection on truth<sup>46</sup>; today, the term is colloquially associated with Einstein's 'theory of relativity' in physics, postulating the relativity of all motion in the universe; however, the particular meaning of relativity in the specific context of space-time is more often assumed than actually understood by non-physicists and it should be referred to with care<sup>47</sup>. In philosophy, it has mainly been brought to the fore by discussions in analytical and post-positivist philosophy; on one hand, some of the contributions of Quine, Sellars, Davidson, and Putnam have<sup>48</sup>, within analytical philosophy itself, introduced notions of the situatedness of knowledge, and, hence, of what could be termed a proto-relativism, although all of them insist on neither being relativists, nor on having laid "the seeds of [epistemology's] own destruction"<sup>49</sup>. Another impulse towards relativism came, as was seen, not so much from, as through the second Wittgenstein and his notion of linguistic situatedness. This line of thought has also been influential in some (analytical) political and legal theorising on incommensurability and relativism<sup>50</sup>.

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<sup>43</sup> See Habermas, *Justification and Application: remarks on discourse ethics*, Cambridge, (MA): MIT Press, 1993, p. 157

<sup>44</sup> Habermas (1987)

<sup>45</sup> Gerard Delanty, "Habermas and Occidental Rationalism: the politics of identity, social learning, and the cultural Limits of moral universalism", 15 *Sociological Theory* (1997): 30-59.

<sup>46</sup> Herodotus shows a distinct consciousness of cultural relativism in his *Persian Wars* (Cambridge: Cambridge University Press, 1982), and some see the Sophists generally as the initiators of the debate [for example, P. Schmidt "Some Criticisms of Cultural Relativism", in *Journal of Philosophy*, 70, 780-791], with Montaigne and Hume as later interlocutors [see F. Hartung, "Cultural Relativity and Moral Judgements", in *Philosophy of Science*, vol. 21, 1954, pp. 118-126, and Clifford Geertz, "Anti Anti-Relativism", in *ibidem.*, *Available Light: anthropological reflections on philosophical topics*, Princeton: Princeton University Press, 2000, and, generally, Alison Dundes Renteln, *International Human Rights: universalism versus relativism*, Newbury Park: Sage Publications, 1990].

<sup>47</sup> See Lawrence E. Hazelrigg, *Social Science and the Challenge of Relativism: A Wilderness of Mirrors: on practices of theory in a gray age*, Gainesville: University of Florida Press, 1989.

<sup>48</sup> Cary Wolfe, "Making Contingency Safe for Liberalism: the pragmatics of epistemology in Rorty and Luhmann", in 0 *New German Critique* (1994): 101-127.

<sup>49</sup> Paul Forster, "What is at Stake between Putnam and Rorty ?", in 52 *Philosophy and Phenomenological Research* (1992): 585-603, p. 586

<sup>50</sup> See, *inter alia*, Joseph Raz, *The Morality of Freedom*, Oxford: Oxford University Press, 1988; Cass Sunstein, "Incommensurability and Valuation in Law", in 92 *Michigan Law Review* (1994): 779

A parallel debate emerged in the context of the disciplinary formation of the social sciences towards the late 19<sup>th</sup> century in relation to two thematic fields: in a narrower sense, it played a role in the so-called historicism/historicism debate -mostly led in theology and the thematic-methodological complex that would later differentiate itself into the disciplines of economics and sociology- which, in essence, dealt with the possibility, or not, of empirically, i.e. historically, obtaining a-historically valid knowledge, or, in other words, with the question of whether all knowledge was historically contingent or not<sup>51</sup>. In a wider, if related, sense, and more or less simultaneous to the historicism debates, the problem -so perceived- of relativity can be said to have led to the emergence of a distinct disciplinary consciousness of what would later be called the social sciences. Both debates drew, of course, partly on the same sources, most prominently on Nietzsche and his radical critique of metaphysics and objective knowledge. While its radicalism, and its subversive implications did not find much of an immediate echo, Nietzsche did introduce a lingering question on the contingency and context-specificity of the knowledge produced by the set of emergent disciplines that pretended to deal with social reality as their object. Generally, responses took, as was already explored above, two opposite forms: the attempt to re-affirm context-independent, objective, *a priori* knowledge, or the acceptance of the relativism thesis in principle and the elaboration of its consequences. The first approach developed its most influential response in form of the various strands of neokantianism, and, later, scientific positivism<sup>52</sup>, the second emerged gradually from the reflection on method in the *Geisteswissenschaften*<sup>53</sup> into philosophical hermeneutics, and from there, has, through several detours, reached the poststructural and post-modern critique of the rationalist meta-narratives of modernity.<sup>54</sup> The basic dichotomy around the relativism problematique has, thus, been between realism and idealism, between a correspondence and a coherence theory of truth, between representationalism and anti-representationalism, and between (neo-)pragmatism and, again, realism. From these basic conceptual settings, various strands of relativism and anti-relativism have developed in different disciplines, most notably ethical relativism<sup>56</sup>, cognitive relativism<sup>57</sup>, aesthetic relativism<sup>58</sup>, and, of course, cultural relativism.

Generally, the dichotomy between these relativisms and their respective antipodes is seen, by adherents of either side, as rigid: to most self-declared anti-relativists, relativism essentially amounts to a form of cynical nihilism which, out of misperceived epistemological scepticism and blind tolerance of anything 'other', is incapable of either advancing knowledge, or effecting (political) change. In particular, anti-relativists affirm the logical impossibility of relativism, since relativism itself is allegedly posed as an absolute by relativists, which is logically contradictory. To relativists, in turn, anti-relativists are little less than self-delusionary ideologues who essentialise their beliefs into 'objective knowledge' and strife towards hegemony. Yet, neither position sees itself as quite as radical as its image of the respective

<sup>51</sup> See, *inter alia*, Ute Daniel, *Kompendium Kulturgeschichte*, Frankfurt a.M.: Suhrkamp, 2001, pp. 409-18.

<sup>52</sup> See, for example, Klee, R.: *Scientific Inquiry: readings in the philosophy of science*, Oxford: Oxford University Press, 1998; Ayer, A.J.: *Logical Positivism*, New York, Free Press, 1966.

<sup>53</sup> Daniel (2001), pp. 400-408; During, S.(ed.): *The Cultural Studies Reader*, London: Routledge, 1993; Grossberg, L./Nelson, C./Treichler, P.A.: *Cultural Studies*, New York : Routledge, 1992.

<sup>54</sup> See Gadamer, H.-G.: *Wahrheit und Methode*, 2 vol, 6 ed., Tübingen: J.C.B. Mohr (Paul Siebeck), 1990.

<sup>55</sup> See C.A.J. Coady's entry "Epistemological Relativism", in Honderich (1995), n. 8; and Wolfe (1994), n. 48, p. 103

<sup>56</sup> Bauman, Z.: *Postmodern Ethics*, Oxford: Blackwell Publishers, 1993; Gewirth, A.: *Human rights: Essays on Justification and Applications*, Chicago: University of Chicago Press, 1982; Harman, G./Thomson, J.J.: *Moral Relativism and Moral Objectivity*, Malden: Blackwell Publishers, 1996; Mackie, J. L.: *Ethics: Inventing Right and Wrong*, New York: Penguin Books, 1977; Maduagwu, M.O.: *Ethical Relativism Versus Human Rights*. Vienna: Third World Center, 1987; see also the online resources at <http://users.telerama.com/~jdehullu/ethics/ertop.htm>.

<sup>57</sup> Barnes, B./Bloor, B.: "Relativism, Rationalism, and the Sociology of Knowledge." In Hollis, M/Lukes, S.: *Rationality and Relativism*, Boston: MIT Press, 1982; Krausz, M./Meiland, J.M.(eds.): *Relativism: Cognitive and Moral*, Notre Dame: University of Notre Dame Press, 1982.

<sup>58</sup> Snaevarr, S.: *Minerva and the Muses: The Place of Reason in Aesthetic Judgment*, Kristiansand (N): Nordic Academic Press, 1999; Wolff, P./Moore, B./Marcuse, H.: *Kritik der reinen Toleranz*, Frankfurt a.M.: Suhrkamp, 1966; Zima, P.V.: *Die Dekonstruktion. Einführung und Kritik*, Tübingen/Basel: Francke 1994 and *ibidem*: *Moderne / Postmoderne*, Tübingen/Basel: Francke, 1997.

other; anti-relativists, for one, usually admit a certain degree of epistemological plurality, such as Donnelly's distinction between weak and strong relativism<sup>59</sup>, or Walzer's thick and thin moral convictions<sup>60</sup>. In addition, relativists have tended to regard their insistence on the 'objectivity of relativism' not as an espousal of logical contradiction, nor as an empirically 'true' description of the world, but rather as merely an ethical concern that, as Geertz has put it, "[with] the world being so full of a number of things, rushing to judgement is more than a mistake, it is a crime".<sup>61</sup> Indeed, very few relativists would go as far as deny the existence of any cross-cultural constants over time, even if they would relativise both the concepts of culture and of constancy. Again in Geertz's perceptive analysis, the main difference between relativists and anti-relativists may come down to a concern, on one hand, over provincialism, i.e. the inadvertent 'objectivation' of one's own horizon, and indifference and arbitrariness, i.e. the dismissal of any intersubjectively valid meaning, on the other hand<sup>62</sup>.

