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COMMENT: HUMAN RIGHTS, NATIONALISM,  
AND MULTICULTURALISM IN  
RHETORIC, ETHICS AND POLITICS:  
A PLURALIST CRITIQUE

by Michel Rosenfeld\*

I. REVISITING UNIVERSALISM VERSUS RELATIVISM IN THE ERA OF  
GLOBALIZATION AND RENEWED ETHNONATIONALISM

Nationalism, ethnic, religious, and cultural identity, and even the universality of what we today call "human rights" are concepts that have been with us for several centuries.<sup>1</sup> In the last half-century, however, perceptions concerning these concepts and the situations to which they are taken to refer have dramatically changed. These changes began in the aftermath of the Holocaust, and thereafter took entirely new directions following the collapse of the Soviet Union (and the resurgence of nationalism which it triggered) and the acceleration of the seemingly irreversible transition to globalism.

Human rights, nationalism, and the collective identities framed by ethnicity, religion, and culture have also been significantly affected by the worldwide turn to constitutionalism over the past half-century.<sup>2</sup> This new constitutionalism has produced many new national constitutions which have had to deal with tensions between national interests, ethnic, religious, or cultural minority group rights, and constitutional protection of basic human rights for all.<sup>3</sup> Moreover, this new constitutionalism

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<sup>1</sup> See Louis Henkin, *New Birth of Constitutionalism: Genetic Influences and Genetic Defects*, in CONSTITUTIONALISM, IDENTITY, DIFFERENCE AND LEGITIMACY: THEORETICAL PERSPECTIVES 39 & n.2 (Michel Rosenfeld ed., 1994) [hereinafter THEORETICAL PERSPECTIVES] (noting commonalities between the 1791 United States Constitution's Bill of Rights, the 1789 French Declaration of the Rights of Man and the Citizen, and the 1948 United Nations Universal Declaration of Human Rights).

<sup>2</sup> See Michel Rosenfeld, *Modern Constitutionalism as Interplay Between Identity and Diversity*, in THEORETICAL PERSPECTIVES, *supra* note 1, at 3.

<sup>3</sup> For an excellent analysis of how the post-World War II constitutions of countries as diverse as Canada, India, South Africa, and Fiji have dealt with these issues, see Yash

has also become implanted at the supranational level, which seems bound to further intensify the above-mentioned tensions.<sup>4</sup>

These developments have not only intensified the conflict between universalism and relativism, but have also dramatically increased the number of areas in which this conflict is being staged. For example, both the eighteenth century American Bill of Rights and the French Declaration of Rights were universal in conception—in the sense that they were intended to establish rights held to be universally justifiable—but only local in scope—inasmuch as the American Bill of Rights was only meant to be in force in the United States, and the French Declaration in France. In contrast, the 1948 Universal Declaration of Human Rights was meant to be universal both in conception and in scope—applicable to all humans throughout the entire globe.<sup>5</sup> Furthermore, the spread of the new constitutionalism at the level of the nation-state raises the possibility that all national constitutions may be converging towards affording legal protection to a common core of universally recognized, and universally grounded, fundamental rights. On the other hand, as the move towards globalization increases, the legal and constitutional regimes designed to accommodate the new transnational order seem ever less likely to garner the support of all those affected, as diversity among those affected proliferates.<sup>6</sup> And as a consequence, those who are convinced that their own values and interests have been left out of the legal and constitutional norms shaped to accommodate or facilitate the process of globalization will most likely feel that, for all their pretensions to universalism, the norms in question are bound to remain relative to the values and interests of their proponents. Beneath competing claims of universalism and relativism lurks a complex dialectical set of relationships involving not only universalism and relativism, but different kinds of universalism and particularisms—with particularism understood as

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Ghai, *Universalism and Relativism: Human Rights as a Framework for Negotiating Interethnic Claims*, 21 CARDOZO L. REV. 1095 (2000).

<sup>4</sup> A telling example of the current impact of supranational constitutionalism is furnished by implementation of the European Convention on Human Rights by means of the decisions of the European Court on Human Rights, located in Strasbourg. These decisions have routinely upheld the fundamental rights of the individual against infringement within his or her own country. See, e.g., *Tyrer v. United Kingdom*, 2 Eur. Ct. H.R. at 1 (1978) (corporal punishment consistent with British law held to violate European Convention).

<sup>5</sup> See Universal Declaration of Human Rights, pmb., G.A. Res. 217A, U.N. GAOR, 3d Sess., pt. 1, at 71, U.N. Doc. A/810 (1948).

