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THE INTERDEPENDENCE OF HUMAN RIGHTS, PEACE AND LAW
SOME REFLECTIONS ON *RELATIVISM AND HUMAN RIGHTS. A THEORY OF PLURALIST UNIVERSALISM* BY CLAUDIO CORRADETTI

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ABSTRACT
In this paper I discuss Claudio Corradetti's recent fascinating book on *Relativism and Human Rights, A Theory of Pluralist Universalism* (Springer 2022, 2nd ed.) by focusing on the global reach of human rights and its implications for law. The paper discusses, inter alia, what relativism conceivably means in the context of EU and international human rights. Moreover, the paper examines human rights and justice in the context of universality. The paper concludes by briefly looking at peace and war theory and argue for its salience for understanding the framework of global human rights protection.

KEYWORDS
Human rights, peace, universalism, proportionality

INTRODUCTION

In *Relativism and Human Rights, A Theory of Pluralist Universalism* (Springer 2020, 2nd ed.), Claudio Corradetti develops a fascinating account on the global reach of human rights and its implications for law. One of the key ideas of the book is that any theory of human rights must be capable of reconciling underlining philosophical concepts with judicial practice, and consequently that human rights are practice dependent. Therefore, an important question is whether human rights can be both ideal and non-ideal as well as moral and political. This question is explored by Corradetti in the context of the interdependence of human rights, peace and law.

While human rights law is wide-ranging, one of the core components of human rights, the very idea of human dignity derives from the Kantian notion of innate

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humanity and the categorical imperative.[1] For Kant, people could only give themselves laws that are consistent with their innate right of humanity and this Kantian idea forms the backbone of contemporary human rights theory.[2] A running theme as presented in the book is therefore that of the relationship between law and human rights protection in the framework of a universalist theory. Another related debate concerns the question as to whether the basic justification of human rights is instrumental and thereby derivative. Or conversely, if human rights are non-instrumental where human rights are seen as morally fundamental. For example, Ariel Zylberman argues that reciprocity, the principle that every person has a basic right to independence and respect against every other person, is the basis for a non-instrumental viewpoint.[3] For him, grounding human rights in a master norm of reciprocity is neither instrumental nor empty and could generate a robust list of human rights grounded in reciprocity.[4] Similarly, Rainer Forst has forcefully argued that the right to justification as a human right theory, is grounded in reciprocity and generality.[5] Forst's theory offers a context-based notion of justice and justification where human rights are linked to dignity and non-domination oriented views.[6] Corradetti's new work on human rights and pluralist universalism, I think, fits squarely in this debate on the realm of human rights.

In the following I will try to demonstrate this claim by highlighting a few relevant examples. I will focus on what relativism conceivably means in the context of EU and international human rights law as well as discussing the global dimension of human rights and justice in the context of universality. Specifically, I want to connect the question of the universality and human rights to the global justice debate and constitutionalism in legal context. I will conclude by briefly looking at peace and war theory and argue for its salience for understanding the framework of global human rights protection.

[1] A. Ripstein, *Force and Freedom*, Harvard University Press, New Haven, 2009; E. Benvenisti, "Human Dignity in Combat: The Duty to Spare Enemy Civilians", Israel Law Review (39)81, 2006.

[2] Ripstein, 2009, p.218.

[3] A. Zylberman, "Why Human Rights? Because of You", *The Journal of Political Philosophy*, 24, 2016, pp.321–43.

[4] Ibid.

[5] R. Forst, *The Right to Justification: Elements of a Constructivist Theory of Justice*, Columba University Press, NY, 2012. For a discussion of the right to justification see the chapters in E. Herlin-Karnell and M. Klatt (eds.) *Constitutionalism Justified: Rainer Forst in discourse*, Oxford University Press, Oxford, 2019, e.g., C. Corradetti 'Engaging with Forst's Right to Justification: Kantian Analogies and the problem of subjectivity', pp.33-52.

[6] Ibid.