In terms of the relation between relativism and understanding, translatability, and (in)commensurability, if as was pointed out earlier, incommensurability is assumed to be strong, i.e. precluding cross-'form of life' translation, comparison, and understanding, cognitive, epistemological, or descriptive<sup>63</sup> relativism is bound to follow. It puts into question the possibility of gaining any form of objective knowledge, and, consequently, of attributing to truth any independent, objective properties. Insofar as the term 'truth' is retained at all, it does not transcend what Rorty has famously called a "compliment people pay to their favourite beliefs"<sup>64</sup>. Truth is, in other words, considered thoroughly situated, dependent on context, and, ultimately, based on subjective belief. This has, of course, several consequences: in the first place, it means that the world 'out there' is fundamentally inaccessible in its 'out there-ness'; this is not the same as saying that the world is simply not out there, but it is to say that the effects it has on the human beings in it do not carry with them a uniform message as to their true being<sup>65</sup>; rather, their being will always depend on the multiplicity of variables which make up the particular context in relation to which human beings perceive and judge 'reality', and which cannot, in themselves, be reduced to a finite, rationally comprehensible set. In its most radical sense, this fundamental contingency could be taken to leave the individual in total isolation, as no language and no thought operation could ultimately assure understanding of or communication with others. It is, presumably, on account of this logical extreme of relativism that its most frequent charge has been nihilism, which allegedly "disarms and dehumanizes" the human being<sup>66</sup>. On a less extreme note, context has been held to be largely coincidental with a broadly defined culture or 'way of life' shared by a group of individuals<sup>67</sup>; here, truth is seen as culture dependent, and cross-cultural understanding, therefore, as an impossibility. One of the consequences of cognitive relativism has, therefore, been ethical relativism, i.e. the relativity of value judgements<sup>68</sup>. Hence, not only can there be

<sup>59</sup> Jack Donnelly (1989), *Universal Human Rights in Theory and Practice*, Ithaca: Cornell University Press, 1989, pp. 109-124.

<sup>60</sup> Michael Walzer, *Thick and Thin: moral argument at home and abroad*, Notre Dame: University of Notre Dame Press, 1996.

<sup>61</sup> Clifford Geertz "Anti Anti-Relativism", in *ibidem.*, *Available Light: anthropological reflections on philosophical topics*, Princeton: Princeton University Press, 2000, p. 45.

<sup>62</sup> *Ibid.*, p. 46.

<sup>63</sup> The most generic term is, probably, cognitive relativism; for 'descriptive' relativism, see Michael Barnhart, "Getting Beyond Cross-Talk: why persisting disagreements are philosophically non-fatal", in Lynda Bell, Andrew Nathan, and Ilan Peleg, *Negotiating Culture and Human Rights*, New York: Columbia University Press, 2001, p. 53.

<sup>64</sup> See, inter alia, Richard Rorty, *The Consequences of Pragmatism*, Minneapolis, University of Minnesota Press, 1982, p. xxiv ff.

<sup>65</sup> Contrary to Glenn's assertion, made in part on the basis of the later Kuhn, that legal traditions, for example, frequently carry the second-order information necessary for their own 'correct' interpretation in them; see Glenn (2001), and Glenn (2000); for the allegedly Kuhnian line of this argument, see Millgram, "Incommensurability and Practical Reasoning", in Chang (1997); p. 159.

<sup>66</sup> I. Jarvie, "Rationalism and Relativism", 34 *British Journal of Sociology* (1983): 45, p. 46

<sup>67</sup> Thomas Hylland Eriksen, "Between Universalism and Relativism: a critique of the UNESCO concept of culture", in Jane K. Cowan, Marie-Benedicte Dembour, and Richard A. Wilson: "Introduction," in *ibidem.* (eds.), *Culture and Rights: anthropological perspectives*, Cambridge, Cambridge University Press, 2001, p. 137.

<sup>68</sup> Renteln (1990).

no objective cross-cultural knowledge, but there can also not be any cross-culturally valid standard by which the worth of cultural practices could be evaluated. One important consequence of this is that, as Raz insightfully observed, the only substitute for the realist figure of 'reasoned judgement' is the decision by sheer will<sup>69</sup>, an idea which resonates with an otherwise very different line of thought extending from Nietzsche to Derrida, which will be taken up later on in the present argument<sup>70</sup>.

### III. What's left, then?: human rights as discourse

If this epistemological critique, and its espousal of relativism, is taken seriously, what is left, then, of human rights? Can they still be considered a meaningful concept capable of achieving anything, and, if not, is there still a legitimate basis for their proactive promotion? Or ought we simply discard the concept and withdraw into the vacuum of post-humanist amorality? While it may be tempting to limit the response to these questions to their epistemological and deontological dimensions –with the latter concerning the ethical consequences of the acceptance of epistemological scepticism for human rights praxis-, there is, arguably, also a third, empirical dimension, which relates to the pragmatics of human rights, i.e. their use in different contexts. For the epistemological and normative responses say nothing about the empirical fact that human rights discourse is being used by a host of different people in diverse socio-cultural contexts. One of the working hypotheses of the present argument is that, to quote an expression by Eduardo Rabossi popularized by Richard Rorty, 'today, human rights are a fact of the world'.<sup>71</sup> They are, in other words, being 'talked' in virtually all places by virtually all kinds of people. Statements about this practical use of human rights are, hence, unrelated to statements about their theoretical foundations. This third dimension, hence, implies a focus on human rights as discourse, or 'talk'. The *prima facie* content of 'rights talk' is what could be termed the standard cliché of human rights, the textbook answer to the question of what human rights (supposedly) are. It is zealously propagated and tirelessly reproduced by an institutionalized and professionalized human rights movement, both academic and activist. Its main tenets are that there are legally valid and institutionally enforceable human rights, most notably those listed in the 'international bill of rights';<sup>72</sup> that these are universal in the sense that everyone has, or should have, them; that they are indivisible in the sense that the international bill of rights essentially forms a coherent package of claims to a certain type of personhood and community —subsumed precisely under the label of human rights; that, on account of the latter, empirical conditions of human beings can — and indeed should — be measured against the 'standards' set by these human rights norms; and, finally, that the foundations of these human rights norms lie in some mixture of common (rational) morality and cross-cultural equivalence.

However, upon closer analysis, this clichéd account of human rights is but a thin veneer that conceals the concept's deeper foundations — or lack thereof. What are human rights, after all? Are they to be seen as distinct from (just) rights? Are they moral, or legal, or something else, in character? Are they local or global; discourse, ideas, legal/moral prescripts, cultural practices, or, indeed, inverted empirical descriptions of their lack, namely human rights violations? And what assumptions underlie the claim that the concept of human rights can be known in socio-cultural contexts different from those in which it emerged? Behind these seemingly abstract questions lurk many of the most controversial issues surrounding human

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<sup>69</sup> "Incommensurability and Agency", in Chang (1997), p. 111f.

<sup>70</sup> See especially Derrida's "Force of Law: The Mystical Foundadtion of Authority", em 11 *Cardozo Law Review* (1990); see also Drucilla Cornell, "The Violence of the Masquerade: law dressed up as justice", 11 *Cardozo Law Review* (1990): 1047-1964.

<sup>71</sup> Ernesto Rabossi, 'La teoría de los Derechos humanos naturalizada' (1990) 5 *Revista del Centro de Estudios Constitucionales* 159; Rorty, 'Human Rights, Rationality and Sentimentality'.

<sup>72</sup> Universal Declaration of Human Rights, General Assembly Resolution 217A(III) (UDHR); International Covenant on Civil and Political Rights, New York, 16 December 1966, in force 23 March 1976, 999 UNTS 171 (ICCPR); International Covenant on Economic, Social and Cultural Rights, New York, 16 December 1966, in force 3 January 1976, 993 UNTS 3 (ICESCR).

rights, including questions of universality, hegemony, and ethnocentrism. If anything, the concept of human rights is not merely a multi-coloured, but nonetheless comfortably stable and static conceptual entity. Instead, what seems to mark reference patterns to human rights is their permanent bind within a multiplicity of overlapping tensions, notably between ahistorical validity and historical particularity, between cultural universality and relativity, between political consensus and hegemony. Human rights would seem to be a fluid concept indeed.

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

This latter assertion becomes clearer when one thinks about the reason for the conceptual haziness of human rights — their discursive character. The meaning of human rights is produced by different linguistic constructions used in specific contexts. Prima facie, the content to which the discourse of human rights refers appears to be what could be termed empirical human rights conditions, i.e. the degree of the realization of those features of individual and collective human life prescribed by human rights in the so-called real world. Indeed, the symbolic imagery invoked in much of human rights activism — and a good amount of academic reflection, too — is predominantly geared towards those empirical conditions, i.e. to different forms of physical suffering. Evidently, however, there is no empirical reality 'out there' of which human rights discourse would be a one-to-one representation. There are no tortured bodies, oppressed women, gagged journalists, or persecuted indigenous peoples; it is only the linguistic structuring of the empirical 'being' of individuals or groups that creates these 'facts' as the reality of human rights. An injured body, for instance, can only be identified as a tortured one by understanding the context in which the injury occurred, i.e. by grasping the specific meaning of the social actions of which the event in question is made up, by means of the concepts provided by human rights. Hence, even where a direct reference to the external, physical world seems to exist, the apparent facticity of the respective rights is ultimately based on socially constructed meanings. In fact, in terms of their discursive constitution, these 'physical' human rights are but special cases within the general discourse, most of which does not at all relate to mind-independent objects — as analytical philosophy would have it — but purely to social facts. Hence, while there may be some rights that appear to refer directly to physical and mental states of individuals, such as the rights to physical integrity,<sup>73</sup> health care,<sup>74</sup> or food,<sup>75</sup> and while it is, arguably, this physicality which often turns these rights into stereotypes of human rights as such, they are ultimately no less grounded in the social — and, hence, the discursive — than are most other rights, such as the right to a fair trial,<sup>76</sup> the right to education,<sup>77</sup> or the right to marry.<sup>78</sup> This serves to illustrate two important points about human rights both as and in discourse. They are, like all social concepts, 'never fully referential, in the sense of identifying a verbal sign that stands for or refers to (and thus comes to represent) some unambiguously identifiable

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<sup>73</sup> See for example UDHR, Arts. 3, 4; ICCPR, Arts. 6, 7; European Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950, in force 3 September 1953, 213 UNTS 221 (ECHR), Arts. 2, 3; American Convention of Human Rights, San José, Costa Rica, 22 November 1969, in force 18 July 1978, 1144 UNTS 123 (ACHR), Arts. 4, 5.