<sup>6</sup> For a more extensive discussion of this phenomenon as well as others in the context of globalization, see Upendra Baxi, *Constitutionalism as a Site of State Formative Practices*, 21 CARDOZO L. REV. 1183 (2000).

distinct from relativism.<sup>7</sup> Thus, for example, both Western liberal individualism and Marxism are universalist in ideology and aspirations, but project very different conceptions of universalism.<sup>8</sup> Furthermore, whereas the human rights movement that took shape at the end of World War II seems truly universal in scope and content, inasmuch as it is set against the ideology that lent support to the Holocaust, it is much less certain that its claims to universality can be convincingly sustained when challenged under very different circumstances.<sup>9</sup> Indeed, it seems impossible to garner any credible argument against the ethics and politics of universal human rights so long as these are mobilized to fight and condemn genocide. In contrast, when these same ethics and politics are advanced against non-Western peoples who oppose expanding market liberalization in the effort to preserve their own traditional culture, it seems fairly plausible that the asserted universality of human rights might ultimately prove to be particular, or even merely relative.<sup>10</sup>

## II. THE CONFRONTATION BETWEEN GROUP IDENTITY AND RIGHTS WITHIN AND BEYOND THE NATION-STATE

The ethos, politics, and rhetoric of universal human rights and the new constitutionalism may conceivably go hand in hand, hence furnishing solid normative and ideological underpinnings to economic, social, and political organization on a global scale. Thus far, however, the process of globalization has hardly borne out this hypothesis. Actually, inasmuch as the move to globalization and supranational organization has been accompanied by increased Balkanization, both among and within nations, divergences among the ethics, politics, and rhetoric of human rights (posited as universal) far outnumber convergences among them. Moreover, the concurrent advance of globalization and Balkanization is not the product of a coincidence, but rather represents two sides of the same coin: as political and economic relations become global in scale, local identities appear increasingly threatened, thus fostering

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<sup>7</sup> More specifically:

[W]hen a normative claim can only be justified in terms of some among several competing conceptions of the good, then the justification for such claim will be deemed relativist in nature. In all other cases, though the justification of a normative claim may be dependent on particular facts or norms, the justification in question will be deemed to be particularist rather than relativist.

Michel Rosenfeld, *Can Human Rights Bridge the Gap Between Universalism and Cultural Pluralism? A Pluralist Assessment Based on the Rights of Minorities*, 30 COLUM. H.R. L. REV. 249, 252 (1999).

<sup>8</sup> See *id.* at 251.

<sup>9</sup> See *id.* at 249.

<sup>10</sup> See *id.* at 249-50.

the intensification of ethnic, cultural, and religious bonds as a means to better secure communal survival.

Even granting the normative validity, and the possibility, of genuinely universal human rights, the question of how best to guarantee and to implement them remains unanswered. Consistent with Kenneth Karst's eloquent evocation of the potential of American nationhood,<sup>11</sup> it may well be that the nation-state committed to the fundamental norms promoted by constitutionalism provides the optimal forum for the purpose at hand. And if that is true, then globalization—at least to the extent that it weakens the nation-state and allows for reinforcement of regional and other subnational identities and autonomy—paradoxically may (at least in the short run) weaken, rather than strengthen, the drive toward universalism.

In as much as the universalism envisioned by Marxism has now faded in favor of the universalism associated with the global spread of Western liberalism and capitalism, globalization has intensified the tensions between the universalism of *homo-economicus* and the particularism of competing ethnic groups, cultures, and religions. By providing a common matrix for collective action and collective identity, the nation-state—or at least some nation-states devoted to the essential tenets of constitutionalism, such as France and the United States—may have nurtured a working balance between individual rights, posited as universally valid, and group concerns. With the advent of globalization, however, the clash between individualism with universal aspirations and group particularism has intensified in ways that have seriously disrupted intragroup security and intergroup cooperation and harmony. This, in turn, leads to several difficult questions, such as: Are all claims to universalism ultimately reducible to mere rhetoric? Are all human rights politics merely a means to advance often-concealed particular interests? Are the ethics of universal human rights ultimately as relativistic and tied to biased conceptions of the good as are those associated with particular ethnic, cultural, or religious groups? Or, on the contrary, are the normative claims of ethnic, cultural, or religious groups opposed to fundamental tenets associated with universal human rights mere rhetoric or mere politics designed to preserve normatively indefensible preferences?

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<sup>11</sup> See Kenneth L. Karst, *The Bonds of American Nationhood*, 21 CARDOZO L. REV. 1141 (2000).

### III. WESTERN LIBERALISM AND ILLIBERAL CULTURES DEMANDING AUTONOMY

These questions become particularly acute in multicultural settings pitting a dominant culture committed to the ideals of Western liberalism against minority cultures whose core values are, to a significant degree, illiberal.<sup>12</sup> Should such minority cultures be granted group rights and internal autonomy? If so, should such intragroup autonomy extend to all dealings between the group and its individual members, regardless of how far the group strays from the prescriptions of universal human rights? Or regardless of whether some of the group's members object to being subjected to particular norms enforced by the group?