1 HUMAN RIGHTS AS A MULTIFACETED CONCEPT

As Corradetti explains, the language of human rights is both moral and political. Yet in "*In the Beginning was the Deed*", Bernard Williams claimed that a proper philosophical inquiry into the nature of human rights did not involve acceptance of a substantive moral outlook.[7] Instead, as he saw it, we must always depart from a minimalist conception grounded in politics.[8] Likewise, liberals like John Rawls adopted a minimalist approach to human rights, fearing that a maximalist approach would turn into an empty vessel or rendering it prone to misuse.[9] A central question in justice theory is consequently if human rights should be limited to basic and uncontroversial rights or if they should be more wide ranging and whether human rights should be subject to cultural variation and claims to political self-determination.[10] As Kok-Chor Tan explains, the problem with a moral approach to human rights is that they are subject to philosophical contestation that potentially renders the content of human rights too thin or unclear. From a legal perspective, human rights have a universalistic and moral starting point,[11] as is clear from for example the UN declaration of human rights.[12] The precise scope and contents of those specific human rights norms with their universal acceptance remains highly contested.[13] Critics of universalism have called for a 'thin' reading of universal human rights, covering only those few norms on which genuine international consensus can be identified.[14] The problem with a political reading, as Arendt emphasized, is that contemporary human rights law since 1950 has been a too political concept as people claimed a 'right to have rights', which allowed them to appear in public as bearers of rights and claimants of justice.[15] The tension between

[7] B. Williams, *In the Beginning Was the Deed: Realism and Moralism in Political Argument*, G. Hawthorn ed., Princeton University Press, 2005. See e.g. the discussion in E. Hall and D. Tsarapatsanis, 'Human Rights, Legitimacy, Political Judgement', *Res Publica* (2020), https://doi.org/10.1007/s11158-020-09470-4.

[8] Ibid.

[9] J. Rawls, *The Law of Peoples,* Harvard University Press, Cambridge Mass., 1999.

[10] K.-C. Tan, *What is this thing called Global Justice?* Routledge, London, 2017, pp.47-59.

[11] R. Forst, *The Right to Justification: Elements of a Constructivist Theory of Justice*, Columba University Press, Chichester-New York, 2012.

[12] Universal declaration of human rights states in Article 2 that everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status and with no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

[13] Y. Shaney 'The Universality of Human Rights, Pragmatism meets idealism', JBI Human Rights Lecture, 2018.

[14] Ibid.

[15] H. Arendt, *The Origins of Totalitarianism*, A Harvest Book, Harcourt Inc., London, 1986. See e.g. discussion in K. Nash, 'Human rights, Global justice and the limits of law', in B. Fassbender & K. Traisbach (eds), *The Limits of Human Rights*, Oxford University Press, Oxford, 2019, Ch 3.

human rights law and global justice theory has led to several theoretical and applicability confusions, since while the two domains have a lot in common and allow for cross-translations of some major concerns, they are not strictly the same.[16] Global justice is a broader project and one which is obviously not a statist one, while some human rights advocate argues that the statist model offers more stable and robust protections for human rights, less susceptible to passing political circumstances and interpretations.[17] On the one hand, this is the classical debate on the relation of human rights protection and the value of sovereignty and the place of the nation state in this regard. On the other hand – if this is indeed an "other" – the debate is also meta-theoretical: pragmatists such as Rorty would reasonably argue that rights exist only through their interpretation and application, which is always contextual and interpretative (although not necessarily by statist agents exclusively).[18] If human rights are universal, why should sovereignty matter as to its application? The familiar argument in favor of statism is that a state is needed to apply human rights.

Note that this by itself is not an argument in support of sovereignty, but a thinner one that is satisfied with the role of states as guardians of rights.[19] This to an extent is also the Kantian argument which as Corradetti illuminates in relation to the question of peace, according to which states must engage cooperatively in an international federation with other states, precisely because of their shared role and function in protecting human rights and human dignity (which obviously is not all that states do).[20]

The complexity of the derivation and universality of human rights is similarly reflected in Forst's work, as mentioned above, anchored in one basic moral right, the right to justification. According to Forst, again, the legal and political function of human rights is to make the right to justification socially and politically effective, both substantively and procedurally. Likewise, Mattias Kumm argues that human rights simultaneously stand above politics and are at the heart of the political process.[21]

States then are useful, if only contingently so; but how? For Kant, (human) rights are *constitutional* because they are the conditions of the state constituting itself as

[16] S. Besson, 'The Bearers of Human Rights Duties and Responsibilities for Human Rights: A quiet (R)evolution?', *Social Philosophy and Policy*, 2015, pp. 244-268.

[17] See, e.g. the discussion in A. Buchanan, *The Heart of Human Rights*, Oxford University Press, Oxford, 2013.