<sup>74</sup> See UDHR, Art. 25; ICESCR, Art. 12.

<sup>75</sup> See UDHR, Art. 25; ICESCR, Art. 11.

<sup>76</sup> See UDHR, Art. 10; ICCPR, Art 9; ECHR, Art. 6; ACHR, Art. 8.

<sup>77</sup> See UDHR, Art. 26; ICESCR, Art. 13; ACHR, Art. 26.

<sup>78</sup> See UDHR, Art. 16; ICCPR, Art. 23; ECHR, Art. 12; ACHR, Art. 17.

feature of an external reality'.<sup>79</sup> Instead, human rights discourse arises from 'the complex of interconnections and relations that constitute the social',<sup>80</sup> which cannot, therefore, be objectively explained but, at most, subjectively — or intersubjectively — understood.

This 'understanding' of human rights implies a distinction — for heuristic purposes — of two complementary conceptual elements of human rights, namely *human rights discourse* and *human rights consciousness*. The former refers, prima facie, simply to human rights 'talk' in its broadest sense, i.e. to all references to human rights, independent of context or speakers' intentions. Importantly, it is a system or structure of signification which is taken to be analytically distinct from the subjective meaning constructed with it in specific contexts. However, while it broadly denotes the 'objective' linguistic aspects of human rights, it is not a unitary, bounded system of references with a clearly delimited vocabulary — or code — the 'grammar' of which would be determinative of the way it is used. It is rather a discursive formation in the Foucaultian sense, and hence characterized by 'dispersion, choice, division, and opposition'.<sup>81</sup> This means, as Purvis and Hunt point out, that the articulation of discursive elements is always only provisional, that discourses, thus, never fully succeed in securing meaning, and that, indeed, a discursive formation may consist of several individual discourses which stand in a relation of competitive struggle with each other.<sup>82</sup> Objective *human rights discourse*, therefore, has a subjective counterpart, namely *human rights consciousness*, which represents the subjective perception of human rights as an ontological (re-)description of personal identity. The precise content of the latter cannot be formalized, but is bound to remain fluid and non-theorizable. Ultimately, it is individuals who are, within their own consciousness, confronted with the question of what to make of that discourse of human rights which has entered their life-world, and ultimately that subjective sense-making cannot be objectivized. This, in turn, implies that from a subjective point of view, the understanding of human rights discourse cannot be evaluated according to some objective criteria of correctness or fit, and that, indeed, there cannot be such a thing as a subjective misunderstanding of human rights.

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

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

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<sup>79</sup> Trevor Purvis and Alan Hunt, 'Discourse, Ideology, Discourse, Ideology, Discourse, Ideology ...', (1993) 44 *British Journal of Sociology* 473 at 474.

<sup>80</sup> *Ibid.*

<sup>81</sup> *Ibid.*, 492. The distinction between a discourse and a discursive formation has especially been clarified by Ernesto Laclau and Chantal Mouffe, *Hegemony and Socialist Strategy: Towards a Radical Democratic Politics* (2<sup>nd</sup> edn, London, 2001).

<sup>82</sup> Purvis and Hunt, 'Discourse, Ideology', 492–3.

incommensurable human rights consciousnesses of those actors engaged in human rights talk, regardless of the institutional context within which they are situated.

Two objections might be raised to this apparent emptying of objective or even intersubjective substance from the concept of human rights. The first concerns what could be termed the practice of international and domestic human rights protection in courts, commissions, government agencies and other fora. These fora, it could be argued, constitute particular interpretive communities playing a particular language game within which all actors are presumed to understand each other. Here, human rights are spoken in a specific 'dialect' — for example, formal legal argument based on legally positivised human rights instruments as used in legal proceedings — and within the confines of that dialect, seem to have a reasonably clear core of meaning for all actors involved. Moreover, anyone not speaking that dialect will be clearly identified as making 'mistaken' references to human rights. In one sense, this argument is, of course, plausible: truth and error need not be defined as relative to individual consciousness, but as relative to the relevant language game, not least because, as the later Wittgenstein has pointed out, that language game determines the way in which its participants can speak, think, and understand. Yet, even within language games, there seems to be a potential for indeterminacy and meaning construction which transgresses their boundaries. Law, for instance, held out by so many human rights activists as a solid rock of meaning, is full of indeterminacies, making it in so many ways an essentially result-open process of contingent argumentation — Dworkin's image of the 'hard case'.<sup>83</sup> What makes a case 'hard', as opposed to not a case at all? How can this difference objectively be fixed, if not by the mere fiat of those charged with determining what the law is? Let us take the concrete example of a Brazilian *favelado* alleging, before a parliamentary human rights commission, that his human rights have been violated by a neighbour who 'robbed' him of his twelve-year old 'lover'. Compare this to the Prince of Liechtenstein, complaining before the European Court of Human Rights about an alleged violation of his right to a fair trial in relation to domestic (German) proceedings concerning a valuable painting formerly in the possession of his father. By what criteria is the *favelado* considered to use human rights incorrectly, and the Prince correctly?<sup>84</sup> Of course, both cases seem intuitively clear-cut, not least since, in the former case, the 'mistake' consists of the fact that the complainant potentially claims a right to violate the rights of a third person (the female minor), whereas in the latter case, a deprivation of the right to fair trial can potentially always constitute a human rights violation (with regard to the relevant instrument referred to), independent of the object the claimant pursues through the trial. Beyond intuition, though, what is the basis for calling the first use of human rights a 'wrong' re-description, but the second an, at best, clever application of human rights to a new problem set? Ultimately, the decision rests with those empowered to decide right or wrong, i.e. legality or illegality, within a particular language game. There can be no firmer foundation for such an inherently foundationless decision.<sup>85</sup>

A second objection would hold up the possibility of (rational) argumentation as a means to tease out a plausible definition of 'rightness' of use that is shared, or at least hypothetically shareable, by all involved. Prima facie, this objection, too, has some force. It would plainly seem possible to engage the *favelado* in an argument which would compel him to rationalize his intuitive sentiments of justice and injustice and, in all likelihood, make him revise some of his earlier assumptions. Yet the point here is not that the *favelado* would not be susceptible to argumentation, but rather that the process of argumentation would not be unidirectional, and that its outcome would not be pre-determined. The interlinking of contexts is always a two-way affair, so that it is not merely the *favelado's* human rights consciousness that is being 'corrected', but also his interlocutor's. Even if the former's claim to a right to an underaged concubine may not persuade the human rights commissioners, they are nonetheless forced to revise their particular horizon and to adapt their own counterarguments to it. It is one thing to sense an absurdity in the *favelado's* claim, yet quite another to try to understand it from his

<sup>83</sup> See Ronald Dworkin, *Law's Empire* (Cambridge, Mass., 1986).

<sup>84</sup> *Prince Hans-Adam II of Liechtenstein v. Federal Republic of Germany*, European Court of Human Rights, No. 42527/98 (2001); see also Florian Hoffmann, 'Report — European Court of Human Rights — 2001/2002' in Russell Miller and Peer Zumbansen (eds.) (2003) 1 *Annual of German and European Law*, pp. 506-528.

<sup>85</sup> See Derrida, 'Force de Loi'.

point of view. Both sides are locked in a continuous process of mutual irritation and adaptation which may lead to the *favelado* coming to 'understand' human rights in the way of the commission, or not. Indeed, the reprimand he is likely to receive might cause him to reject human rights discourse as a viable remedy, or his 'learning' might consist not of a genuine (communicative) understanding of human rights as conceived by the commissioners, but of a strategic understanding of how to manipulate human rights discourse and advance his cause more effectively. What is important is that none of these adaptations is ever a one-off renegotiation of meaning and identity. Instead, they constitute a dynamic process of mutual feedback loops. This implies that no particular interlinkage of human rights discourse and human rights consciousness at any one point in time is ever safe from subsequent modification. This is as true for any informal conversation about human rights, as it is for the judgments of domestic or international tribunals. Hence, human rights are only instantiated momentarily, when particular meanings emerge through the interaction of discourse and consciousness.

