# Human Rights as Fairness:
## A Common Ground for the Integration of Religious and Human Rights Commitments

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## Abstract

The guiding question of this paper is "How can, if at all, the universality of human rights survive critical examinations within the prevailing multiculturalist frame of reference?" This paper examines the possibility conditions of critically reasoning for the universality of human rights. The discussions in this paper runs at two levels of analysis. At the conceptual level, a theoretical monist-pluralist frame of reference will be developed to reformulate the problematic of the universality of human rights in a form more compatible methodologically with multiculturalist approaches in the humanities, social sciences and current discourses of cultural studies. Demonstrating the weaknesses of the alternative solutions, the main hypothesis of this study suggests to refer to a reconstructed version of the "golden rule of a reciprocal fairness." At the practical level, this paper will set forth three "why", "which", and "how" questions regarding those principles which can bolster a universal reception of the human rights as fairness.

**Keywords:** The Universality of Human Rights; Fairness; Multiculturalism; Monism; Pluralism.

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**The Enigma of the Universality**

Form a methodological point of view, this paper locates mainly in the multidisciplinary intersection of theoretical human rights studies, philosophy of ethics, moral philosophy, and political philosophy. Moreover, wherever required Islamic studies will be considered. Therefore, the main debates of this study will be meta-textual debates that from a second-order point of view evaluate and assess the contextual relationships among theories and schools in relation to our questions and hypothesis. The main methodological-epistemological approach of this study is analytical-philosophical. Moral universalism is one of the analytically inseparable pivotal tenets of the human rights conception, without which any notion of whatever set of rights applicable by definition to all human beings regardless of all particularities, like local legal jurisdiction, and culture or other localizing factors, such as ethnicity, nationality, and sex seems unconceivable. The most crucial and complicated mode of the dilemma of the universality happens when the dilemma is to be approached within a multiculturalist frame of reference. The multiculturalist debate on the universality of human rights can be marked with a puzzling question: "In a postmodern era of multiculturalism where there have apparently remained no possibilities to set forth universal claims, is it still plausibly conceivable to think about human rights?"

Thatothe 'universality' is an "analytic" (and not "synthetic") element to whatever conception of human rights makes the problem seem insolvable. In other words, whereas "non-universal human rights" is a contradiction in terms, universality cannot be claimed for any sets of normative principles within a multiculturalist frame of reference. Therefore, any particularistic justification of human rights leads inevitablypto "particularistic universalism" which is a contradiction in terms. Any argument for the universality of human rights based on any particularistic moral universalism of religious or ideological type fails to accomplish the task.

**A Typology of the Theories Upholding Universality of Human Rights**

In the aftermath of the World War II, in parallel with the genesis of universalistic arguments for the possibility and desirability of a set of "international"a(and later,n"universal") moral codes, which ushered in the Universal Declaration of Human Rights (UDHR) in 1948, three strong waves of criticism rose one after the other against both the possibility and desirability

of the universality claims. One of the arguments against the idea of the universality of human rights came from the Western and the two others from the non-Western camps of debates. The main sources of these three waves were Western cultural relativism or multiculturalism, Muslim cultures and traditions, and Asian values.

In response to the doubts and questions raised by those camps, late modern versions of moral universalism originated to preserve and protect the universality of human rights as claimed in UDHR. The most important suggestions to defend the core idea of the universal morality of human rights have been based upon cultural, philosophical, anthropological, functional and pragmatic bases and principles.[1] Notwithstanding these theoretical approaches to the universality of human rights, the universality is sometimes understood as a matter of form.[2] Formal universality of human rights, in this context, means the adherence of almost all member states of the United Nations to the international legal instruments of human rights. This meaning of the universality is out of the context of our debates in this paper.