[18] See e.g. B. Ramberg, "Richard Rorty", *The Stanford Encyclopedia of Philosophy,* Spring 2009 Edition, Edward N. Zalta (ed.), available at https://plato.stanford.edu/archives/spr2009/entries/rorty/.

[19] See e.g., Benvenisti, 2006.

[20] C.Corradetti, *Relativism and Human Rights. A Theory of Pluralistic Universalism*, Springer, Dordrecht, 2021 (2nd ed.), Ch. 4, p.140

[21] M. Kumm, 'The Turn to Justification: On the Structure and Domain of Human Rights Practice' in A. Etinson (ed.), *Human Rights: Moral or Political?* Oxford University Press, Oxford, 2018, pp.238–61.

an omnilateral will, derived from the wills of all the particular individuals.[22] This means generality in law-making and applicability to everyone.[23] This is precisely the kind of universalism that particularistic theory rejects, working not from a vision of a global community of persons but from one of idiosyncratic political entities.[24]

Moreover, Katrin Flikschuh explains how Kant's invoking of human rights as 'recht der Menschheit' tend to have collective and not individualistic focus and thus is better translated as 'right of humanity' rather than human rights as such.[25] Moreover, the categorical imperative can be found at various pivotal points in Kantian political philosophy, not just in his ethics. For example, for Kant holding rights is only possible "under universal law"; while one must never allow oneself to be "treated as a mere means," the people must "give laws to themselves".[26]

The grid of EU constitutionalism provides a very interesting context for these debates about human rights and the democratic dimension. The constitutional dimension is significant when discussing human rights, as they are both part of the public law framework and related to constitutional rights.[27]

2 EUROPEAN LAW AND HUMAN RIGHTS: CONSTITUTIONALISM AND PRACTICE-DEPENDENCE

An important theme in Corradetti's writings (and beyond this book) is that human rights theory is dependent on human rights practice as expressed in legal judgments. From a universalism perspective, it may seem a challenge that central human rights instruments, for example the European Convention on Human Rights (ECHR) and the EU Charter of Fundamental Rights, are regional and bounded jurisdictionally. In light of the regional specific character of EU law human rights instruments, several scholars have argued that the EU is not a cosmopolitan enterprise, but instead is vested with certain aspects of cosmopolitanism.[28] Leaving

[22] A. Stone Sweet & C Ryan, *A Cosmopolitan Legal Order,* Oxford University Press, Oxford, 2018, p. 32

[23] Ibid.

[24] For example, Carl Schmitt argued that recognizing particularism is what 'political respect' in international law actually means: that every state would recognize the right of every other state to particularism, with jurisdiction solely over its own nationals. Schmitt rejected for example the international framework for prohibiting the war of aggression and as Seyla Benhabib explains he disempowered individuals and rejected human rights. S. Benhabib, 'Carl Schmitt's Critique of Kant: Sovereignty and International Law', *Political Theory*, 2012, pp. 688-713.

[25] Flikschuh, 2015.

[26] Ibid.

[27] K. Möller, "From Constitutional to Human Rights: On the Moral Structure of International Human Rights", *Global Constitutionalism*, 3, 2014, pp.373-403.

[28] As G.W. Brown observes, "in contrast to Kant's laws of hospitality, member states as well as the European Commission often pursue morally and normatively inconsistent positions on the protection of universal human rights outside its borders despite the EU's official position towards a foreign policy

aside the question as to whether it would be legitimate for the EU to claim a broader jurisdiction than its political boundaries, the nature of cosmopolitan rights is fascinating in an EU context. While trade and security are central driving policies for the EU, Member State and EU practices are often difficult to discern and have often global implications.

Consider the ECHR regime. Under the ECHR, right-holders must have exhausted domestic remedies in order to secure admissibility at the ECtHR (Article 34 of the ECHR). The ECHR system both empowers states and limits their authority.[29] What about the EU? In fact, the EU legal system has always had a complicated relationship to human rights. The classic example of a clash between the institutional desire to extend the objectives of the EU Treaty and is expressed in the Solange case, where the German constitutional court found issue with EU law on grounds of the latter's suboptimal safeguarding of human rights.[30] In general, EU law has been accepted by constitutional courts, but subject to conditions and limitations, such as the EU legal order continuing to guarantee an adequate level of protection of fundamental rights.