#### IV. Without a Safety Net: rights, relativism, and Rorty

This pragmatic perspective, hence, aims to comprehend human rights discourse not in terms of what it could be, or ought to be, but in terms of what it arguably *is*, namely a plural, polycentric, and ultimately indeterminate discourse amenable to be used by everyone (nearly) everywhere. Wherever individuals and groups wish to challenge what they perceive as oppressive or hegemonic structures, they can avail themselves of that discourse, as if using a hammer to send shockwaves through a concrete wall. The logic of plurality implies, however, that the effect of these discursive irritations is beyond the control of those creating them, and is ultimately uncertain.<sup>86</sup> There is no single 'correct' signification, and therefore, *use* of human rights, but only context-specific *uses*. This, in turn, means that a pragmatically inspired acceptance of epistemological scepticism need not lead to the summary dismissal of human rights and the abrupt discontinuance of their active promotion. Instead, it may just be a precondition for a new discursive form, one that accepts at once the multiple validities of human rights, and the singular validity of their promotion.

This discursive form has, in part, been shaped by the thought of Richard Rorty, who offers the most clearly articulated, if, for that same reason, also most controversial, account of the post-metaphysical and post-epistemological life that is implied in the pragmatic vision of human rights. His starting point is the *prima facie* relativist assertion that truth, rationality, and understanding are constituted within particular 'language games' which cannot be transcended.<sup>88</sup> For Rorty this, however, does not imply a subscription to relativism as the opposite of objectivism (which is ultimately about the nature of truth). Instead, he argues that the dichotomy between the two should be dispensed with altogether and replaced with the figure of conversation; pragmatism, he explains, is a 'doctrine that there are no constraints on inquiry save conversational ones — no wholesale constraints derived from the nature of objects, or the mind, or of language, but only those retail constraints provided by the remarks of fellow inquirers'.<sup>89</sup> Hence, there can be neither any meta-language in which incommensurable beliefs could be compared and evaluated, nor any room for argument. The latter is, for Rorty, only possible within the same logically fixed space,<sup>90</sup> i.e. within the same language game or, as he prefers to call it, the same vocabulary, lest it amount to yet another attempt to re-found an all encompassing meta-language.

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<sup>86</sup> The notion of such conceptual 'irritation' has been inspired by the idea of 'legal irritants' as developed by Gunther Teubner; see, for example, his 'Legal Irritants: good faith in British law or how unifying law ends up in new divergences', (1998) 61 MLR 11.

<sup>87</sup> *Ibid.*, p. 414f.

<sup>88</sup> Matthew Festenstein, 'Richard Rorty: Pragmatism, Irony and Liberalism' in Matthew Festenstein and Simon Thompson (eds.), *Richard Rorty: Critical Dialogues* (Cambridge, 2001), pp. 1–14 at p. 5.

<sup>89</sup> Richard Rorty, *The Consequences of Pragmatism* (Minneapolis, 1982), p.165.

<sup>90</sup> Richard Rorty, *Objectivity, Relativism, and Truth* (New York, 1991), p. 94.

Thus, up to this point, cross-cultural or cross-language game exchange would seem to be an impossibility, with individuals being 'stuck' within their interpretive community without reservation or distance.<sup>91</sup> Yet Rorty does not confine himself to this epistemological second-order observation of human ontology,<sup>92</sup> but, in a remarkable construction, links it to a first-order stance epitomized by his notorious liberal ironist. The second-order account is, of course, about the fundamental contingency of language, self, and community. Here, the self, in particular, is seen as a 'web of beliefs without a center',<sup>93</sup> which is however, in Rorty's view, not only capable of discerning but also of accepting this very contingency of the first-order, or first-person, level. It is this capacity to accept contingency in a concrete and 'practical' way that distinguishes Rorty's account from those of 'adjacent' theorists, notably the poststructuralists on one side, and Habermas' universal pragmatism on the other. The former, especially through the ground-breaking work of Jacques Derrida, have attempted to deconstruct the linkage of language to subjectivity, thereby placing the traditional notion of agency in epistemological brackets.<sup>94</sup> While subject positions and the (subjective) agency implied by them are, from his perspective, possible, any positive affirmation of subjectivity is always qualified by the discernment of the impossibility of subjectivity in the face of the play of *différance* in language. Like Rorty and the poststructuralists, the universal pragmatists reject the metaphysical view that language is a medium between the subject and the object, but they retain the possibility of language being a medium between subjects, allowing, thus, for genuine communication (under certain circumstances). Moreover, the same inherent properties that enable language to mediate between subjects, also enable it to get behind contingency, not so much in the sense of a transcendental God's eye view, but at least by constructing, step by step, partial intersubjective truths by which the chains of historical and linguistic situatedness can gradually be broken. Rorty stays far away from Habermasian (neo-)foundationalism, but is equally determined to retain the instrumental character of language. Based on his reading of the original pragmatists, and especially Dewey, as well as on his epistemological behaviourism,<sup>95</sup> he sees language as a tool for that which, in his view, must replace argumentation, namely re-description. The latter essentially consists of 'grabbing hold of causal forces and making them do what we want, altering ourselves and our environment to suit our aspirations'.<sup>96</sup> Contrary to what argumentation presupposes, there is 'no critical terminology to describe our textual strategies, only the metaphilosophical ontology that the self is a holistic web of beliefs'.<sup>97</sup> Accepting contingency, hence, means proactively and continuously engaging in the practice of re-description, not with the aim of ever reaching any higher truth, but of, at best, getting to final vocabularies — expressions of one's fundamental values and beliefs.<sup>98</sup> Of course, these 'final vocabularies' are always in principle also re-describable, and are not outside of contingency; what is outside of contingency is, for Rorty, the commitment one has to them. It is at the interface of these seemingly contradictory

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<sup>91</sup> Indeed, some fellow neo-pragmatist thinkers, notably Stanley Fish, Walter Benn Michaels and Steven Knapp, have taken this radical turn; see Stanley Fish, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (Durham, 1989); W. J. T. Mitchell (ed.), *Against Theory: Literary Studies and the New Pragmatism* (Chicago, 1985).

<sup>92</sup> Or third-person account, as Meili Steele calls it; see Meili Steele, 'How Philosophy of Language Informs Ethics and Politics: Richard Rorty and Contemporary Theory' (1993) 20(2) *Boundary 2* 140 at 158.

<sup>93</sup> Richard Rorty, *Contingency, Irony, and Solidarity* (Cambridge, 1989); as discussed in Steele, 'Philosophy of Language', 158.

<sup>94</sup> Steele, 'Philosophy of Language', 158.

<sup>95</sup> *Ibid.*

<sup>96</sup> Rorty, *Objectivity*, p. 81.

<sup>97</sup> Rorty, *Contingency*, p. 9.

<sup>98</sup> Rorty, *Contingency*, pp. 78–80; see also John Horton, 'Irony and Commitment: An Irreconcilable Dualism of Modernity' in Matthew Festenstein and Simon Thompson (eds.), *Richard Rorty: Critical Dialogues* (Cambridge, 2001), pp 15–28; Steele, 'Philosophy of Language', p.161.

positions that the liberal ironist emerges — ironic in the sense of ‘recognizing the contingent historical causes of [their] beliefs’,<sup>99</sup> so that the

realization that anything can be made to look good or bad by being re-described, and [the] renunciation of the attempt to formulate criteria of choice between final vocabularies, puts [the ironist] in the position which Sartre called “meta-stable”: never quite able to take themselves seriously because always aware that the terms in which they describe themselves are subject to change, always aware of the contingency and fragility of their final vocabularies, and thus of their selves.<sup>100</sup>

And liberal in the realization that, as some sort of meta-‘final vocabulary’, the most practical way to attend to this ironic predicament is by adopting the liberal (Rawlsian) privileging of the right over the good. Only the liberal meta-values of justice and diversity can ensure the free exercise of re-description, though only at the cost, as critics have seen it, of a new form of public/private distinction in which the vocabulary of self-creation is consigned to the private sphere and attends to the maximization of the individual’s sense of autonomy, and the vocabulary of justice is reserved for the public sphere, where it provides the basis for argumentation (!) on the best way to reduce cruelty, another final vocabulary of liberal societies.<sup>101</sup> Rorty is, of course, careful not to make out the ironists’ espousal of liberalism as a necessary, non-contingent feature. Rather, it has its ultimate basis in the contingent historical circumstance of the postmodernist bourgeois liberal inhabiting the real existing liberal capitalist democracies. Rorty thereby inscribes the liberal ironist within a double historicist circle: on one hand, the only warrant for her liberal ironist beliefs is the particular tradition within which she encounters herself — or Rorty himself — while, on the other hand, those beliefs are the most plausible product of that bourgeois postmodernism. Hence, unlike the radical pragmatists, the liberal ironist is fully aware not just of her own situatedness, but of the substantive content of that situatedness. Unlike Habermas, however, she not only does not believe in the possibility of using that insight to emancipate herself or others from the existing state of affairs, but, more importantly, actually has no desire to do so. In fact, as Steele has insightfully observed, Rorty formally admits a duality between first-person (self-understanding) accounts — namely those in the private sphere — and third-person (liberal justice) accounts of oneself as a liberal subject among others — those in the public sphere. But instead of thematizing potential conflicts between the two, i.e. between the inner self and the outer subject, Rorty simply imposes the latter onto the former. Thus, ultimately, Rorty makes the liberal ironist see herself as one because she is one.<sup>102</sup>

The question that arises at this point is on what basis the liberal ironist practises her liberalism vis-à-vis others, given that it is not founded on any objective, or even intersubjective, truths. Rorty’s well-known answer is, of course, that only solidarity can replace metaphysical foundations as a motivational force. The latter is, however, closely tied to the group that constitutes one’s immediate context — a position connected to his Wittgensteinian conviction that one’s own language game is as far as one can go. It is, in other words, essentially only people who are already in, or can be brought into, that language game to whom some form of solidarity can be extended. Indeed, there is a modestly deontological element within the logic of solidarity, in the sense that, according to Rorty, it is part of liberal ironic solidarity to try to expand, wherever possible, the group of people towards whom commonality is felt. As such, there is what has been called a liberal humanism inherent in Rorty’s thought.<sup>103</sup> Yet Rorty’s solidarity does not only stand in for epistemological objectivity, but also for some of the latter’s

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<sup>99</sup> David Owen, ‘The Avoidance of Cruelty: Josting Rorty on Liberalism, Scepticism and Ironism’ in Matthew Festenstein and Simon Thompson (eds.), *Richard Rorty: Critical Dialogues* (Cambridge, 2001), pp 93–111 at p. 96.