Those who accept Western liberalism's claim to universality as unproblematic and those who adhere to an extreme relativist position can each give fairly easy answers to these questions. Indeed, the former can consistently maintain that there is no room for group rights and therefore minority cultures are entitled to pursue their collective interests only so long as these rely on individual rights, including the individual right to voluntarily associate with others for purposes of jointly pursuing common objectives.<sup>13</sup> For their part, extreme relativists—those who believe that all norms can only be legitimated in relation to particular conceptions of the good, and that all conceptions of the good are strictly equivalent from a normative standpoint—would argue that all ideologies are equivalent and therefore liberalism cannot be justified any more than any of its rival nonliberal ideologies.<sup>14</sup>

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<sup>12</sup> For a thorough and enlightening discussion of the clash between liberalism and minority cultures, see WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS* (1995).

<sup>13</sup> Up to a point, group rights can be recast as individual rights and vice versa, but there remains a core of irreducible individual and group rights. See Rosenfeld, *supra* note 7, at 254. As an example of a group right that, to a large extent, may be recast as an individual right, one can cite the right of a religious community to practice its religion. Such a right can either take the form of a group right giving the religious community autonomy over its internal affairs, or emanate from individual rights to freedom of worship, freedom of expression, and freedom of association. Although the two approaches lead to a vast area of overlap, they are by no means equivalent. Thus, when a group right is involved, religious authorities are likely to have far greater influence over members who deviate or dissent from religious dogma than when only individual rights are at stake. For instance, in a group rights regime, religious authorities might have the power to subject members of the religious community to the jurisdiction of religious tribunals, while this clearly would not be possible in the context of an individual rights regime.

<sup>14</sup> From a strictly philosophical standpoint, relativism puts all conceptions of the good on exactly the same footing and is, accordingly, completely indifferent between hegemonic liberal capitalism and broad multiculturalism prescribing full intragroup autonomy for every identifiable cultural group. For a more extended discussion of the philosophical dimension of relativism, see MICHEL ROSENFELD, *JUST INTERPRETATIONS: LAW BETWEEN ETHICS AND POLITICS* 206, 208 (1998).

And, accordingly, extreme relativists seem bound to reject the very possibility of any intercommunal validity of norms.

For those who stand somewhere between the unreconstructed liberals and the extreme relativists, on the other hand, there seem to be no simple or definite solutions to the conflict between the ethos of universal human rights and that of group rights in a multicultural environment. At best, this conflict could be managed through accommodation of a wide range of viewpoints with an eye towards fostering a workable *modus vivendi* among universalists and particularists, majorities and minorities, and those who tend toward liberalism as well as those committed to rather illiberal conceptions of the good. Although they differ from one another in significant respects, the respective positions advanced by Yash Ghai,<sup>15</sup> Kenneth Karst,<sup>16</sup> Upendra Baxi,<sup>17</sup> and Suzanne Stone<sup>18</sup> all offer many valuable insights on how the conflict between universalism-through-rights and cultural particularism might best be handled without recourse to reductionism. Also, these contributions highlight how the rhetorical, ethical, and political strands of this conflict are closely interwoven. In the end, the positions elaborated by Yash Ghai and Kenneth Karst lean towards universalism, while those advanced by Upendra Baxi and Suzanne Stone place greater weight on cultural particularism. With this in mind, I now briefly consider how these contributions advance the quest for a reconciliation between universal rights and cultural diversity.

#### IV. UNIVERSALISM AND PARTICULARISM IN RHETORIC AND HISTORY

Yash Ghai focuses on the politics surrounding the conflict between universal rights and cultural diversity, concludes that claims made in the name of cultural diversity are often more rhetorical than real, and proposes a pragmatic approach relying on universal human rights as useful tools against authoritarianism and oppression. For his part, Kenneth Karst explores the ethos inherent in the conceptions of American nationhood and illustrates how such ethos, if properly interpreted, can serve as a bridge between universalism and particularism. The core values on which American nationhood is built—individual liberty,

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<sup>15</sup> Ghai, *supra* note 3.

<sup>16</sup> Karst, *supra* note 11.

<sup>17</sup> Baxi, *supra* note 6.

<sup>18</sup> Suzanne Last Stone, *Cultural Pluralism, Nationalism, and Universal Rights*, 21 CARDOZO L. REV. 1211 (2000).

equality, democracy, and tolerance<sup>19</sup>—are universal in scope and aspiration. As envisioned by Americans, however, these core values acquire certain particularist tinges and, depending on how they are interpreted, may ultimately amount to a particular (but normatively productive) expression of universal ideals or to a merely parochial particularism with universalist pretensions. As discussed below, Karst casts American nationhood in the best of lights, thus making the strongest possible case in support of America's capacity to provide concrete embodiment to universal ideals. However, the question remains whether, in spite of Karst's imaginative and generous vision, his case is strong enough to align the universal with the particular.