Indeed, some of the criticism against the EU has been that it hijacks human rights and other national principles in order to extend its own competences. In *Opinion 2/13*, the Court of Justice of the EU concluded that the present EU legal framework could not be acceded with the ECHR, as the planned arrangements for complying with the obligation imposed on the EU by Article 6(2) TEU to accede to the ECHR are not compatible with EU law.[31] Specifically, the Court of Justice rejected the possibility of EU accession to the ECHR partly on the grounds that as "EU law imposes an obligation of mutual trust between those Member States, accession is liable to ... undermine the autonomy of EU law".

In Opinion 2/13 the Court held that:

> In so far as the ECHR would require a EU Member State to check that another Member State has observed fundamental rights, even though EU law imposes an obligation of mutual trust between those Member States, accession [to the ECHR] is liable to upset the underlying balance of the EU and undermine the autonomy of EU law.

Yet the enforcement question is different under the EU regime as compared to the ECHR, as national courts can ask the EU court of justice directly and individuals

to promote human rights and democracy", G. W. Brown, "The European Union and Kant's idea of Cosmopolitan Right: Why the EU is not Cosmopolitan", *European Journal of International Relations,* 2014, pp. 671-693.

[29] A. Zysset, *The ECHR and Human rights theory: reconciling moral and political conceptions*, Routledge, London, 2016.

[30] Judgment of 12 October 1993, 2 BvR 2134 and 2159/92, BVerfGE 89, 155. e.g, S Boom, The European Union after the Maastricht Decision: Will Germany be the Virginia of Europe' (1995) 43 *American Journal of Comparative Law* 177.

[31] Opinion 2/13, Accession to the ECHR, 18 December 2014.

can claim EU rights directly in the national setting. But the problem of enforcement remains. Currently in the EU there is a rule of law debate on 'backsliding' – or regression – and the current challenges to the rule of law in certain EU Member States such as Poland and Hungary.[32] For example, Article 7(1) TEU provides for the possibility for the EU Council, acting by a majority of four fifths of its members, to determine that there is a clear risk of a serious breach by a Member State of the common values referred to in Article 2 TEU. In the judgment of *Commission v Poland*, the EU Court stated that Article 19 TEU, gives concrete expression to the value of the rule of law affirmed in Article 2 TEU, and entrusts the responsibility for ensuring the full application of EU law in all Member States and judicial protection of the rights.[33] The Court held in essence that respect for the rule of law is essential for citizens to trust public institutions and that without such trust, democratic societies cannot function.

Regarding the relationship between the Court of Justice and the European convention court, the ECtHR's case law, has been rather more solicitous of asylum-seekers' fundamental rights, as in *M.S.S.* v. *Belgium and Greece* mentioned above. According to Halberstam, by asking for an express exemption for Member States' Convention violations caused by EU law's mutual confidence obligations, it has been suggested the EU Court is trying to mimic the existence of a federal state in international law.[34]

Most importantly, Article 51 of the Charter makes it clear that the Charter is directed at the Union's institutions and to Member States when they are implementing EU law. In the case of *Åkerberg Fransson* concerning the compatibility with the *ne bis in idem* principle of a national system involving two separate sets of proceedings to penalize the same wrongful conduct, the EU Court tested the meaning of implementation of the EU Charter.[35] In this case the Court of Justice adopted a very broad reading of the Charter. Moreover, the Court observed that EU law precludes a judicial practice which makes the obligation for a national court to disapply any provision contrary to a fundamental right guaranteed by the Charter conditional upon that infringement being clear from the text of the Charter or the case law relating to it. The EU Court pointed out that the national court must be given the power to assess fully whether that provision in question was compatible with the Charter (para 48 of the judgment).[36] Member states cannot opt out of EU values which include the protection of human rights.

[32] See e.g. L. Pech and K. Lane Scheppele "Illiberalism Within: Rule of Law Backsliding in the EU", 19 *Cambridge Yearbook of European Legal Studies* 3-47, 2017, p. 7.

[33] Case C-619/18, *European Commission v Poland* judgment of 24 June 2019.

[34] D. Halberstam, "'It's the Autonomy, Stupid!" A Modest Defence of Opinion 2/13 on EU Accession to the ECHR, and the Way Forward', *German Law Journal* 16, 2015, pp. 105–46.

[35] *Åkerberg Fransson* Case C-617/10.

