Notes on an Ethics of Human Rights: From the Question of Commitment to a Phenomenological Theory of Reason and Back

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Abstract

One of the challenges for our culture is how to think human rights in a way that does not fall pray to cultural relativism, but remains open to intercultural dialogue and alert to historical contingency. This is why we need an ethics of human rights as a culture of thinking for which this paper will try to outline two basic threads. Loidolt will focus on man not as the bearer of human rights but as the being that can adjudge *(zusprechen)* and constitute 'right' at all. Hence, Loidolt will rather concentrate on human accomplishments and responsibility than on human needs. The philosophical background of the argument is a phenomenological one. With this approach Loidolt will try to embrace both a universal, transcendental level and a level of cultural awareness that tries to face the other *as* other. In this approach, universality remains something aspired after that keeps being constituted from the outside and that asks for a practical performative attitude.

1. The Issue: Why Do We Need an Ethics of Human Rights?

In thinking human rights, Europe can claim a certain political and philosophical culture. As much as this is a historical fact, it is a complication on a theoretical level: The inherent claim for universalism in the concept of human rights demands legitimization beyond cultural and historical boundaries.

However, also within our boundaries, one can find very diverse attitudes towards the question, or behind the support of human rights. Besides a diverse tradition of philosophical legitimization and criticism, political theory and revolution, religion also still serves as a medium for thinking and identifying with human rights. But reasons and motivations why people support human rights are not contingent because of their universal claim. Especially, as soon as these reasons become official theoretical or political positions with the aim to make them plausible and acceptable

to *everybody*, they should reflect on their own cultural impact and try to cope with it. If we want human rights to be universal, we should try to target this universality also in our culture of thinking, identifying and legitimizing human rights – we should try to get to a theoretical and practical responsibility for this universal claim: an ethics of human rights.

In the ongoing discussion on universality and cultural relativism of human rights (Gosepath & Lohmann, 1998), some authors like e.g. Otfried Höffe (1998) have tried to present a minimalist concept with the aim to be as culturally neutral as possible. Höffe refers to 'transcendental needs', i.e. needs that constitute the conditions of the possibility of living a human life. Thus, as they are crucially essential, the claim for these needs has to be equally exchanged between humans – Höffe speaks about 'transcendental exchange' *(transzendentaler Tausch)*. It is easy to recognize that this idea is influenced strongly by the Hobbesian 'state of nature'. It is however one of the paradigmatic attempts to boil down the sometimes overloaded concept of human rights to a version that can be accepted in different cultures.

What I would like to propose in this essay is a very different kind of the transcendental in thinking human rights. The aim is not to elaborate a set of indispensable needs, but to get to the core responsibility of *meeting* these needs through an analysis of the structure of subjectivity as such. These will be very basic thoughts that should just serve as a background theory for a certain political and ethical culture. I will try to focus on man not as the bearer of human rights but as the being that can adjudge *(zusprechen)* and constitute 'right' at all. Hence, I will rather concentrate on human accomplishments than on human needs.

The philosophical background of my argument is a phenomenological one. With this approach I will try to embrace both a universal, transcendental level, and a level of cultural awareness that tries to face the other *as* other. Universality thus remains something aspired after that keeps being constituted from the outside (Butler, 1996) and that asks for a practical performative attitude. The challenge for our culture is how to think human rights in a way that does not fall pray to cultural relativism, but remains open to intercultural dialogue and alert to historical contingency. I will try to outline two threads that could show basic guidelines for such an ethics of human rights as a culture of thinking.

2. Two Threads for a Possible Groundwork for an Ethics of Human Rights

The first thread I would like to follow is a certain understanding of law and right in our culture. I will sketch out two versions of thinking the relation between man and right, and propose a critical revision of both from a phenomenological[1] viewpoint. From that perspective I will try to emphasize the transcendental importance of legitimization and justification for having a meaningful world at all. This should serve as a basis for an ethics of human rights that acknowledges the following: because our normative interpretation of the world is a universal and necessary one, a right is not an existing entity apart from our (subjective and intersubjective) accomplishments, but only depends on our responsibility of adjudging it.