Uproar Baxi is much more skeptical in his assessment of whether human rights can lead to genuine universalism. Referring to the loss of certainty occasioned by the emergence of post-modern thought, and to the inherent violence of law,<sup>20</sup> Baxi reminds us that modern constitutionalism began to spread in the heyday of colonial imperialism.<sup>21</sup> As Baxi sees it, modern constitutionalism promotes a coercive kind of universalism. Moreover, such universalism succeeds through a process of decontextualization which allows for concealment of the particular forces animating the push towards universal human rights and globalization. Consistent with Baxi's analysis, the problem is not so much one of identity, but rather one of unfair accumulation and distribution of wealth and power. As globalization takes hold, social and economic rights recede in favor of civil and political rights, and corporate power vastly increases. This is because corporations now enjoy rights previously reserved for natural persons and because, as their operations become truly global, they increasingly can legally escape from the grasp of national regulation.<sup>22</sup>

If this reading of Baxi is correct, his critique of the universalist pretensions of Western liberal universalism is reminiscent of the Marxist critique of liberal rights as bourgeois—that is, as inextricably tied to selfish class interests while being posited as being of equal importance to all.<sup>23</sup> But while Marxism opposed liberal universalism with a universalism of its own—which was supposed to become fully realized upon completion of the

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<sup>19</sup> See Karst, *supra* note 11, at 1149.

<sup>20</sup> See Baxi, *supra* note 6, at 1193.

<sup>21</sup> *Id.*

<sup>22</sup> See *id.* at 1197.

<sup>23</sup> See Karl Marx, *On the Jewish Question*, in KARL MARX EARLY WRITINGS 3, 26 (T.T. Bottmore ed. and trans., 1964).



transition from capitalism to communism—it is not clear what Baxi's own alternative might be. In any event, he brings home the important point that the clash between universalism and multiculturalism should not make us blind to the increasing inequities and welfare discrepancies foisted by the process of globalization and its embrace of liberal universalism.

Suzanne Stone places the struggle between multicultural particularism and universalism in its historical perspective, and concludes that no genuine reconciliation between the two can be realistically contemplated. In the past, particular cultures relied heavily on the maintenance of thick collective bonds among their members, and left little room for individual deviation from group-enforced norms.<sup>24</sup> Today, in contrast, with the ascent of liberal individualism and its embrace of universalism, the cultural life of groups that do not share in the ideological vision carved out by the Enlightenment becomes seriously threatened. For Stone, modern universalism amounts to yet another particular conception of the good, but one that strongly insists on casting its parochial vision in universal terms.<sup>25</sup>

The major problem for Stone is not that modern universalism competes with other particular conceptions of the good, but rather that it casts them in purely relativist terms, and thus disempowers and marginalizes them. In short, liberal universalism's rights-oriented regime is destructive of group life and culture, or, as Stone strongly puts it: "the abstract and universal quality of rights sets the individual in a sea of anomie, destructive of the very notion of community."<sup>26</sup>

Liberal individualism's propensity to marginalize cultures that do not conform to its particularism, disguised as the embodiment of universalism, is perhaps best illustrated by the American conception of freedom of religion enshrined in its Constitution.<sup>27</sup> By prohibiting the adoption of a state religion, and by proscribing state interference with expressions of religious belief through professions of faith and worship, the Constitution sets an aura of state neutrality as between religions, and of equal tolerance towards all religions. Upon closer inspection consistent with Stone's analysis, however, beneath the surface American

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<sup>24</sup> See Stone, *supra* note 18, at 1213.

<sup>25</sup> *Id.* at 1214.

<sup>26</sup> *Id.* at 1220.

<sup>27</sup> Freedom of religion is afforded constitutional protection in the First Amendment's Free Exercise Clause which, with the Establishment Clause, sets the parameters for legitimate relations between religion and state in the United States. The relevant constitutional text provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. amend. I.

constitutional treatment of religion seems well suited for the need of one religion in particular—Protestantism—but not for those of others—such as Judaism—which are “religious cultures that are not organized around faith or beliefs, but around law, custom, and a communal way of life.”<sup>28</sup> For these latter religious cultures, group rights and corporate self-governance seem essential; accordingly, the millet system inherited from the Ottoman Empire—whereby each religious community is given autonomy over its own religious and communal life as well as over personal relationships among its members—seems far superior to any scheme patterned on the one carved out by the American Constitution.<sup>29</sup>