Regardless of the formal approach to the dilemma of the universality of human rights depicted at the outset of this paper, there are at least five big families of studies and theories upholding the idea(l) of the universality of human rights over the past six decades:

1. The Mixed Cultural Origins of Human Rights: Some writers tried to show how diverse cultural norms and values can defend the same set of human rights from different point of views and for diverse forms of life. They insist that the Western essence of human rights has been exaggerated; otherwise, human rights would have not been viewed as a Western phenomenon in the first place. According to this argument, that is a matter of historical fact that this certain formulation of rights emerged after the World War II under the domination of the Western normative approaches to the post-WWII era; however, this does not necessarily mean that those rights are substantially and exclusively "Western". In other words, different cultures can accommodate the same set of rights in different ways. Scholars like Georges Abi-Saab[3], Stephen P. Marks, Robert Y. Jennings, Admantia Pollis, Shashi Taroor, and Mary Robinson are among those who follow this line of argument.

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1. See: Brems, 2001: 295.
2. See: Dias, 1993: 44.
3. See: Abi-Saab, 1993: 41.

2. The Cross-Cultural, Anthropological Bases for Human Rights: Some other scholars have undertaken a yet more difficult task. They have claimed and tried to argue that there are some notions, values, and norms commonly shared or very similar among all existing cultures and forms of life. These commonalities and similarities support equally the same set of human rights. Scholars like Bertrand G. Ramcharan[1], and Onuma Yasuaki expand the literature from this perspective.

3. The Philosophical Foundations of Human Rights: From a philosophical point of view, some scholars have tried to develop philosophical justifications for the universality of human rights. They have grounded the claim to the universality of human rights on a certain principle extracted from one or another philosophical school. Consequently, a family of arguments has taken shape in support of the universality of rights each member of which is based upon a different philosophical school. The distinguished members of this family adhere to different versions of liberalism, conservatism, pragmatism, and humanism. Some Muslim scholars can also be found in this camp trying to argue that the Muslim mixed tradition of philosophical thought can inspire some justification to the universality of human rights from a Muslim point of view. Richard Rorty, Jeanne Hersch, A. Lapeyre, F. de Tinguy, K. Vasak, Philip Alston, Antonio Cassese, Alan Gewirth, Michael Freeman, and Abdullahi an- Na'im[2] have approached the universality of human rights from this perspective.

4. The Functionalist Approach to Human Rights: Another approach that can be found in the literature tries to associate the universality of human rights with the necessary functions of the universal phenomenon of modern nation-states. In this sense, there is no moral, cultural or philosophical justification for the universality of human rights; rather, there is only a functional necessity of protecting individuals against the huge machinery of the state, and because modern nation states are the unique form of power governing all around the world, it is a functionally universal necessity that all people in all cultures adhere to human rights shielding their rights against this universal machinery. Reza Afshari[3], Rhoda E. Howard, Andrew Clapham, Oliver de Schutter, and Karel Rimanque count among this functionalist fraction of the proponents of the universality of human rights.

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1. See: Ramcharan, 1994: 105.
2. See: An-Na'im, 1990: 37.
3. See: Afshari, 1994: 248.

5. The Practical Universality of Human Rights: This approach can be viewed as complementary to the functional approach. The main argument here points to the absence of any alternative moral institutions that can substitute the currently existing and vastly approved institution of human rights that has survived and evolved through more than half a century. This approach has been developed mainly in the works by Joel Feinberg and Clarence J. Dias who do not find a satisfactory philosophical foundation for the universality of human rights and yet continue to defend it. According to them, a world with human rights is a better world than the one without them.[1]

## A Critical Review of the Theories of Universality

A critical review of this colorful literature on the universality of human rights shows that none of these groups and their subgroups has yet succeeded to satisfactorily respond to the critiques set forth by its respective counter-arguments. The last two camps are criticized for having no satisfying answer to the question as to whom they are trying to persuade.[2] They only can convince those who are already convinced.

The third approach has been criticized for its proponents trying to argue that a certain set of rights could be deemed universal if and only if the validity of a certain set of philosophical foundations are already assumed. But this does not serve the purpose of the debate, because the universality here is, in fact, conditioned by a particular set of beliefs, which means nothing less than "particular universality" that overtly is an obvious contradiction in terms.