The second thread will follow the question of how to face the appeal of the other[2]. It tries to think the adjudgement of 'right' from a phenomenological first-person perspective instead of the classical, 'objective' third-person perspective of reciprocity. This intends to show how we are constituted by the appeal of the other and called to answer to this appeal as originally responsive (Waldenfels, 1994) and responsible beings. As it is always an appeal of *many* others, reason has to measure the immeasurable and compare the incomparable in order to deliver the urgently demanded judgement and justice. The question will be what kind of a practical attitude is required in this case of constant overstrain when human rights are thought as the right of the other. This thread should also help in understanding cultural and historical contingency and coping with it.

These two basic outlines form a phenomenological framework for constituting an ethics of human rights[3]. They should function as a sketch of the groundwork that would have to be done to formulate a new state of nature under the guidance of responsibility that would be a state of nature of consciousness.

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[1] I focus on the works of Edmund Husserl that I try to make fruitful for my question within the realm of a genesis of reason. In this paper I concentrate on Husserl's 'Phenomenology of Reason', the last part of the *Ideas* and Husserl's genetic phenomenology in *Experience and Judgement (EJ)*.
[2] My second phenomenological emphasis lies on the work of Emmanuel Lévinas and his philosophy of alterity, mainly as it is elaborated in *Autrement qu'être ou au-delà de l'essence* (Lévinas, 1978 [1998]). I will also refer to two of several essays where Lévinas has touched the question of human rights and has proposed to think them as the 'rights of the other man' (Lévinas, 1987), (Lévinas, 1991 [1995]).
[3] An excellent study with similar intentions and background has been done by Alfred Hirsch (2005).

2.1 Legitimization as a Condition for a Meaningful World

In our culture, there are two dominant attitudes towards rights within the realm of law. I want to argue that they are both not useful for a substantial and responsible grounding of intercultural ethics of human rights.

The first attitude is one that derives from the legacy of legal positivism: Legal positivism[4] has put an end to the search for an absolutely justified legal order by declaring that law has nothing to do with morals and justice, and moreover, that science could not say anything about these rather irrational decisions. With this move to theoretically eliminate the trace of justice and justification in the notion of law, jurisprudence or 'legal science' has accomplished a process of self-differentiation from morals and has achieved a state in which non-reflected ideological biases in its judgements are to be avoided. However, the often discussed problem is that it cannot judge or criticize the legal system it is analyzing (Horster, 2002. Radbruch, 2003). It leaves the content of law totally to an unquestionable and un-criticizable legislator and just pays attention to the coherence of the normative system. Thus, laws and rights in legal positivism are regarded as an assembly of contingent compulsory *rules* within a coherent system of norms. This strong aspect of contingency puts man in an *arbitrary* and *external* relation to the notion of law, regarded as a "social technique" (Kelsen, 1934 [2000]) that is dependent on the respective power relationships and the customary irrational moral decisions. Only a theory of democracy and intersubjective decision-making can supplement and thus sustain such a concept of law (as contingent rules) with political legitimacy. The question is however if it is sensible to 'outsource' the idea of complete legitimization and justification out of the notion of law and right altogether – or if we should not better keep an idea of 'right' that corresponds to the *intention* of complete comprehensible legitimization.

It seems that the common understanding of human rights – the second attitude I would like to refer to – provides exactly this idea of a 'right'. However, it is remarkable that these positions, derived from natural law, often embrace a just as unquestioned and un-criticizeable authority that moreover claims to be in possession of the absolute truth: God, a certain 'insight' in the nature of man, or a certain political system or historical tradition. It is also remarkable that, not only in the

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[4] I am especially referring to Hans Kelsens theory of legal positivism in *Reine Rechtslehre* (Kelsen, 1934 [2000]).

common understanding of human rights, but also in a couple of theories there is a tendency to refer to the notion of *dignity* as something rather self-evident (Horster, 2002). Man is imagining himself and his 'dignity' as a sort of a substance that is the carrier of an innate originary right that belongs to him just as, for example, his body. To claim an innate right for every human being creates a very *internal* and *substantial* relationship of man and right (and of course also of man and law, because the view of an independent existence of something like an innate right claims correspondence in legal systems, and sustains the old theory that law has something to do with morals and justice). This very *internal* and *substantial* relationship between man and right/ law is grounded by the conviction that everyone, thanks to his belonging to the human race (that is blessed by reason and dignity), has a right coming directly and independent from anything else with his own person. I would like to call this the metaphysics of human rights.