<sup>100</sup> Rorty, *Contingency*, p. 73–4.

<sup>101</sup> *Ibid.*, p. 141–3. For such a critique see Steele, ‘Philosophy of Language’, 166–7.

<sup>102</sup> Steele, ‘Philosophy of Language’, 166–7; also David Conway, ‘Irony, State and Utopia: Rorty’s ‘We’ and the Problem of Transitional Praxis’ in Matthew Festenstein and Simon Thompson (eds.), *Richard Rorty: Critical Dialogues* (Cambridge, 2001), pp . 55–88.

<sup>103</sup> Cary Wolfe, ‘Making Contingency Safe for Liberalism: The Pragmatics of Epistemology in Rorty and Luhmann’ (1994) 61 *New German Critique* 101 at 105.

brainchilds, such as equality or humanity. It entails, in other words, nothing short of an ethnocentric position, as Rorty freely admits: 'for to say that we must work by our own lights, that we must be ethnocentric, is merely to say that beliefs suggested by another culture must be tested by trying to weave them together with beliefs we already have',<sup>104</sup> and which, it should be added, Rorty believes we share with other participants in 'our' common culture. Thus, per se, cultures are incommensurable in a strong sense, and 'radical difference is unintelligible'.<sup>105</sup> Yet somewhat paradoxically, within this incommensurability, Rorty admits the possibility of what he calls comparison between 'societies which exemplify [habits such as toleration, free inquiry, undistorted communication] and those that do not ... [s]uch justification is not by reference to a criterion, but by reference to various detailed practical advantages'.<sup>106</sup> It is difficult not to be puzzled by this deus-ex-machina appearance of comparability without foundations, based merely on the inner understanding of contingent practices. The only way such an approximation could work, given Rorty's premises, is by what could be termed a bee's eye view — reducing comparison to a crude form of analogizing in which the 'other' is converted into a rough and hazy mosaic of which broadly familiar features, such as colours and shapes, could just about be discerned. The 'other' is, of course, not ever reached in any real way, and is, in fact, internalized at arm's length, without needing to get into its messy concreteness, in correspondence with the necessarily superficial image of the great happy liberal family.

This seemingly celebratory stance on ethnocentrism<sup>107</sup> has, of course, attracted fierce criticism from a variety of corners. On a moral-political level, 'conservatives' have attacked the ironist for allegedly espousing nihilism and cynicism,<sup>108</sup> and 'progressives' the liberal for advocating a self-satisfied complacency with her own privileged status quo, and, of course, for endorsing what they see as the scourge of modernity, notably ethnic chauvinism. On the epistemological level, in turn, foundationalists of diverse quarters have attacked Rorty: analytical philosophers for his anti-realism, liberals for basing liberalism on too shaky a ground, and communitarians for not letting substantive conceptions of good enter the public sphere. He has even taken heat from anti-foundationalists, either on account of his pragmatic insistence on language as a tool, or for drawing allegedly wrong or unnecessary conclusions from the correct epistemological premises, thereby re-cementing a transfigured form of essentialism where, instead, a freer and more complex dynamic of forces would seem to follow. Within the latter strand of (constructive and, in part, still sympathetic) critique, two targets emerge in particular: Rorty's alleged reduction of difference, on one hand, between communities, cultures, or language games; and, on the other hand, within the particular 'we' in question. With regard to the former, the main alternative conception broadly within Rorty's epistemological premises has been articulated by Clifford Geertz, in a comment on Rorty's inversion of the commonly negative connotation of ethnocentrism. Geertz, who is an interpretivist, but would not call himself a postmodernist, charges Rorty, by means of the now well-known 'Drunken Indian and the Kidney Machine' example,<sup>109</sup> with a priori rejecting any attempt to overcome or diminish the ethnocentric indignation and distrust which marks the relationship between the Indian and his doctors. In this view, Rorty rightly rejects the universalist reduction of difference to an abstract sameness, only to replace it, wrongly, with a rigid separation of a concrete 'we' pitted against an unreachable 'they'. Here, too, difference, or rather, alterity are treated as something to be avoided at all cost. Geertz, on the other

<sup>104</sup> Rorty, *Objectivity*, p. 26.

<sup>105</sup> Steele, 'Philosophy of Language', p. 164.

<sup>106</sup> Rorty, *Objectivity*, p. 29.

<sup>107</sup> Farid-Abdel Nour, 'Liberalism and Ethnocentrism' (2000) 8 *Journal of Political Philosophy* 207 at 207.

<sup>108</sup> See, for example, Neal Kodozy, cited in Richard Rorty, *Philosophy and Social Hope* (New York, 2000)

<sup>109</sup> In which an alcoholic native American, after having waited for his turn in the customary queue, receives dialysis treatment despite the fact that he refuses to stop drinking; his irritated, but liberal-minded doctors apparently ruminate about the value of giving him this treatment in the face of potentially more cooperative patients further back in the queue, but they refrain from critically raising the issue with him: see Clifford Geertz, "The Uses of Diversity", in *ibidem.*, *Available Light – anthropological reflections on philosophical topics*, Princeton, Princeton University Press, 2001, pp. 68-88.

hand, suggests that an encounter with difference should lead to a proactive engagement with it, not to reduce it to either sameness or otherness, but to construct bridges to it in its alterity. This does, of course, correspond to an essentially hermeneutic programme, though one which is well aware that whatever understanding is attained of the other as other is always precarious, subject to revision, and never objective. Such a programme may, of course, run up against the poststructuralist insistence that language cannot possibly function even as an imperfect medium, but the important point is that Geertz inverts Rorty's liberal humanism: the consequences of anti-foundationalism cannot be the withdrawal, however liberal, into an imaginary 'we', but ought to be the urge to engage alterity, and, thus, one's own situated self, in a constructive and permanent way.

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

Rorty homogenizes social space, assuming that there are no deep cleavages capable of generating conflicting solidarities and opposing we's. It follows from this absence of social antagonisms that politics is a matter of everyone pulling together to solve a common set of problems. Thus, social engineering can replace social struggle.<sup>110</sup>

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

For if one accepts, with Geertz, that the 'other' can inspire something more than either acceptance or rejection, namely interest in it as an other,<sup>111</sup> but at the same time rejects both purely hermeneutic and 'critical' accounts for their continuing connection of subjectivity with rationality, as well as purely poststructuralist accounts for their emptying out of the subject position, a space for mutual perturbations between language games emerges. These would be akin to bridge-building attempts, without, however, there being any verifiably shared consonance, and hence with understanding never quite achieved. Rather, it would be a mutual signalling exercise, with the signals neither entirely lost in linguistic transmission, nor transformed into meta-discursive forces. They would cause something on the other side, but neither the sender of the signal nor the medium of its transmission could entirely control that

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<sup>110</sup> Nancy Fraser, as cited in Steele, 'Philosophy of Language', 167.

<sup>111</sup> Rejecting here not merely Rorty's scheme, but also his Freudian justification of it; solidarity is, for Rorty, not linked to universal values but to a subconscious recognition of similarity: see Rorty, *Contingency*, 31–4.; and Steele, 'Philosophy of Language', 164.

cause or its consequences. In fact, these signals are like discursive shots into the dark, the precise impact of which are quite unforeseeable.

## V. Shooting into the dark: towards a new paradigm of human rights (activism)

Such 'shots' are not singular and unidirectional actions, but they cause repercussions and may produce 'reactive' uses of human rights, thus creating a continuous recursive dynamic. As such, discursive hegemony, if it occurs at all, is accidental, and, in any case, always only momentary, as any petrification of the meaning of human rights in concrete contexts can always be itself 'shot at'. No imposition, no rationality, no law, no judgement, no argument is ever safe from being challenged by the many uses of human rights.<sup>112</sup> While this way of looking at human rights may just highlight their groundlessness, it nevertheless also points to potentially new forms of conceiving human rights activism: one not based on the assumption of universal rationality, values and understanding, but one based on an ultimately non-rationalizable inner motivation to 'shoot' human rights at what is perceived as oppressive structures, an awareness that such shooting is, in fact, 'into the dark', and an openness to be oneself, in turn, 'shot at'.