The two first groups of suggestions have been always criticized for their lack of empirical and historical evidence. Moreover, there are three other problems with them. Firstly, it seems methodologically impossible to performe "enough"a empirical studies that suffice to conclude the universality of a certain set of rights in cross-cultural or mixed-cultural senses. Secondly, this approach predicates on ethical essentialism, which suffers from incurable errors. And thirdly, their claim of cross- or mixed-cultural universality runs against moral intuitions and the common sensical perception of non-universality.

In what follows I try to formulate and examine an alternative solution for the problematic of the universality of human rights.

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1. See: Feinberg, 1973: 94.
2. See: Hollinger, 2001: 119.

## Central Issues and Final Aims

In order to approach the problematic of the universality from a different perspective, I try to explain my provisional suggestion for reformulating the problem.

The main problem is that when whatever legal/moral system, here human rights, is claimed to be universal, this claim immediately encounters with at least two different barriers. On the one hand and theoretically speaking, there is an irreducible plurality of theoretical foundations some of which are ready to support the universality of one or the other moral/legal system. But when the claim of universality is grounded on one of these theoretical foundations, this immediately and necessarily (because they are irreducible to each other by definition) associates the universality claim with that certain theoretical foundation. This exclusive association contradicts the inclusivity that is the integral feature of the universality. On the other hand, there is, in practice, a colorful variety of irreducible cultures and forms of life every one of which comes with a set of particular moral and legal tenets and none of which is ready to withdraw from its own tents and submit to those of the others.  In line with Isaiah Berlin's notions of pluralism and monism[1], the main issue stems from the incomparability, incommensurability, and uncombinability of diverse cultures and different forms of life with one another. In the light of Berlin's pluralism, the paradoxical dilemma, therefore, is as to how to reconcile the theoretical and practical pluralities with the universality of a set of legal/moral rules such as human rights. The importance of this debate lies in the fact that in an increasingly globalizing world, one single prevailing normative order seems as impossible as the dominance of a single superpower. Inspired by Isaiah Berlin's pluralism, the main problem can be reformulated in the following form: "How a pluralistic, human-rights-based, universal order can be conceived of ?" In what follows I discuss this question. the question of.

## Human Rights as Fairness

The main hypothesis of this paper is to refer to a revised, multicultural version of the "Golden Rule of Fairness" whose a basic (affirmative) version states: "One should treat other people as (s)he wishes to be treated by them." This is the original affirmative version of the fairness principle. Drawing on an extended notion of Berlin's distinction between the positivity and negativity of rights, and also drawing on Popper's situational logic, and taking the role of

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1. For instance see: Galston, 2002: 4 – 30.

consent in a global order into account, the 'negative situational' formulation of the principle of fairness is the building block of our hypothesis: "One should not treat others as (s)he doesn't consent to being treated in the same situation." I will try to examine the claim that this statement can be used in a multicultural context as an applicable criterion to reach an open-ended, in-flux, set of pluralistic universal human rights.

## Critical Appraisal

To evaluate the hypothesis of this paper, we go through the following stages:

*1. Multicultural pluralist frame of reference; monism vs. pluralism*: There are five critical questions about the possibilities prior to any discussion of ethics and moral philosophy:

> a.   Question of *coherency*: can a single system of moral commands encompass all goods and values coherently with no internal inconsistency among them?
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> b.   Question of *reducibility*: can all goods and values be reduced to or extracted from a single fundamental good or value?
>
> c.   Question of *commensurability*: can all goods and values be arranged hierarchically in one system of ethics?
>
> d.   Question of *comparability***:** can different systems of values be compared to one another?
>
> e.   Question of *combinability*: can a certain form of life (a culture) accommodate and ensure all goods and values?

Monism can be defined or demarcated in terms of different degrees of affirming these possibilities, whereas pluralism rejects, in contrast, all or some of them. Relativism as a categorical rejection marks the extreme end of the spectrum of pluralism.

Monistic end of interpretations for diversities begins with different mythical and or mystical systems of belief and continues through fundamentalist versions of religious claims about being, knowledge and values. These are simple formulations of monism. More sophisticated and complicated versions of monism uses diverse quasi-pluralistic masks. In this manner, the continuum of pluralism begins with the veiled monism Contrasting the 'negative pluralism' that rejects different degrees of believing in any final authority – epistemological and ontological, as well as deontological; let's call the veiled monism as 'positive', since it affirms the need to believe in a sort of final authorities as universal and immutable points of reference.