So, on the one hand we have a theory that suggests a very external, contingent relation of law and man; on the other hand we have a very strong internal conjunction between a human being and its human right. The problem is that one side is totally expelling the trace of (moral) justification from the notion of law and that the other side is imagining a total justification and legitimization that is never given without accepted authority. Both attitudes are not so useful to ground an ethics of human rights that reflects on our cultural situation. The first one cannot promote the idea of just and non-contingent human rights at all, and the second one has the self-perception of an absolute truth that just needs to be exported to those who obviously have not had that insight. To achieve cultural awareness and maintain a claim for universality, a more open attitude has to be achieved.

The responsibility I would like to outline goes all the way back to our basic structure of consciousness. Phenomenology seems to be very appropriate to guide this reflection: In its fundamental intentions it is a transcendental philosophy which investigates consciousness as the epistemological and ontological grounding par excellence. Husserl pointed out that consciousness is always consciousness *of* something – this means that the correlation between an act and its content which Husserl calls an intentional correlation – marks the very essential characteristic feature of consciousness. The insight that all reality is through *Sinngebung* within this correlation leads to the transcendental turn in Husserl's philosophy. If we take a step back and look at consciousness itself, we find that it *is* that correlation and thus the

domain of meaning. We can also see that this 'step back' is not a step out of the world, but consciously into it with the realization that everything we can mean by 'world' *is* already conscious and thus within consciousness. In short: Not consciousness is within the world, but the world itself *is conscious*. This view opens up a whole new sphere, where the accomplishments of consciousness that make our world a meaningful world can finally be visible – and these accomplishments go to the very basic point of perceiving and thus constituting the category of 'reality' itself. The eidetic structures and correlations Husserl has sketched out, work as a perfect 'map' of that normally hidden sphere of consciousness which is mainly a sphere of accomplishments (Husserl: *Ideen I*).

To get to the question of how to think 'right' in a phenomenological view, we have to broaden the context from an only morally understood right to a wider comprehension of a *meaning of right*: Of course this meaning goes far beyond the realm of 'law', where a right designates a claim or a competence of a subject (of law) within a legal system. But 'right' is not only used in the sense of 'a right' but also as 'the right action' or 'the right result', so either in the sense of moral *(recht)* or of logical *(richtig)* correctness. My thesis is that this 'equivocation' is not by chance, but that a certain structure is employed not only in moral and legal reasoning, but also in theoretical reasoning. There is an intentional 'strategy' of justification which essentially employs a notion of right, and which is at work all the time in (philosophical and non-philosophical) argumentations. It needs to be reflected on to find out where it originates from and how it shapes the features of our understanding.

Husserl himself has a strong notion of legitimization in his own phenomenology, where he understands 'originary intuition' and 'evidence' as *legitimizing grounds (Rechtsquelle)*[5]. Without getting too deep into Husserlian phenomenology, it seems quite plausible that something completely clear has more of a 'right' to be acknowledged than something which is cloudy and inarticulate. But this naturally understood integration or involvement in a system of adjudication is

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[5] The 'Principle of all Principles', section 24 of *Ideen I*, reads like the 'constitution' (in a political sense) of phenomenology: the main legitimizing grounds that will be the measure for every investigation, are laid down by Husserl: "Am Prinzip aller Prinzipen: daß jede originär gebende Anschauung eine Rechtsquelle der Erkenntnis sei, daß alles, was sich uns in der 'Intuition' originär […] darbietet, einfach hinzunehmen sei […] kann uns keine erdenkliche Theorie irre machen." (*Ideen I:* 51) In the last part of the book Husserl develops a 'Phenomenology of Reason' where the correlation between original intuition, evidence and 'right' becomes even stronger and seems to be the movement of reason itself.

something that deserves our attention. Because: there is obviously an own form of intentionality which grasps evidence *as* a source of justification and thus interprets this lived experience (*Erlebnis*) within a frame of legitimization or justification. This has to be acknowledged as a particular accomplishment of consciousness – and if we take a closer look, it turns out that this particular accomplishment, which I would like to call *legitimizing intentionality,* is exactly the inner movement of reason itself.