Stone recognizes that in the contemporary world the restoration of group rights cannot be given full normative justification without imposing certain curbs on the group’s coercive power over its individual members.<sup>30</sup> Stone does not elaborate on this, but seems to draw on Kymlicka’s distinction between “external protections” of group autonomy and “internal restrictions” imposed by the group on recalcitrant members.<sup>31</sup> According to Kymlicka, a minority culture should be protected from external intervention or coercion coming from the larger society, but should not be free to impose unwelcome internal restrictions on its own members in order to preserve cultural purity or to bolster group solidarity.<sup>32</sup> Given Stone’s rejection of the possibility of reconciling liberal universalism with cultural group particularism, however, it is difficult to see how Kymlicka’s suggestion could be implemented without ultimately threatening group identity. Indeed, Kymlicka—who is, after all, a liberal—is concerned with protection of individuals *within* the group; if push comes to shove, he sides with basic individual autonomy against the need to preserve the paramouncy of group values.<sup>33</sup> Stone, in contrast, does not seem willing to sacrifice essential group values or goals. Her position, therefore, may be more consistent with guaranteeing a right of exit from the group for dissenting members rather than with granting individual rights against the group so long as the dissenter wishes to retain his or her membership within it.

Both Stone and Kymlicka share the view that it is not possible

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<sup>28</sup> Stone, *supra* note 18, at 1218.

<sup>29</sup> See *id.* at 1214.

<sup>30</sup> *Id.* at 1215.

<sup>31</sup> *Id.* For Kymlicka’s distinction, see KYMLICKA, *supra* note 12, at 7.

<sup>32</sup> KYMLICKA, *supra* note 12, at 34-48.

<sup>33</sup> See Rosenfeld, *supra* note 7, at 268-69.

or desirable to overcome the divide between group particularism and universal rights. Both also believe that protection must be afforded to groups as well as to individuals. But whereas Kymlicka's demand for protection of individuals within their own groups may ultimately undermine group survival or integrity, Stone's position—if it would indeed restrict individuals to the right of exit—would give too little to persons who feel oppressed within their own group but desire changes from within. So long as exit or conformity with all group norms and customs remain the only alternatives, dissenting members would be confined to choosing between continued oppression at home, or exile as outcasts or strangers in a larger culture with which they share too few bonds.

#### V. THE QUEST FOR MUTUAL ACCOMMODATION

As neither side in the conflict between cultural particularism and universal rights can be legitimately eliminated or relegated to mere subordination, the only viable option is to strive for some accommodation sufficient to prevent undue fragmentation, notwithstanding that it would fall far short of full reconciliation. Both Yash Ghai and Kenneth Karst provide helpful insights into how such accommodation might be best accomplished. Ghai does so primarily by underscoring the need to eliminate or reduce obstacles to accommodation. Karst, on the other hand, indicates how it might be possible to reach a workable level of accommodation by striving for a sufficient degree of unity without narrowing the space for group pluralism and cultural diversity too much. In short, Ghai draws our attention to the critical or negative tasks which loom as preconditions to accommodation, whereas Karst opens our eyes to the positive or constructive efforts on which the attainment of such accommodation depends.

As already mentioned, Ghai regards much of the conflict between universal rights and cultural diversity as being, above all, rhetoric, and as a tool used in the pursuit of particular objectives. For example, Ghai insists that the condemnation of universal rights as Western impositions which threaten Asian values is often nothing but a smokescreen designed to protect entrenched Asian authoritarianism.<sup>34</sup> Moreover, even within Western polities, resistance to universal rights in the name of cultural identity can mask deeper political objectives. Thus, in Ghai's view, the resistance of the Québécois against the 1982 Canadian Charter had much less to do with cultural identity than with fair allocation

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<sup>34</sup> Ghai, *supra* note 3, at 1096.

of political power and economic resources.<sup>35</sup> Indeed, Canadian Francophones are by no means adverse to Western universalism, but are drawn to group rights and a distinct status to combat what they perceive as unfair Anglophone political and economic dominance.<sup>36</sup>

More generally, Ghai believes that struggles over apportionment of material resources and distribution of power are more important than are clashes among cultures.<sup>37</sup> Furthermore, rights can play a positive role in structuring legitimate frameworks for power and resource allocation, and they can also perform a mediating role in the management of ethnic and religious conflicts.<sup>38</sup> But to appreciate the real potential of rights, it is important to demystify certain prevalent notions of culture and rights, and to cut through the false polarities connoted in the vision of an unresolvable struggle between rigid, all pervasive, and uniformly universal rights, and self-contained homogeneous static cultures whose very survival hinges on exclusion of all extraneous external values.