**- Positive Pluralism**

The veiled monism comprises two main sorts of theories both recognizing the reality of pluralities and diversities. They differ in respect of justifying and explaining these recognized – but, in fact, 'unreal' – pluralities and diversities. Both versions of the positive pluralism carry out optimistic epistemology and pessimistic anthropology. They both need to suggest utopias as the final exemplar for human life. The first group contains the theories of ignorance. These theories explain the diversities of human knowledge and forms of life by referring them to human ignorance caused by diverse forces determining the life of the mankind. The second one consists of ontological theories. These theories refer to the ancient (Platonic and Neo-Platonic) idea of an inescapable ontological hierarchy. There are religious and irreligious reinvented versions of this kind of theories. Recent claims of 'selected nation/race', 'millennialism' and 'the end of history' are some examples of the reincarnation of those ancient ideas of monism.

**- Negative Pluralism**

The idea or tendency of negative pluralism, in contrast to its positive counterpart, attacks the supposed idea of a unifying focal point at the centre of 'the' epistemological and the moral system. Instead of explaining how there are a plurality of diverse systems of morals and truths, negative pluralism deconstructs the basic idea of such a focal unifying centre. From a negative pluralist point of view, there are no meta-discursive, meta-historical or universal criteria that make it possible to compare different systems of morality and knowledge and evaluate them objectively. The plurality is irreducible and inevitable both in theory and practice. This plurality replaces the idea of the possibility and desirability of a unique and universal rationality with the inevitability of a variety of cultural rationalities and different forms of life based upon the common sense. The spectrum of this negative notion of pluralism can be sketched with its four indicative points; analytical-critical realism, pragmatism, relativist pluralism and multiculturalism.

*2. A Critical review of monistic human rights as a closed fixed text*: Monistic readings of human rights whatsoever refer these rights to liberalist, or at least 'Western', epistemological and ethical authorities. On the opposite side, opponents – among them some of Muslims – reject human rights exactly for the same reason that they are based on certain 'Western' values and norms to which we do not subscribe. Having the theoretical frame of reference – underlying our main discussions – set forth in the previous part, this part of the

study undertakes to sketch an overview of predominating, overtly or covertly, monist tendency of the Western, as well as Muslim, intellectual legacies to trace the current human rights conflict between Muslims and the West back to its deepest monistic backgrounds which both sides of the conflict share friendly. The monistic perception of human rights as a set of rules to actualize a certain form of life has nothing to do with a set of universal human rights.

First of all we need to make a strategic distinction between the core and the margin or the ends and the means of human rights doctrine. I suggest that the monistic idea that human rights doctrine is mainly a pursuit of actualizing the liberal ideals in human life all around the world (that connotes the claim of the universality for theoretical liberalistic values and tenets) must be substituted by the pluralistic idea that the main aim of the human rights doctrine is to preserve and celebrate as much plurality, variability, diversity and difference as exist all around the world. This pluralistic notion of human rights coincides a democratic understanding of the world order that provides all the parties to have their voices and run their plays; yet there is only one exception regarding the 'universal' principle of fairness: when pluralist doctrine of human rights would be manipulated in a monistic way to act against itself. This happens when an anti-pluralist party to the game takes 'unfairly' the opportunity of playing under comprehensive umbrella of pluralistic rules of human rights to undermine, practically not merely theoretically, the same rules by practicing some eliminating acts against the existence of 'other' members. Regarding this only exception, the violating attempt strips the violator party from its rights to that certain difference based upon which it has violated the rule of fairness. This pluralism-based doctrine of human rights receives strong corroborations from all theories of negative pluralism. This attitude towards human rights holds the pluralistic content of human rights doctrine as its pivotal end. Furthermore, all the expressional variables and diverse forms of justifications make no notable differences.