[36] Article 52(1) of the Charter of EU Fundamental Rights grants some important exceptions to the application of the Charter as a whole. Subject to the principle of proportionality, limitations may be

3 HUMAN RIGHTS, DEROGATIONS AND PROPORTIONALITY

Human rights in EU law forms part of the constitutionalist thinking about law, where judicial review plays an important role.[37] The idea that Member States can derogate from constitutional duties, if it can be justified, is a common feature of human rights law. For example, Member States can invoke exceptions for national security, national identity, and health public to name a few of the exceptions. All derogations from EU law, however, have to pass the proportionality test to count as a valid justification.[38] Yet, unlike the EU law rights framework, the ECHR does not directly address individual rights, but whether the state is granted a certain margin of appreciation. The question of to what extent Member States have a margin of appreciation is of course an ongoing issue.

The possibility of derogations is however not unique to EU law, but many international human rights Treaties can be derogated from. Take for example the ECHR regime Article 15 ECHR states which states that in time of war or other public emergency threatening may take measures derogating from its obligations provided that such measures are not inconsistent with its other obligations under international law. No derogation is permitted from the right to life except in respect of deaths resulting from lawful acts of war and, inter alia, no torture or forced slavery is permitted. While the question of exception in war time is dependent on the jus in bello principles,[39] i.e. the rules in war and International Humanitarian Law (IHL), the revisionists war theory goes against this stipulating that any killing in war may be unlawful. Jeff McMahen for example argues that unjust war combatants may not attack just war combatants.[40] For him proportionality could however serve as a constraint on violence in a war with just aims.[41] The use of proportionality in the context of war theory is well documented.[42] Is there a rational connection between the means and the ends, and were those means suited to the ends? Is the action necessary and are there no less drastic means available for achieving the same ends?[43] Let me very briefly turn to the human rights debate at the international level in this context. In a nutshell, for a long time there was an assumption that IHL and International Human Rights Law (IHRL) represented different systems of law

made if they are necessary and genuinely meet objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others.

[37] On the judicial review and human rights C.Corradetti, 2021 (2nd ed.), Ch 3, pp.112-113

[38] See e.g. on proportionality, for example, T Tridimas, *General Principles* (2012) chs 3–5

[39] See e.g. M.Walzer, Just and Unjust War, Basic Books, New York, 1977, T.Meisels, Contemporary Just War, Theory and Practice, Routledge, London, 2018.

[40] J. McMahen, *Killing in war*, Oxford University Press, Oxford, 2009.

[41] J. McMahen, "Proportionality and Necessity in *Jus in Bello*", chapter in S. Lazar & H.FRowne (eds.), The Oxford Handbook of Ethics of War, Oxford University Press, Oxford, 2018, p.418.

[42] D. Kretzemer, "The Inherent Right to self-defence and proportionality in Jus Ad Bellum", *European Journal of International Law*, 2013, pp. 235–282

[43] Ibid.

which apply in different situations, as the former would be focused on war and the latter on law enforcement situations.[44] The extent to which this is or is not still the situation in international armed conflicts remains a matter for debate.[45] Regardless, from a constitutional and human rights perspective, it seems odd that IHLR would not apply in cases where IHL applies, rather the question is one of permissible derogations and enforcement.[46] International criminal law represents of course an interesting merger between human rights law, humanitarian law and criminal law, sometimes a neglected area in human rights discourse.[47]

Moreover, the value of dignity is always at the heart of human rights theory. Human dignity is very interesting in the context of the scope and meaning of human rights. The right to life and the idea of international human rights law is founded on the principle of human dignity.[48] For Dworkin, human dignity is an organising idea, as it brings ethical principles under the one roof of human dignity.[49] Aharon Barak, in turn, has emphasized the multifaceted structure of dignity.[50] Both the margin of appreciation test and the proportionality test will always operate within the ambit of the constitutional value of dignity.[51] Yet as Yuval Shaney points out the *UN Human Rights Council* has refused so far to follow the footsteps of the ECtHR and recognize a margin of appreciation in the interpretation and application of the *International Covenant on Civil and Political Rights*.[52] The rationale behind this being that reverting back to the discretion of national authorities without sufficient institutional guarantees in place to ensure the IHRL compatibility of their decisions, could result in negative outcomes for potential victims of human rights violations. What exactly is the margin of appreciation?

The margin of appreciation test, as developed by the European Court of Human Rights (EctHR), is similar to the EU proportionality test, but is directed to the state, and thus is different from proportionality, which goes in both directions, i.e., also concerns the relationship between the individual and the state. It provides a margin of appreciation to the state vis-à-vis the international fora. Likewise, both

[44] D. Kretzmer, "Rethinking the application of IHL in non-international conflicts", *Israel Law Review,* 2009, pp.8-45.