The precondition for such a contingency-accepting, self-revising and self-responsible political activism based on personal beliefs and felt solidarity that is, as Rorty has shown, the absence of objective, rational, abstract foundations. Only if the 'world outside' is not forcefully pushed into predetermined categories can one freely engage concrete 'others' in ongoing micro-political processes. Yet if Rorty's ethnocentrism thesis plausibly demonstrates that relativism is not inimical to activism, it also has obvious and grave shortcomings. Indeed, its reduction of the 'I' to a concrete historical 'we' and the (admittedly contingent) foundation of political action on a solidarity strictly tied to that 'we' is unconvincing. It is so, because Rorty seems here to be willing to buy into the highly stylized myth of his particular American 'we' which is all too easily exposed as nothing but a grand meta-narrative. It precisely lacks the cultural authenticity upon which he bases the sentiment of solidarity, and it therefore brings him close to the chauvinism he otherwise considers incompatible with liberalism. It also makes it all too easy for some critics to reclassify him as just a post-modern variant of old Eurocentric bias. Indeed, a proactive, cross-cultural human rights activism groundlessly founded on Rortyan ethnocentrism can ultimately only base itself on the exercise of at least discursive, if not political or military hegemony.

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

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

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<sup>112</sup> On this point, in particular, see Julie Ringelheim and Florian Hoffmann, 'Par-delà l'universalisme et le relativisme : la Cour européenne des droits de l'homme et les dilemmes de la diversité culturelle' (2004) 52 *Revue interdisciplinaire d'études juridiques*, pp. 109-152.

Secondly, the difference between the 'us' and the 'other', i.e. between different socio-cultural spheres, needs to be de-reified. A useful strategy would be to de-exoticize the 'other', and re-exoticize the 'we'.<sup>113</sup> Both are much more interrelated and marked by mutual confluence than the rigid we/they dichotomy would suggest. The de-exoticization of the 'other' would essentially consist of granting it the same degree of irreducible complexity as is characteristic of the I/we. Hence, instead of, for example, reducing the religiously-motivated suicide-bomber to an entirely alien being whose inner logic we cannot understand, and whose primary characteristic is her/his belonging to a 'species' of de-subjectivized suicide-bombers, she or he could be seen as marked by the same complex mixing of a multiplicity of variables, only some of which are incommensurable, as any I/we identity. De-exoticization does not, therefore, mean the imposition of (ethnocentric) standards of normality, but simply the refusal to think in simplistic, orientalist-type categories. Exoticizing the we, in turn, would consist of a similar attempt to complexify the familiar and known by self-consciously adopting an anthropological gaze vis-à-vis ourselves. It would involve looking at concepts, practices, or institutions from a resolutely third person perspective, and it would entail a strong historicism. Regardless of the epistemological limits to socio-historical understanding, exoticization would attempt to render the familiar as strange as possible, thereby showing its contingent and idiosyncratic nature. In the case of human rights, this would, for example, entail a deliberately anti-anachronistic reading of their historical emergence, highlighting the nearly alien and incommensurable character of, say, the medieval contexts in which proto-rights concepts were discussed, or the much more communitarian — as opposed to individualistic — character of late eighteenth century North American society, a fact almost entirely drowned out by the prevailing historical myth of the 'founding fathers'.<sup>114</sup>

Thirdly, a de-reification of both the 'we' and the 'other' would reveal that the simplistic hegemony thesis does not hold. In the same way as, for example, oriental peoples cannot be reduced to orientalist stereotypes, the real complexity of occidental identities is hardly captured by the all-or-nothing label of Eurocentrism. In this sense, the (non-essential) essence of human rights in post modernity could be taken to be the concession of an irreducible complexity to all.<sup>115</sup>

Yet this, too, would not be immune from the anti-relativist accusation of disabling any form of (political) action. Respect for the other's complexity amounts, prima facie, to having to accept everything she or he does; thus, we would be back to the 'anything goes' nihilism of which the anti-realists are so fearful. At this juncture, several ways out, or, more properly, ways through, are imaginable. Martti Koskenniemi, for one, comes from a critique of human rights discourse resonant of David Kennedy's 'pragmatic' objections to the human rights movement,<sup>116</sup> which thematize the fundamental (political) manipulability of human rights discourse — associated by Kennedy with a 'rights-as-trumps' logic<sup>117</sup> — as a consequence of its institutionalization, professionalization, and routinization. Arguing against the simple dispensation of the discourse for want of any alternative that would have the same potentially emancipatory properties, Koskenniemi initially sees as the only 'way through' a slightly ill-humoured 'bad faith belief' in human rights which retains the discourse, but more or less openly acknowledges that it rarely gets beyond being a mere masquerade for politics. This 'liberal

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<sup>113</sup> See for an interesting reflection on, inter alia, exoticization, Nathaniel Berman, 'Aftershocks: Exoticization, Normalization, and the Hermeneutic Compulsion' (1997) *Utah Law Review* 281.

<sup>114</sup> Hendrik Hartog 'The Constitution of Aspiration and "The Rights that Belong to Us All"' (1987–8) 74 *Journal of American History* 1013.

<sup>115</sup> In a similar vein, notably on the need to not reduce complexity, but try to live up to it, see Klaus Günther, 'The Legacies of Injustice and Fear: A European Approach to Human Rights and their Effects on Political Culture' in Philip Alston, Mara Bustelo and James Heenan (eds.), *The EU and Human Rights* (Oxford, 1999), pp. 117–44.

<sup>116</sup> Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Helsinki, 1989); Kennedy, 'The International Human Rights Movement'; see also David Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (Princeton, 2004).

<sup>117</sup> On which he is contradicted by Philip Alston, 'Introduction' in Philip Alston (ed.), *Human Rights Law* (Aldershot, 1996).

cynic' would, thus, be an antidote to Rorty's happy, if smug and inadvertently chauvinistic, ironist. At a later stage, though, Koskenniemi develops his earlier vision into a cautiously positive endorsement of what he calls a 'culture of formalism', which, he argues, resists the forcible reduction into substantive policy.<sup>118</sup> It does so by allowing for an 'empty' universality, or the universal articulation of what he describes with Laclau as the lack of fullness and presence which infects all discourse. Hence, not unlike the pragmatics of human rights outlined here, formalism makes it possible to take a position and argue proactively for it — within the formalist framework — while avoiding substantive fixation, since 'every decision process with an aspiration to inclusiveness must constantly negotiate its own boundaries as it is challenged by new claims or surrounded by new silences'.<sup>119</sup> This is an appealing position, and quite close to the one espoused here. Doubts only arise with regard to formalism itself, since, for all its anti-foundationalist potential, it would appear to derive its ability to provide an 'empty', but nonetheless universal communicative medium from its own, more or less forcible, imposition. Formalism allows for that universality not because its inner logic would, in fact, be universal, but only because the particular language game of which it is made up allows its 'speakers' to use it as a simulacrum for universality. And what's more, not all those within the formalist 'dialect group' are aware that it is but a placeholder for an unattainable unity. They tend to essentialize formalism itself, treating it as an expression of a higher reason and more objective truth than non-formalist discourse. Indeed, a good part of the (formalist) legal profession — whether in human rights or not — arguably manifests a hegemonic gatekeeperism that does not quite square with the — albeit 'gentle' — transgressive capacities of the uses of formalism endorsed by Koskenniemi.

The slightly distinct position taken here is that there is room for action, precisely on account of the recognition that there is no objective foundation for it. As both Derrida and Laclau, among others, have shown, action is always ultimately based on an unfounded moment of decision, a momentary reduction of all context to the deepest self.<sup>120</sup> And, indeed, such decisionism, insofar as it impinges on the 'other', is nothing but hegemonic, as its basis is no mutual consensus, but a unilateral act. However, if the entirely contingent character of such decisionism is always recognized, it becomes no more than an imposing gesture, a cautious 'jump into the dark', so to speak, which cannot control its consequences. It seeks to establish temporary hegemony — namely by 'succeeding' in the action undertaken— always knowing that it is merely temporary, subject to revision at any moment. And, most importantly, the unfounded decision is always a mutual process. It engages an 'other' in its (or her/his) otherness, and it is, thus, intrinsically political — premised on the irreducible existence of the 'other' as 'other'. This, then, would point to a basis for human rights praxis: 'we' need not construct or presuppose any common basis for defending human rights, and for acting accordingly. As long as any such action is done in full awareness that it will never do more than irritate the 'other', and in full acceptance that the end result will always be an unpredictable, non-linear and non-dialectical blend of 'my' action and the 'other's' response, it does not, in fact, constitute violence and cruelty. The latter only occur where the complexity of the 'other' is forcefully reduced, and where rigid divisions, categories, and essentialisms are introduced instead. In sum, human rights could be likened to an ever-rotating kaleidoscope, or, indeed, a recursive algorithm, endlessly re-applying itself to the forms it has itself generated, thereby producing a beautiful, if ultimately unpredictable, 'chaotic' image.<sup>121</sup>

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<sup>118</sup> Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge, 2002), pp. 503–9; see also Anne Orford's masterful 'The Gift of Formalism' (2004) 15 *European Journal of International Law* 179.

<sup>119</sup> Koskenniemi, *Gentle Civilizer*, p. 508.

<sup>120</sup> See Jacques Derrida, "Force of Law: The Mystical Foundadtion of Authority", em 11 *Cardozo Law Review*, 1990, pp. 919-1045.

<sup>121</sup> See, on this line of thought, Robert L. Devaney, *Chaos, Fractals, and Dynamics: Computer Experiments in Mathematics* (Boston, 1989).