The core of Ghai's argument is that, once the myths that cultures are homogeneous and rights are rigid and absolute are exposed for what they are, rights should be viewed as useful in combating oppression and promoting fairer allocations of power and resources, without thereby having to trample on what is worth preserving in various cultures. As he emphasizes, cultures are not homogeneous or singular, and they can be rather oppressive to at least some of their members.<sup>39</sup> Moreover, no present-day state is made up of a single culture.<sup>40</sup> Thus, if a particular ethnic or religious culture is oppressive to women, recourse to state-backed gender equality rights may pose some threat to cultural hegemony, but should nonetheless be welcome as means of reducing injustice. On the other hand, since rights are not monolithic, they can be molded in different ways to accommodate the needs of particular communities. For example, the right of equality can be shaped to suit quests for individual-regarding, as well as group-regarding, equality, and it can be framed through the deployment of affirmative action programs so as to promote equal treatment or to facilitate bringing disadvantaged groups to the material levels reached by others.

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<sup>35</sup> *Id.* at 1137.

<sup>36</sup> *See id.* at 1118.

<sup>37</sup> *Id.* at 1099.

<sup>38</sup> *See id.*

<sup>39</sup> *See id.* at 1119.

<sup>40</sup> *See id.*

Ghai's plea for demystification is salutary and it opens new paths to workable accommodations between universal rights, in their many particular embodiments, and cultural diversity. His appeal to pragmatism in the deployment and use of rights is also attractive in many ways, but it ultimately leaves open a troubling question. What is practical may not always be right, and even what is practical in certain circumstances may only become apparent in light of the particular objectives which are being pursued.<sup>41</sup> Accordingly, a pragmatic approach, such as that advocated by Ghai, seems inadequate to indicate *when* rights and *which* rights ought to predominate over cultural claims rather than vice versa. In other words, while Ghai's critical analysis significantly advances the debate, his proposed solution remains too incomplete to provide useful guidance in a large number of cases.

As already briefly mentioned, Kenneth Karst explores how American nationhood, seen in the best of lights, and in terms of its greatest potential, may provide the optimum medium for the reconciliation of universalism and particularism.<sup>42</sup> Consistent with Karst's vision, the nation-state may still hold the best promise for institutionalizing universal values tailored to the needs of particular polities. Thus, the nation-state which emerged in France after the 1789 Revolution was designed to provide a working framework for the effective institutionalization of democracy, and a regime of universal rights guaranteed to the individual and to the citizen.<sup>43</sup> Although universalist in aspiration, the French project launched during the Revolution could only become viable within a manageable political unit which would make possible a workable citizens' democracy based on a sustained public discourse in a common language.<sup>44</sup> In other words, although the universalist vision of the Enlightenment adopted by the French Revolution in theory extended to all human beings throughout the earth, it could not be put into practice beyond the confines of the nation-state, or among people who did not share the same language. Thus, whereas the French nation and the French language may be purely contingent from the standpoint of the ethics of universal rights, it became necessary to extend such rights to a particular people at a

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<sup>41</sup> For an extended discussion of this issue and an argument that pragmatism unduly emphasizes means at the expense of ends, see ROSENFELD, *supra* note 14, ch. 6.

<sup>42</sup> See Karst, *supra* note 11, at 1179.

<sup>43</sup> Cf. Ulrich K. Preuss, *Constitutional Powermaking of the New Polity: Some Deliberations on the Relations Between Constituent Power and the Constitution*, in THEORETICAL PERSPECTIVES, *supra* note 1, at 143, 148-52 (contrasting the French concept of the nation as a *demos* with the German concept of the nation as an *ethnos*).

<sup>44</sup> See *id.* at 151-52.

particular time in history. And in that sense, the French nation and the French language may be regarded as one particular embodiment of a regime of universal values.

Unlike the French nation, with its common culture and history, the American nation did not truly exist before independence from Britain or commitment to universal rights through adoption of the Bill of Rights—as Karst put it, “our pluralism is older than the American nation.”<sup>45</sup> Thus, the United States would seem even better-suited than France to provide an optimal environment for the implantation of universalism. As a country of immigration, with people coming from a broad array of cultures and traditions, the United States indeed seems to provide an optimal setting for blending the universal and the particular. And as Karst emphasizes, a general commitment to the same core constitutional values is at the root of American nationhood.<sup>46</sup>

To the extent that Irish-Americans, Italian-Americans, Japanese-Americans, African-Americans, Gay-Americans, etc. are, above all, Americans, it seems plausible that American nationhood is the product of the transformation of universalism into the cultural heritage of the American people taken as a whole. In that case, moreover, the particular differences that distinguish one American from another, such as those based on race, ethnic origin, or sexual orientation, ought to be regarded as peripheral rather than central, and as extending the range of acceptable particular expressions of American universalism rather than standing against it.

According to Karst, there are two major threats to this vision which draws universalism within the confines of American nationhood. The first is the division between the haves and the have-nots;<sup>47</sup> the second is the tendency among various segments of American society to restrict full equal membership to nationhood in ways that exclude significant numbers of people who permanently reside within the country’s borders.<sup>48</sup> I shall not deal further with the first of these threats, which boils down to a conflict over which kind of universalism ought to be enshrined by American nationhood, thus raising the same issue which I briefly addressed in my discussion of Baxi’s position.<sup>49</sup> The second threat, however, is crucial, inasmuch as it either results from inadequate or incomplete particularization of the universalism propounded by

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<sup>45</sup> Karst, *supra* note 11, at 1142.