[45] See e.g. A. Ganesh, "Between Wormholes and Blackholes: A Kantian (Ripsteinian) Account of Human Rights in War", chapter in E. Herlin-Karnell and E. Rossi (eds) *The Public Uses of Coercion and Force from Constitutionalism to War*, Oxford University Press, Oxford 2021, ch 12 p 151.

[46] M. Milanovic *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy*, Oxford University Press, Oxford, 2011.

[47] E. Sliedregt, "International Criminal Law", in M Dubber & T Hörnle (eds.) *Oxford Handbook of Criminal Law*, Oxford University Press, Oxford, 2014.

[48] Benvenisti, 2006.

[49] R. Dworkin, *Justice for Hedgehogs*, Cambridge MA, Harvard University Press, 2011.

[50] A. Barak, *Human Dignity: The Constitutional Value and the Constitutional Right*, Cambridge University Press, Cambridge, 2015, pp. 112–13.

[51] Ibid. See, also, the contributions in C. McCrudden (ed.), *Understanding Human Dignity*, Oxford University Press, Oxford, 2013.

[52] Y. Shaney, 2018.

proportionality and the margin of appreciation doctrine deal with the relative importance of the marginal social benefit added by fulfilling the law's purposes in relation to the marginal social benefit of preventing the harm caused to the constitutional right.[53]

Moreover, the margin of appreciation test allows for diversity (but leads to fragmentation and lower human rights standards some would argue) and is important in the case law of the ECtHR. It allows Member States to derogate from their Treaty obligations with a given margin, or area, of discretion upon the basis of their moral preferences as reflected in their national constitutions. The margin of appreciation test has, however, also constitutional implications in that it regulates the Member States' leeway in applying their own national standards. The doctrine of the margin of appreciation has been extended to other sensitive areas, such as freedom of expression, privacy, fair trial and freedom of religion.[54] The strategy of the ECtHR normally consists in allowing a restricted margin when a wide consensus among the Member State parties exists. But the margin of appreciation is very much political and the Court has narrowed it down considerably, when the right at issue was considered fundamental to democracy.[55] At the same time, the Court seems often wary of interfering in national sovereignty even when it would be necessary in order to uphold human rights and the rule of law.[56]

Interestingly, the margin of appreciation test was developed in parallel with the emergency provision of Article 15 ECHR where authorities should be able exercise a certain measure of discretion in assessing the extent strictly required by the exigencies of the situation.[57] The ECHR commission maintained that it was competent to decide whether a derogation from the Commission was justified and whether the state's measures were strictly required by the exigencies of the situation.[58] The margin of appreciation doctrine initially responded to concerns of national governments that international policies could jeopardize their national security.[59] The discussion concerns the role of the state in protecting human rights.

[53] See e.gg. the contributions in: E. Brems and J. H. Gerards (eds), *Shaping Rights in the ECHR: The Role of the European Court of Human Rights in Determining the Scope of Human Rights*, Cambridge University Press, Cambridge, 2014.

[54] See, for example, *Handyside v United Kingdom*; Application no 5493/72 ECtHR; *Klass v Germany*; Application no 65655/01 ECtHR; *Lautsi v Italy*; Application no 30814/06 ECtHR.

[55] E.g. E. Benvenisti, "Margin of Appreciation, Consensus and Universal Standards, International Law and Politics", *New York University Journal of International Law and Politics*, 31, 1999, pp. 843–54.

[56] For a more elaborate overview of these questions see E. Herlin-Karnell, *The Constitutional Structure of Europe's Area of "Freedom, Security and Justice" and the Right to Justification*, Hart publishing, Bloomsbury, 2019.

[57] E.g. A. Føllesdal, "Appreciating the Margin of Appreciation" in Adam Etinson (ed), *Human Rights: Moral or Political?*, Oxford University Press, Oxford, 2018, pp. 269–94, discussing the 1958 *Cyprus* case, Application nos 1976/56 and 299/57.

[58] Ibid.

[59] Benvenisti, 1999 and Føllesdal, 2018.

But most importantly, Corradetti moves beyond this well-trodden debate in constitutional- and human rights law by connecting human rights and the role of the state to peace theory.