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<sup>122</sup> See, inter alia, Chantal Mouffe (ed), *Deconstruction and Pragmatism*, London: Routledge, 1996; Rorty (1991); Ricard Rorty, "A Reply to Dreyfus and Taylor," 34 *Review of Metaphysics* (1980): 39; further, Wolfe (1994); Richard Rorty, "Is Derrida a Transcendental Philosopher," 2 *Yale Journal of Criticism* (1989): 211; Richard Rorty, "Moral Identity and Private Autonomy: The Case of Foucault," in *Essays on Heidegger and Others, Philosophical Papers II*, Cambridge: Cambridge University Press, 1991, p. 195; (1984); "Deconstruction and Circumvention," *Critical Inquiry*, vol. 11, September, pp. 1-24. (1984b) "Solidarity or Objectivity?," in J. Rajchman and C. West (eds.), *Post-Analytic Philosophy*, New York: Columbia University Press, (1989): 3-19; *Contingency, Irony, and Solidarity*, Cambridge: Cambridge University Press, 1989; "On Ethnocentrism: a reply to Clifford Geertz.," in Rorty (1991); "Habermas, Derrida and the Functions of Philosophy." *Revue Internationale de Philosophie* 49: 194 (1995), 437-460; "Emancipating our Culture: a response to Habermas" (24-30), in Jozef Niznik and John T. Sanders (eds.), *Debating the State of Philosophy: Habermas, Rorty and Kolakowski*, Westport: Praeger Publishers, 1996; "Putnam on Truth", in 52 *Philosophy and Phenomenological Research* (1992), 415-418; "Reponses de Richard Rorty" [to Jacques Bouveresse, Vincent Descombes, Thomas MacCarthy, Alexander Nehamas, and Hilary Putnam] in Jean-Pierre Cometti *Lire Rorty*, Paris: Editions de l'Éclat, 1992, pp. 147-250; "Putnam and the Relativist Menace." 90 *Journal of Philosophy* ( 1993): 443-461; "Habermas and Lyotard on Post-Modernity." 4 *Praxis International* (1984): 32-44.

<sup>123</sup> The secondary literature on Rorty is now sizeable; see, inter alia, the critical monographs and responses by Rorty collected in Robert Brandom, *Rorty and His Critics*, Oxford: Blackwell, 2000; Mathew Festenstein and Simon Thompson, *Richard Rorty: critical dialogues*, Cambridge: Polity Press, 2001; an excellent and critical overview is also provided by Meili Steele's "How Philosophy of Language Informs Ethics and Politics: Richard Rorty and contemporary theory", in 2 *Boundary* (1993): 140-172; see also the comprehensive primary bibliography of Rorty's works compiled by Gideon Lewis-Kraus at <http://www.stanford.edu/~rrorty/biblio.htm> (last visited 2003).

<sup>124</sup> An erroneous view, in any case, as there could not ever any 'after' deconstruction; deconstruction is, precisely, not equivalent to destruction, but involves a continuous process of undermining of language games and the knowledge they produce, without, however, thereby getting rid of the language games themselves. It is true, however, that this tends to transfer agency away from the subject, and towards language, leaving the subject as a multiplicity of continuously changing subject positions; this image is epistemologically appealing, but does not address the fact of the concrete subjectivity of individual consciousness, and, thus, does pose a problem with regard to the thematisation of individual action; the same goes, by analogy, for communication.

<sup>125</sup> Mathew Festenstein, "Richard Rorty: pragmatism, irony, and liberalism", in Festenstein/Thompson (2001), p. 5f.

<sup>126</sup> Rorty (1982), p.165.

<sup>127</sup> Rorty, "Inquiry as Recontextualization", in Rorty (1991), p. 94.

<sup>128</sup> Indeed, some fellow neo-pragmatist thinkers, notably Stanley Fish, Walter Benn Michaels, and Seven Knapp, have taken this radical turn; see Fish (1989); and W. T. Mitchell (ed.), *Against Theory: literary studies and the new pragmatism*, Chicago: University of Chicago Press, 1985.

<sup>129</sup> Or third-person account, as Steele calls it; see Steele (1993).

<sup>130</sup> Rorty (1989); see also Steele (1993), p. 158.

<sup>131</sup> Steele (1993), p. 158.

<sup>132</sup> Ibid.

<sup>133</sup> Rorty (1991), p. 81

<sup>134</sup> Rorty (1989), p. 9

- <sup>135</sup> Rorty (1989), p. 78; see also John Horton, "Irony and Commitment: an irreconcilable dualism of modernity", in Festenstein/Thompson (2001), pp. 15-28; and Steele (1993); p.161
- <sup>136</sup> David Owen, "Avoidance of Cruelty: liberalism, scepticism, ironism", in Festenstein/Thompson (2001), p. 96
- <sup>137</sup> Rorty (1989), p. 73f.
- <sup>138</sup> Rorty (1989), p. 191
- <sup>139</sup> Steele (1993), *passim*, and p. 166; also David Conway, "Irony, State and Utopia: Rorty's 'we' and the problem of transitional practice", in Festenstein/Thompson (2000), p. 55ff.
- <sup>140</sup> Wolfe (1994), p. 106
- <sup>141</sup> Rorty (1991), p. 26
- <sup>142</sup> Steele (1993), p. 164
- <sup>143</sup> Rorty (1991), p. 29
- <sup>144</sup> Farid-Abdel Nour, "Liberalism and Ethnocentrism", in 8 *Journal of Political Philosophy*, (2000): 207-226, p. 207
- <sup>145</sup> See, for example, Neal Kodozy, cited in Rorty, *Philosophy and Social Hope*, New York: Penguin, 2000.
- <sup>146</sup> See, for example, Richard Bernstein, *The New Constellation*, Cambridge: Polity Press, 1991; Norman Geras, *Solidarity in the Conversation of Humankind: the ungroundable liberalism of Richard Rorty*, London: Verso, 1995; Christopher Norris, *The Contest of Faculties*, London: Methuen, 1985; Terry Eagleton, "Defending the Free World", in R. Milliband and L. Panitch, *The Socialist Register 1990: the retreat of the intellectuals*, London: Merlin, 1990.
- <sup>147</sup> In which an alcoholic native American, after having waited for his turn in the customary queue, receives dialysis treatment despite the fact that he refuses to stop drinking; his irritated, but liberal-minded doctors apparently ruminate about the value of giving him this treatment in the face of potentially more cooperative patients further back in the queue, but they refrain from critically raising the issue with him; see Clifford Geertz, "The Uses of Diversity", in R. Borowsky (ed.), *Assessing Cultural Anthropology*, New York : McGraw-Hill, pp. 454-467.
- <sup>148</sup> Nancy Fraser, *Unruly Practices: power, discourse, and gender in contemporary social theory*, Minneapolis: University of Minnesota, 1989, p. 104
- <sup>149</sup> Rejecting here not merely Rorty's scheme, but also his Freudian justification of it; solidarity is, for Rorty, not linked to universal values but to a subconscious recognition of similarity, see Rorty (1989), 31f.; and Steele (1993), p. 164
- <sup>150</sup> For the problematic notion of the 'West', see Charles Leben, 'Is there a European Approach to Human Rights?' in Philip Alston, Mara Bustelo and James Heenan (eds.), *The EU and Human Rights* (Oxford, 1999), pp. 69–97 at p. 72; for a more philosophical reflection on the concept of 'Europe', see Jacques Derrida, *Das andere Kap & Die vertagte Demokratie: Zwei Essays zu Europa* (trans. Alexander García Düttmann, Frankfurt am Main, 1991). For simplicity's sake, the term will nonetheless be used, though always as if in parentheses.
- <sup>151</sup> See, inter alia, Joan Fitzpatrick, 'Speaking Law to Power: The War against Terrorism and Human Rights' (2003) 14 *European Journal of International Law* 241; Paul Hoffman, 'Human Rights and Terrorism' (2004) 26 *Human Rights Quarterly* 932; Anthea Roberts, 'Righting Wrongs or Wronging Rights? The United States and Human Rights Post-September 11' (2004) 15 *European Journal of International Law* 721; Frédéric Mégret, 'Justice in Times of Violence' (2003) 14 *European Journal of International Law* 327.
- <sup>152</sup> There is a vast literature on these lines of thought; for some indication, however, see Thomas S. Kuhn, *The Structure of Scientific Revolutions* (Chicago, 1962); Thomas S. Kuhn, *The Essential Tension: Selected Studies in Scientific Tradition and Change* (Chicago, 1977); Paul Feyerabend, *Against Method: Outline of an Anarchistic Theory of Knowledge* (London, 1975); Ruth Chang (ed.), *Incommensurability, Incompatibility, and Practical Reason* (Cambridge, Mass., 1998); Peter Winch, *The Idea of a Social Science and Its Relation to Philosophy* (London, 1958); Lawrence E. Hazelrigg, *Social Science and the Challenge of Relativism: A Wilderness of Mirrors: On Practices of Theory in a Gray Age* (Gainesville, FL., 1989); Cass R. Sunstein, 'Incommensurability and Valuation in Law' (1993–4) 92 *Michigan Law Review* 779; Jacques Derrida, 'Force de Loi: Le fondement mystique de l'autorité' (1990) 11 *Cardozo Law Review* 920; see also Drucilla Cornell, 'The Violence of the Masquerade: Law Dressed up as Justice' (1990) 11 *Cardozo Law Review* 1047; Costas Douzinas, *The End of Human Rights: Critical Legal Thought at the Turn of the Century* (Oxford, 2000); Zygmunt Bauman, *Postmodern Ethics* (Oxford, 1993); Richard Rorty, 'Human Rights, Rationality and Sentimentality' in Stephen Shute and Susan Hurley (eds.), *On Human Rights: The Oxford Amnesty Lectures* (New York, 1993), pp. #–#. Tom Campbell, K. D. Ewing and Adam Tomkins (eds.), *Sceptical Essays on Human Rights* (Oxford, 2001); on a different line,

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see also Michael Ignatieff's oft-cited essay 'Whose Universal Values? The Crisis in Human Rights' (The Hague, 1999); David Kennedy, 'The International Human Rights Movement: Part of the Problem?' (2002) 15 *Harvard Human Rights Journal* 101.