Equally affected by Eurocentric or Orientalist perspectives, as well as the 'reversed Orientalism' of 'Eastern' critics,[1] and also in contrast to the pluralist notion of human rights, the monist, positive and positivist positions understand UDHR and the two ensuing Conventions of 1953 and 1966 as closed legal texts. On the contrary, human rights as fairness suggests that these instruments should be understood as open-ended, in-flux, dialogical paths towards human

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1. See: Al-'Azm, 2000: 217-238.

rights as a permanently improving set of morals accumulated throughout a long history of human social interactions. Therefore, understanding all the contents of the human rights documents will be assumed constantly conditioned by epochal changing situations of the human life. While our understanding of human rights is due to change concerning the changes continuously happen to our theories of anthropology, epistemology, ontology and deontology, it demarcates as well the limits of our epochal notions of justice, liberty, right and basic norms and values of civil life. Exactly as is the case with democracy as a system of governance, the only supporting argument can be set forth for human rights are those arguments that just show that this set of moral principles, when compared to all other alternative counterparts, are *yet relatively* the best one to provide all societies with healthier and safer situation of human social life.

**The (Universal) Human Rights: Instead of Conclusion**
In the concluding part of this paper, I try to employ the theoretical thread of argument which has been built up so far to assess the hypothetical capacity of the revised human rights on the bases of the principle of fairness (as follows below in the section of which-question) as a solution for the problem of the universality of human rights. I split this final discussion to three sections.

*Why-Question*: Why human rights? This question targets the main goals and purposes that the idea of a universal set of human rights is set to meet. The domain of possible answers differs regarding how one may answer these questions: Are human rights to materialize and actualize the ideals of certain political or philosophical schools and ideologies, e.g. liberalism, humanism, or secularism? Are they to eliminate local particularities of religions and cultures to impose instead a set of Western norms and values? Are they to impose a certain set of criteria to determine *the* form of life worthy of *human being* and, therefore, to define which people more/less deserve to be called true human beings? Are they desirable because the dominant culture of our times, i.e. the Western culture, wants to impose them to all other peripheral and local cultures?

Many other questions of the same nature can be asked. The point here is that any degree of a vastly-held (by the both camps, agreeing and disagreeing with the universality of human rights) 'yes-answer' to the above questions leads inevitably to evaporation of the idea of a universal set of human rights in an era of multiculturalism. The reason is clear. The affirmative answer in this context contradicts the pivotal and prevalent multiculturalist assumption of our time that cultures are incommensurate and irreducible to each other; therefore,

no culture can claim any kind or degree of superiority in the name of humanity or rationality over others. But if we hold this multiculturalist perspective, why do we really need the idea of *one* set of *universal* rights.

I answer all those sub-question in the negative and propose to give a totally different answer to the why-human-rights question. I think if we hold human rights as regulatory rules to preserve and protect the survival of the cultural particularities and varieties to survive healthier in an era of rapid globalization, then we can imagine a set of universally applicable human rights. In this sense, human rights norms are about the forms of living healthier with other cultures rather than being about a set of values which some (dominating) cultures claim that they are based on universal truths and worthy of true human beings.

Therefore, the answer to this question is simply that all and specially those living in the so-called periphery need human rights to survive side by side. It is not a matter of ideological (dis)agreements or preferences. Rather, it is a matter of survival. And the more one human entity (an individual, a society, a culture, or a nation-state) differs from the others, the more it needs human rights as a protection belt. Suppose a nation-state that differs totally with almost all the other nation-states all around the world in terms of language, religion, culture, race, ideology, political system, national interests and so forth. The most crucial need of such a state as an exceptional one regardless of its basic ideology, political system and religion is to survive. To survive as an exception is extremely more difficult than surviving as an instance of a rule.

*Which-Question*: Which human rights? Which-question is about the content of a set of rights that can meet the purpose of protecting differences all around the world against the tendency of big powers towards global unification and hegemony. I propose that the content of such difference protecting human rights cannot be determined within a fixed, closed, text, like the current Universal Declaration of Human Rights and the ensuing conventions although these texts can be considered as the established drafts suitable to begin the discussions with to reach an open-ended, influx, set of human rights based on an international democratic consent.