Furthermore, if we look at the act that constitutes a meaning of right, we have to acknowledge the following: 'a right' is not something that appears or that is given originally (like e.g. sensual impressions), but it is a product of an intentional accomplishment. More precisely: the meaning that something is 'right' or has 'a right', is not something that is perceived, but something that is achieved through passing a *judgement*: By judging something, by the means of implementing a norm or any measure, the meaning of 'right' or 'a right' originates as the formal expression of an 'accordingness' *(Gemäßheit).* So far, one could call this a phenomenological version of what the legal positivist Hans Kelsen calls the 'normative interpretation' *(normative Deutung)* (Kelsen, 1934 [2000]: 3-25) of the world by man that constitutes the realm of law. Although I fully agree with Kelsen -- the difference of the phenomenological perspective is giving the take on 'normative interpretation' a transcendental turn: I would argue that not only morals and law derive from a normative interpretation of a given world, but that our whole way of thinking, arguing and justifying is itself a normalizing or normative movement that constitutes a world where truth at least becomes an issue. The difference to Kelsen is, that it is not as if a world was constituted and *then* we interpret it with norms, but that the process of constitution itself is a priori going on in a context of legitimization.

For the legal positivist Kelsen, a so-called 'objective norm' (Kelsen, 1934 [2000]: 2-3) is enough to guarantee the validity of a judgement: the movement of reason, however, demands a norm it itself regards as valid. This is how an interesting dynamic, that we know from our own argumentations and reflections, unfolds: If the parameter that guarantees that something is 'right' or has 'a right' comes into doubt, the question of validity is exceeding or transgressing into a higher level of a formerly accepted measure/ criterion. That the question 'But is this right?' can always transgress, and *must* always transgress if it is not fully and completely justified, is the main characteristic feature of the movement of reason or of the dynamics of the legitimizing intentionality. The interesting point about it is that it is a *formal* relation

that expresses nothing else but the demand for accordingness and full validity. Husserl recognizes this tendency towards fulfilment in every kind of intentionality and calls it teleology. I would like to argue that as a structure of reason this teleology functions in a purely formal way and thus constitutes the condition of the possibility of a critique at all. It is a structure that involves a meaning of right (legitimacy = accordingness and validity) within a legitimizing intentionality and a certain formal dynamic in the demand of full validity. My crucial point is that this structure is not an accidental attitude, but constitutive of our apperception as such. That is why I would speak of a *category of legitimization,* which is a priori structuring our experience. The structure and the movement of reason are working in that formal category as well as in logical categories. It produces the sense of the regulative idea (in the Kantian sense) as a demand for total legitimization progressing into infinity.

Philosophers like Habermas, and especially Apel, have built up a whole ethics of communication from the idea of such a legitimizing category. Apel (1976) argues that we are bound to this category because of an intersubjective apriori of communication and argumentation. Methodological solipsism thus realizes that his real transcendental condition lies in the intersubjective community of communication. What I would like to do to get to a more phenomenological grounding of ethics, is to trace back this category of legitimization (which is at work in every subject) like Husserl traces back the origin of logical categories in *Experience and Judgement*[6]: that means that a genesis or genealogy of reason itself and its structures of legitimization and justification is in question. The question of *how* and *why* reason works in the category of legitimization must lead us to corresponding prepredicative features in the receptive structure. I would argue that it is *being receptive as such* that makes us answer in a category of legitimization. Husserl himself speaks of "the responsive position-taking of the ego […] in predicative judgement"[7] (EJ: 272f.) – this ‚responsive position-taking' to weave something into legitimizing structures at all is thus to be rated as an 'answer' to givenness as such, in its own appeal and an irrefutable claim. Consciousness must not be understood as a secluded sovereign

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[6] In this late work Husserl is as inquiry into the genealogy of logic. As J. Churchill points out in the introduction, its guiding thesis is that "even at its most abstract, logic demands an underlying theory of experience, which at the lowest level is described as prepredicative […]." (EJ: xxi) "Part I begins with an analysis of the 'passive' data of experience […]. Starting from this level, Husserl exhibits the prepredicative conditions of predication as such. As underlying every act of objective experience, these structures found the specific forms of judgement encountered on the level of formal logic." (EJ: xxii).
[7] In German: "antwortende Stellungnahme des Ich im prädikativen Urteil" (EU: 327).

entity, but as openness as such. What is given on a prepredicative sphere is thus never a *right* (in the sense of an already legitimized and justified claim) but a pre-predicative passive *appeal*. This appeal is thus comprehended and 'answered to' in the predicative structure and demand for legitimization.