4 HOLISM, UNIVERSALISM, PEACE AND HUMAN RIGHTS

If there is a human right to life, surely there must be a human right to peace? In the last section of the book Corradetti looks at the question of war between democracies and what that can tell us about the structure of human rights protection and universalism. Corradetti argues that peace cannot be understood simply as the absence of war but must be understood in terms of promotion of international justice according to a standard of promotion of self-determination. Yet what is the role of the individual in this debate? For example, does the right of life presuppose justice? This in turn may pose the question of whether self-determination hinges on democracy. The main obligations entailed by self-determination, according to Rawls, for example, are the duty to respect the domestic self-government rights of other peoples, to observe treaties and undertakings and to honour human rights.[60]

Relatedly, Kant's legal cosmopolitanism establishes an ultimate normative level where any legally definable form of appropriation is to be subordinated to a notion of cosmopolitan 'belonging'.[61] Cosmopolitan right does not generate an entitlement of everyone in the world to open borders or to membership in the state that they would most like to join. The right of refuge is not a welfare right; it is a juridical right, the right to be a member of some rightful condition somewhere.[62] There is in Kantian theory a duty for states to exit the state of nature by joining a voluntary federation that will regulate their conduct with respect to one another.[63]

A central part of Corradetti's thesis argues for 'holism' as a regulative idea representing the ultimate goal towards which any system of rights and obligations should conform. While holism is an organzing idea, it does not tell us what level has the power to decide.

Universalism is a cosmopolitan idea as well as connected to the idea of holism. The Universal Principle of Right says that "an action is right if it can coexist with everyone's freedom in accordance with a universal law, or if on its maxim the

[60] A. Banai, "Is investor Investor-State Arbitration Unfair? A Freedom-Based Perspective", *Global Justice*, 2017, pp. 57-78, J. Rawls *The Law of Peoples,* Cambridge: Harvard University Press, 1999; and see the discussion in T. Christiano, "Self-Determination and the Human Right to Democracy", in Rowan Cruft et. al. (eds.) *Philosophical Foundations of Human Rights,* Oxford University Press, Oxford, 2015, pp. 459-480.

[61] C. Corradetti, "Judicial cosmopolitan authority", *Transnational Legal Theory*, 2016b, discussing Yves C. Zarka, *L'inappropriabilité de la Terre*, Armand Colin, 2013, p. 47

[62] P. Niesen, "What Kant would have said in the Refugee Crisis", *Danish Yearbook of Philosophy*, 50, 2017, pp. 83–106, Ripstein, 2009.

[63] For example, Ripstein ibid.

freedom of choice of each can coexist with everyone's freedom in accordance with universal law.[64] Kant offers both a moral and political definition of cosmopolitanism.[65] In order to coordinate the external freedom, individuals must submit to a general authority capable of enforcing a univocal system of norms binding for everyone with coercion powers. The need to leave the state of nature at the international level means the need to enter into peaceful relations through the implementation of international institutions. Cosmopolitan law is the unwritten code that is not regulated between states.

As Yirmiyahu Yovel has explained, cosmological idea, the idea of the world as a totality of all phenomena, gives rise to antinomy because it makes claim about the world as a single whole and a thing in itself, although the experience we have concerns some segment, part or aspect of the world.[66]

One such segment (which is crucial in order to realize and perceive justice), is the human right to peace. The problem of war appears then as one of the key dilemmas for any human rights theory and its proper enforcement. Peace has to be backed up by a normative foundation, not just that it is in everyone's interest.[67] For Kant law is central in this regard.[68] Law provides the relevant background: the rightful condition.[69] For Kant, there can be no real peace within a nation if peace is not first secured at international level, for the continuous external danger will lead states to prepare for war.[70] Likewise, for Corradetti law – and in particular the institute of judicial review –is central for achieving peace and thereby a robust theory of human rights through a process of legal pluralism and court dialogues both locally and worldwide.

[64] Ripstein, 2009.

[65] A. Pinheiro-Walla 'Kant on Cosmopolitan Education for Peace' *Con-Textos Kantianos*, vol. 7, 2018, pp. 332-347.

[66] Y. Yovel, *Kant's Philosophical Revolution, a short guide to the critique of pure reason*, Princeton University Press 2018, pp.92-93.

[67] P. Kleingeld, "Approaching Perpetual Peace: Kant's Defence of a League of States and his Ideal of a World Federation", *European Journal of Philosophy*, 2004, pp.304-25.

[68] A. Ripstein, *Kant and the law of war*, Oxford University Press, Oxford 2021.

[69] Ibid.

[70] Ibid.