<sup>153</sup> See Kennedy, 'International Human Rights Movement'.

<sup>154</sup> Ernesto Rabossi, 'La teoría de los Derechos humanos naturalizada' (1990) 5 *Revista del Centro de Estudios Constitucionales* 159; Rorty, 'Human Rights, Rationality and Sentimentality'.

<sup>155</sup> Universal Declaration of Human Rights, General Assembly Resolution 217A(III) (UDHR); International Covenant on Civil and Political Rights, New York, 16 December 1966, in force 23 March 1976, 999 UNTS 171 (ICCPR); International Covenant on Economic, Social and Cultural Rights, New York, 16 December 1966, in force 3 January 1976, 993 UNTS 3 (ICESCR).

<sup>156</sup> See for example UDHR, Arts. 3, 4; ICCPR, Arts. 6, 7; European Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950, in force 3 September 1953, 213 UNTS 221 (ECHR), Arts. 2, 3; American Convention of Human Rights, San José, Costa Rica, 22 November 1969, in force 18 July 1978, 1144 UNTS 123 (ACHR), Arts. 4, 5.

<sup>157</sup> See UDHR, Art. 25; ICESCR, Art. 12.

<sup>158</sup> See UDHR, Art. 25; ICESCR, Art. 11.

<sup>159</sup> See UDHR, Art. 10; ICCPR, Art 9; ECHR, Art. 6; ACHR, Art. 8.

<sup>160</sup> See UDHR, Art. 26; ICESCR, Art. 13; ACHR, Art. 26.

<sup>161</sup> See UDHR, Art. 16; ICCPR, Art. 23; ECHR, Art. 12; ACHR, Art. 17.

<sup>162</sup> Trevor Purvis and Alan Hunt, 'Discourse, Ideology, Discourse, Ideology, Discourse, Ideology ...', (1993) 44 *British Journal of Sociology* 473 at 474.

<sup>163</sup> *Ibid.*

<sup>164</sup> *Ibid.*, 492. The distinction between a discourse and a discursive formation has especially been clarified by Ernesto Laclau and Chantal Mouffe, *Hegemony and Socialist Strategy: Towards a Radical Democratic Politics* (2<sup>nd</sup> edn, London, 2001).

<sup>165</sup> Purvis and Hunt, 'Discourse, Ideology', 492–3.

<sup>166</sup> See Ronald Dworkin, *Law's Empire* (Cambridge, Mass., 1986).

<sup>167</sup> *Prince Hans-Adam II of Liechtenstein v. Federal Republic of Germany*, European Court of Human Rights, No. 42527/98 (2001); see also Florian Hoffmann, 'Report — European Court of Human Rights — 2001/2002' in Russell Miller and Peer Zumbansen (eds.) (2003) 1 *Annual of German and European Law* [page].

<sup>168</sup> See Derrida, 'Force de Loi'.

<sup>169</sup> Matthew Festenstein, 'Richard Rorty: Pragmatism, Irony and Liberalism' in Matthew Festenstein and Simon Thompson (eds.), *Richard Rorty: Critical Dialogues* (Cambridge, 2001), pp. 1–14 at p. 5.

<sup>170</sup> Richard Rorty, *The Consequences of Pragmatism* (Minneapolis, 1982), p.165.

<sup>171</sup> Richard Rorty, *Objectivity, Relativism, and Truth* (New York, 1991), p. 94.

<sup>172</sup> Indeed, some fellow neo-pragmatist thinkers, notably Stanley Fish, Walter Benn Michaels and Steven Knapp, have taken this radical turn; see Stanley Fish, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (Durham, 1989); W. J. T. Mitchell (ed.), *Against Theory: Literary Studies and the New Pragmatism* (Chicago, 1985).

<sup>173</sup> Or third-person account, as Meili Steele calls it; see Meili Steele, 'How Philosophy of Language Informs Ethics and Politics: Richard Rorty and Contemporary Theory' (1993) 20(2) *Boundary 2* 140 at 158.

<sup>174</sup> Richard Rorty, *Contingency, Irony, and Solidarity* (Cambridge, 1989); as discussed in Steele, 'Philosophy of Language', 158.

<sup>175</sup> Steele, 'Philosophy of Language', 158.

<sup>176</sup> *Ibid.*

<sup>177</sup> Rorty, *Objectivity*, p. 81.

<sup>178</sup> Rorty, *Contingency*, p. 9.

<sup>179</sup> Rorty, *Contingency*, pp. 78–80; see also John Horton, 'Irony and Commitment: An Irreconcilable Dualism of Modernity' in Matthew Festenstein and Simon Thompson (eds.), *Richard Rorty: Critical Dialogues* (Cambridge, 2001), pp 15–28; Steele, 'Philosophy of Language', p.161.

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<sup>180</sup> David Owen, 'The Avoidance of Cruelty: Joshing Rorty on Liberalism, Scepticism and Ironism' in Matthew Festenstein and Simon Thompson (eds.), *Richard Rorty: Critical Dialogues* (Cambridge, 2001), pp 93–111 at p. 96.

<sup>181</sup> Rorty, *Contingency*, p. 73–4.

<sup>182</sup> *Ibid.*, p. 141–3. For such a critique see Steele, 'Philosophy of Language', 166–7.

<sup>183</sup> Steele, 'Philosophy of Language', 166–7; also David Conway, 'Irony, State and Utopia: Rorty's 'We' and the Problem of Transitional Praxis' in Matthew Festenstein and Simon Thompson (eds.), *Richard Rorty: Critical Dialogues* (Cambridge, 2001), pp. 55–88.

<sup>184</sup> Cary Wolfe, 'Making Contingency Safe for Liberalism: The Pragmatics of Epistemology in Rorty and Luhmann' (1994) 61 *New German Critique* 101 at 105.

<sup>185</sup> Rorty, *Objectivity*, p. 26.

<sup>186</sup> Steele, 'Philosophy of Language', p. 164.

<sup>187</sup> Rorty, *Objectivity*, p. 29.

<sup>188</sup> Farid-Abdel Nour, 'Liberalism and Ethnocentrism' (2000) 8 *Journal of Political Philosophy* 207 at 207.

<sup>189</sup> See, for example, Neal Kodozy, cited in Richard Rorty, *Philosophy and Social Hope* (New York, 2000), p. #.

<sup>190</sup> In which an alcoholic native American, after having waited for his turn in the customary queue, receives dialysis treatment despite the fact that he refuses to stop drinking; his irritated, but liberal-minded doctors apparently ruminate about the value of giving him this treatment in the face of potentially more cooperative patients further back in the queue, but they refrain from critically raising the issue with him: see Clifford Geertz, 'The Uses of Diversity' in R. Borowsky (ed.), *Assessing Cultural Anthropology* (New York, 1992), pp. 454–67.

<sup>191</sup> Nancy Fraser, as cited in Steele, 'Philosophy of Language', 167.

<sup>192</sup> Rejecting here not merely Rorty's scheme, but also his Freudian justification of it; solidarity is, for Rorty, not linked to universal values but to a subconscious recognition of similarity: see Rorty, *Contingency*, 31–4.; and Steele, 'Philosophy of Language', 164.

<sup>193</sup> See for an interesting reflection on, inter alia, exoticization, Nathaniel Berman, 'Aftershocks: Exoticization, Normalization, and the Hermeneutic Compulsion' (1997) *Utah Law Review* 281.

<sup>194</sup> Hendrik Hartog 'The Constitution of Aspiration and "The Rights that Belong to Us All"' (1987–8) 74 *Journal of American History* 1013.

<sup>195</sup> In a similar vein, notably on the need to not reduce complexity, but try to live up to it, see Klaus Günther, 'The Legacies of Injustice and Fear: A European Approach to Human Rights and their Effects on Political Culture' in Philip Alston, Mara Bustelo and James Heenan (eds.), *The EU and Human Rights* (Oxford, 1999), pp. 117–44.

<sup>196</sup> Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Helsinki, 1989); Kennedy, 'The International Human Rights Movement'; see also David Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (Princeton, 2004).

<sup>197</sup> On which he is contradicted by Philip Alston, 'Introduction' in Philip Alston (ed.), *Human Rights Law* (Aldershot, 1996).

<sup>198</sup> Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge, 2002), pp. 503–9; see also Anne Orford's masterful 'The Gift of Formalism' (2004) 15 *European Journal of International Law* 179.

<sup>199</sup> Koskenniemi, *Gentle Civilizer*, p. 508.

<sup>200</sup> See Derrida, 'Force de Loi'; Ernesto Laclau, *Emancipations* (New York, 1996), pp 54.

<sup>201</sup> On this point, in particular, see Julie Ringelheim and Florian Hoffmann, 'Par-delà l'universalisme et le relativisme : la Cour européenne des droits de l'homme et les dilemmes de la diversité culturelle' (2004) 52 *Revue interdisciplinaire d'études juridiques* [page].

<sup>202</sup> See, on this line of thought, Robert L. Devaney, *Chaos, Fractals, and Dynamics: Computer Experiments in Mathematics* (Boston, 1989).