Let me briefly summarize the thesis I am trying to argue on the basis of a phenomenological background: We have to comprehend 'right' (in the sense of a legitimized claim) not as something that appears, but as something that is adjudged. Here my position resembles more the one of legal positivism than that of natural law: Because the classical thesis of natural law states that 'right' appears together with the phenomenon or its evidence, and that it objectively belongs to it. However, in a phenomenological perspective, it is clear that something like a meaning of 'right', or of 'legitimization' can only be obtained through the act of a judgement. Thus we have to comprehend the whole 'net' of legitimizing structures that is spanned over our perceptions as an accomplishment of our structures of thinking (a 'normative interpretation', but on a transcendental level). This category of legitimization is answering to an essential state or a formation of consciousness itself: that it is being addressed, approached, appealed by givenness itself. This appeal calls for an answer – in position *(Setzung)*. Measurements like the relations of fulfilment (evident, originary given, given in space and time, etc.) are constituted and comprehended as legitimizing grounds. The search for these grounds is the ultimate movement of reason itself that has to be understood as an answering movement on a fundamental situation of being addressed.

If we go back to the basic structures of subjectivity, anything like 'a right' or a legitimizing entity has to be thought firstly as a predicative accomplishment and secondly as an accomplishment that is not completely random or due to the absolute freedom of reason but due to a spontaneous freedom that is demanded as an answer to an appeal. In other words: the subject considered as a phenomenologically reduced consciousness does not *have* a right, but it *is the source* of all attributions or adjudications of legitimization. This legitimization is bound to a demand of fulfilment that can be projected into infinity in the form of a regulative idea which is nothing else but a predicative answer to a call that cannot be put into finalizing measurements. I would thus call this legitimizing structure a responsive or responsible structure.

How can this rather epistemological theory of reason get to an ethical impact on the question of human rights? The very nature of the ethical appeal that confronts

the legitimizing structure with an excessive demand will be the main issue of the next chapter. So far we have remained in the realm of theoretical reason, where evidence can be described as the *non plus ultra* of givenness in the prepredicative sphere that is answered to in predication as a legitimizing ground. Only in the last paragraph there has been an idea of transgression of these measurements.

But still, the clarification of a *meaning of right* that is not lost or hidden in a contingent meaning of rules, can contribute to a more responsible attitude towards the question of right: That man is the source or the ground for this legitimizing pattern, however not in a contingent, but in a responsible or responsive way, creates a *critical* but more originary relation of man and right: neither that of an external contingency, nor that of an imaginary internal substance which carries something like an innate right. We have to comprehend the full dimension of being subjected to an appeal that we respond to in legitimizing structures: it means that right is not an existing entity apart from our (subjective and intersubjective) accomplishments but only depends on our responsibility of adjudging it. Acknowledgement of this critical relation can have three benefits: Firstly, to see the notion of law within a continuity of legitimization (which integrates subjective accomplishments into the 'social technique' and thus tries to build a subject-related bridge from the legal to the political and ethical). Secondly, to recognize the essential status of intersubjective discourses of legitimization (as otherwise a meaningful world would not be possible). Thirdly, to realize the intentional movement of reason towards complete legitimization: even if it cannot be achieved, legitimizing intentionality can not stop at an unjustified benchmark, but transgress it necessarily with critique[8].

2.2 Urgency and Judgement: The Appeal of the Others as an Excessive Demand

The second thread for an ethics of human rights builds on the first one. It confronts a phenomenology of reason as legitimizing intentionality with the phenomenon of the ethical. For an ethics of human rights, it is necessary to realize that we are responsible for the right of others, whereas at the same time we cannot point to evident legitimizing grounds – and if we do, we know that they are never enough for the ethical appeal that confronts us.