<sup>46</sup> *Id.* at 1148.

<sup>47</sup> *See id.* at 1174.

<sup>48</sup> *See id.* at 1149.

<sup>49</sup> *See supra* text accompanying notes 20-23.

American nationhood, or it constitutes proof that, in the last analysis, American nationhood is the expression of a mere particularism concealed in the trappings of universalist rhetoric.

Karst strongly favors the first of those two alternatives. As he sees it, racists, bigots, those who are homophobic, and even the militia groups who arm themselves to the teeth and vow to combat the federal government as the mortal enemy of freedom, are all committed to some version of America's universalist creed—albeit a deeply flawed version of it.<sup>50</sup> Thus, slave owners could sincerely endorse the American Declaration of Independence's postulation that "all men are created equal," and yet deny that slavery is morally wrong by casting slaves as being less than fully human. Similarly, militia members can display a profound attachment to America as the land of freedom, but wrongly perceive the federal government as the worst enemy of freedom.

Upon reflection, notwithstanding Karst's charitable intuitions, slave owners did not only distort equality and militia members do not only pervert liberty. Rather, both espouse positions that squarely contradict the respective ideals involved. To be sure, universal rights may well be consistent with a plurality of different particular incarnations. For example, a free speech jurisprudence that draws the line at pornography or flag burning may well be as consistent with a universal right to free speech as one that does not draw such lines. In contrast, slavery is the very contradiction of equality among all human beings; and violence against fellow citizens, forcing the Bible on everyone, and virulent anti-Semitism<sup>51</sup> are the very opposite of liberty, tolerance, or live and let live.

Slave owners and militia members who invoke liberty or equality ultimately engage in mere rhetoric, and while they may provide the most blatant examples of those who use universalist rhetoric to make a mockery of universal rights, they are not the only ones. Indeed, outspoken racists, misogynists, homophobes, and religious fundamentalists with no patience for any religious diversity all seem to hold strongly to values that squarely contradict, rather than merely distort or fall short of, those that buttress Karst's conception of American nationhood.

More generally, it is not clear whether American nationhood ultimately rests on an ethic of inclusiveness or on one that, while open to a fair amount of diversity, relies on a constant interplay

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<sup>50</sup> See Karst, *supra* note 11, at 1157 (observing that, in spite of their violent antigovernment streak, the militia members are "Americans" who believe that they are the "true Americans").

<sup>51</sup> See *id.* at 1156.

between inclusion and exclusion. Furthermore, even America's notion of inclusion is by no means universal. Indeed, America has embraced an assimilationist ideal captured in the metaphor of the "melting pot," which contrasts with other visions of inclusion, such as the apparently much more multicultural one prevalent in Canada, which is symbolized in the image of an "ethnic mosaic."<sup>52</sup>

Based on those observations, American nationhood, while it appeals to universal values, ultimately amounts to a particular ideal with universalist overtones. Nevertheless, both Ghai and Karst advance the debate on multiculturalism and universalism, by showing that it is imperative to move away from rigid polarities and absolutes and to look for more modest ways in which to narrow the distance between the two. The question remains, however, whether this can be done in any normatively cogent and consistent way.

#### VI. TOWARDS AN INCREMENTAL SOLUTION? PLURALISM AS BRIDGE BETWEEN INTRACOMMUNAL AND INTERCOMMUNAL DEALINGS

It is indeed possible to approach the conflict among universalism, particularism, and relativism systematically, and to gain a critical understanding of the issues involved, even if it is not always possible to find a definite resolution for every particular problem. The approach in question relies on an endorsement of pluralism as a normative criterion—or, more precisely, a particular version of pluralism which I have termed "comprehensive pluralism."<sup>53</sup> Comprehensive pluralism prescribes, as a paramount normative objective, inclusiveness towards as great a diversity of conceptions of the good as possible. Comprehensive pluralism thus constitutes a conception of the good, but, unlike other such conceptions, it is not self-contained; instead, it depends on the protection of other conceptions of the good—so long as, and inasmuch as, the latter do not trample on other competing conceptions. Among other things, comprehensive pluralism prescribes tolerance towards other conceptions of the good, even towards those that are not themselves tolerant. For example, consistent with comprehensive pluralism, tolerance should extend to an intolerant religion, but only to the extent that the latter does not interfere with other religions, or other nonreligious conceptions of the good.

Although comprehensive pluralism requires respect for other

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<sup>52</sup> KYMLICKA, *supra* note 12, at 14.