However, the crucial suggestion of this paper here is to take the revised negative version of the principle of fairness as the single criterion of all discussions. According to this principle, when it is applied to assess how one rule or right can protect diversities, all sides of any debate on human rights have to commit only to one principle regardless of all their differences. This

principle which I call "The Principle of Fair Difference" can be stated in the following form: "Any degree of any kind of difference or diversity should not be eliminated, demolished, limited, or humiliated if and only if that degree of that difference or diversity does not eliminate, demolish, limit, or humiliate any degree of any kind of other differences or diversities."

But why all can or even have to submit themselves to this basic rule? For any theoretical reason based on this or that philosophy or ethical system? Or for it is self-evident? Or because it is the final good and virtue covering all goods and virtues? My answer is simply because if one human entity (e.g. an individual, a culture, a nation and so on) does not submit to the "Principle of Fair Difference", it automatically and inevitably loses its immunity from being eliminated, demolished, limited, or humiliated. Therefore, submission to this principle is not a matter of theoretical and philosophical arguments. Rather it is a basic practical necessity and extremely minimal condition for survival. All human entities can suggest any article to be added to the list of human rights if and only if it can show that the content of its suggestion agrees with the "principle of fair difference" and meets its conditions. And any article or part of the present human rights documents must be deleted if and only if any human entities can show how that article or part violates or harms the same principle. In this sense, human rights are influx and open-ended and always due to revisions and changes.

*How-Question*: This very practical question asks how those debates must be designed and held, out of which an open-ended influx set of universal, fairness-based, and difference-protecting principles of human rights can gradually come out and be achieved.

As far as the formal, administrative and bureaucratic regulations and procedures are considered, I think it is too soon to propose any structure for the dialogues. But the how-question is not restricted to this level. A more important level of this question targets the logic of the debates. When the first endeavors took place in the aftermath of the World War II to establish a moral base for international relations, the international atmosphere was very ready to reach a set of guaranteed international moral and legal codes at the both national and international scales. It was more compensatory and retrospective. It was dressing the wounds of the War. All shared the need for a moral consensus to stop violence. And the consensus on the UDHR came out of this pressing need to integrity.

But what about the present time? Can that atmosphere of integrity among all different and, let us say, struggling rival cultures and politics be reinvented? I believe a different form of urgent common need to such integrity has already emerged, especially in the after math of the 9/11 attacks and invasions of Afghanistan and Iraq and the current fragile and horrifying situations in the Middle East. Of course, the roots of the current need are far deeper and stronger in the many UN's failures in different peace-making/keeping projects from Africa throughout the Middle East to Eastern Europe, at local to regional and international scales all over the past fifty years. But the very urgent need for such integrity to achieve a more globally and universally justifiable and applicable set of human rights stems from the horrible phenomenon that the scissors that is made of the two blades of fundamentalist terrorism and governmental terrorism threatens the very thin thread of human survival all around the place in a way never experienced before.

The current urgency for reinventing a set of universally justifiable and applicable moral codes is rather prospectively preemptive and preventive, in contrast to the situations after the WWII. It is to prevent the next world disaster. For this reason, I believe it will not be more difficult than the past to think about the processes and procedures of opening up discussions on new patterns of human rights as fairness. There are thrree additional observations which can support the hope in reaching such a consensus. Firstly, this time all parts of the world, especially the Muslim world, feel engaged in the center of the threat and crisis compared to the World War II where many parts of the world felt at the sideline of the disasters of the War and the debates on human rights. Secondly, the mechanisms, techniques and procedures of reaching consent-based decisions and consensuses have improved to a huge degree in comparison to those of the post-WWII situation. And finally, the proposal of the replacement of the current Western-culture-based universal human rights (which have been constantly seen as an instrument of imposing Western values on non-Western cultures) with a fairness-based set of rights (that by definition are to protect diversities and differences and, therefore, to preserve the plurality of forms of life) can break the deadlock of the current debates on human rights with a way out by reformulating the very problem of the universality.

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