<sup>53</sup> For an extended discussion of the principal features of comprehensive pluralism, see ROSENFELD, *supra* note 14, chs. 7 & 8.



conceptions of justice, it is not reducible to mere relativism. Indeed, strictly speaking, relativism must give equal weight to a conception of the good that requires elimination of all other such conceptions and to one that, on the contrary, postulates tolerance as the highest good. In contrast, comprehensive pluralism rejects acceptance of the first of these two conceptions as incompatible with the very notion of pluralism, and thus allows no room for it, as it threatens the conception of the good prescribed by comprehensive pluralism at its very core.

Consistent with this, the conflict between universal rights and cultural diversity should not be reduced to a hopeless struggle within the confines of mere relativism. Rather, this conflict should be viewed as one between universalism and particularism—with universalism regarded as one conception of the good, and particularism as either a specific embodiment of universalism, or as deriving from a conception of the good distinct from, and competing against, universalism.

In the broadest terms, comprehensive pluralism requires that *prima facie* all conceptions of the good be put on an equal footing and be considered as equally worthy of respect. However, while working to best accommodate the largest possible number of such conceptions, comprehensive pluralism requires restraining proponents of those conceptions that threaten the integrity of other conceptions to the extent necessary to neutralize the threats in question. Accordingly, in an ideal world exclusively regulated by comprehensive pluralism, inclusion of conceptions of the good would not be unlimited, but rather only permitted to the extent that the threats that any such conceptions pose to the integrity of others are properly neutralized.

Within this perspective, both universalism and the diverse cultures apparently opposed to it carve out distinct conceptions of the good which compete with one another in certain respects and most probably overlap in certain others. Those who share the same conception of the good can be envisioned as forming a single normative community, and the relationships among them can be considered as being intracommunal. On the other hand, dealings between those who do not share the same conception of the good should be considered intercommunal. Moreover, since those distinctions apply at the normative level, intracommunal relations can be confined within an ethnic, cultural, or religious group, but can also extend beyond.<sup>54</sup> By the same token, intercommunal

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<sup>54</sup> For example, a worldwide group of ecologists whose environmental concerns strongly determine their entire normative outlook would constitute an intracommunal unit, even if its members came from otherwise very different cultures.

relationships can occur within a single ethnic, religious, or cultural group as well as across many of them.<sup>55</sup>

With this in mind, universalism and universal rights would have both an intracommunal and intercommunal profile. Moreover, their intracommunal dimension, for the most part, would not be global in scope. Arguably, a very thin layer of universalism—involving consensus against such practices as genocide or certain forms of torture—may remain intracommunal on a worldwide basis.<sup>56</sup> But otherwise, even after discounting merely rhetorical attacks against it, universalism would have to be assessed in intercommunal terms, and at least *prima facie* would not be entitled to any privileges against its opponents. Accordingly, every contested assertion of universal rights would have to be assessed to determine whether it would be more likely to promote greater inclusiveness than the proposed alternatives. The same approach would also apply to every claim for the vindication of particular ethnic, religious, or cultural norms at the expense of universalist pursuits.

Comprehensive pluralism treats both external coercion of a cultural group and internal restrictions by such group on recalcitrant members the same way: they both must be critically evaluated as instances of intercommunal conflict. Consistent with this, comprehensive pluralism does not privilege either individual rights or group rights.<sup>57</sup> Consequently, universalism enjoys no *prima facie* advantage over multiculturalism, and a cultural group's traditions are no more or less important than the innermost convictions of its dissident members who seek change from within, rather than exit.

In the last analysis, whether comprehensive pluralism can provide more than a systematic critical tool of analysis and help resolve conflicts between universalism and various types of particularisms depends on the respective natures of the conceptions of the good that are actually competing in legal, ethical, and political arenas. If there is virtually no overlap, so that intercommunal dialogue is nearly impossible, then it seems highly

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<sup>55</sup> For example, if women were to demand significant changes in a culture that has traditionally treated them as inferior, at least with respect to that struggle, their dealings with those who seek to entrench the status quo should be considered intercommunal rather than intracommunal. In other words, although such a struggle would qualify as an intracommunal one from an anthropological standpoint, it ought to be treated as an intercommunal one from a normative standpoint.

<sup>56</sup> Also, to the extent that there is no such worldwide consensus, comprehensive pluralism would nonetheless condemn genocide and torture as unacceptable threats against the integrity of a large number of conceptions of the good.

<sup>57</sup> For a more extended discussion of this point, see Rosenfeld, *supra* note 13.

unlikely that any fair, broadly acceptable solution would emerge. If, however, consistent with the analyses of Ghai, Karst, Baxi, and Stone, there is room for significant overlap, then many constructive solutions seem possible. And, so long as one could remain within the area of overlap, it would not matter much if the solutions involved were labeled as universal or particular.

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