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[8] This is a structure that Husserl already develops for the very basic pattern of perception. In *Experience and Judgement*, he speaks about *Rechtfertigungsfrage* (EJ: §§ 78-79), in *Formal and Transcendental Logic* about *Richtigkeitsbewusstsein* (FTL: §§44-46).

The philosopher Emmanuel Lévinas claims: "Se manifester originellement comme droits de l'autre homme et comme devoir pour un moi […], c'est là la phénoménologie des droits de l'homme." (Lévinas, 1987: 169) With this statement Lévinas calls for a radical change of perspective; instead of the classical objective third-person perspective, where everyone is equal and right is adjudged through the reasonable balance of the free will, Lévinas takes his position from a first-person perspective. He practically conceptualizes a genesis of the meaning of human rights from the view *of* a single subject as a duty *for* every single subject. Instead of thinking right as the outcome of a radical objectivity, he thinks the 'right of the other' as an even more original experience of a radical subjectivity. Lévinas criticizes the basic understanding of human rights as it has been developed in a classical Kantian argumentation that refers exclusively to reason. This alone is not enough, says Lévinas, because a sort of justice that derives from the demarcation of many different free wills which are indifferent to one another would not be anything else but a bad compromise[9]. This is why Lévinas tries to conceptualize human rights as the rights of the other for whom I am responsible.

For Lévinas, the radical other is the ethical phenomenon par excellence, as he is not at disposal for the measurements of reason – his main feature of being other and being transcendent to everything I know, does precisely *not* 'show' or 'appear' in the sense of all other phenomena, but confronts me with a radical excess and deprivation that cannot be understood in a concept (Marion, 2001). The other, who remains radically impenetrable or inaccessible *as* other, brings subjectivity into an anarchical and asymmetrical relation with his infinite and radical transcendence. Lévinas thinks the other as a radical figure of givenness, namely givenness of deprivation or

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[9] « Mais dès lors, dans la défense des droits de l'homme, il conviendrait de ne plus comprendre ceux-ci exclusivement à partir d'une liberté qui, virtuellement, serait déjà la négation de toute autre liberté et où, entre l'une et l'autre, le juste arrangement ne tiendrait qu'à une réciproque limitation. Concession et compromis ! Il faut à la justice qui est incontournable, une autre 'autorité' que celle des proportions s'établissant entre volontés d'emblée opposées et opposables. Il faut que ces proportions soient agréées par les volontés libres en raison d'une préalable paix qui ne serait pas la non-agression pure et simple, mais qui comporterait, si on peut dire, une positivité propre […] S'en tenir, dans la justice, à la norme de la pure mesure – où modération – entre termes qui s'excluent, reviendrait encore à assimiler les rapports entre membres du genre humain au rapport entre individus d'une extension logique, qui ne signifient, de 'un à l'autre, que négation, additions ou indifférence. Dans l'humanité, d'individu à individu, s'établit une *proximité* qui ne prend pas sens à travers la métaphore spatiale de l'extension d'un concept. » (Lévinas, 1987).

excess[10]. In that givenness itself lies an affective and prepredicative appeal, the appeal of the other which individualizes subjectivity in its responsibility. Moreover, the other is never alone. There are always many others (Lévinas calls this structure 'The Third'), who demand my full responsibility. Here emerges the problem: What do I rightfully have to do? (Lévinas, 1978 [1998]) If we read this question within a genesis of reason, we can find the connection to our first thread.

The Third does not only make the urgency of the other's appeal even more urgent, he demands a judgement, a measure. Lévinas reads this as the origin of judgement, reason and consciousness[11] as such – the experience of the other is a sort of prepredicative experience that is trying to put itself into measures in the wake of the Third. Measures have to be constituted to be able to make a 'just' judgement – but they can never be totally adequate measures, as the others as others do not show themselves as measurable phenomena – the excess remains un-conceptualized and not at disposal; the ethical always calls for more – it is a situation of excessive demand.

The crucial difference between Lévinas' concept of justice and the usual or conventional one is that Lévinas considers the sort of justice that is aware of its ethical responsibility beyond justice. It is not a self-assured calculation with symmetrical portions of free will, but an urgent conceptual reaction to an overwhelming appeal that can never be adequately responded to. Justice has to be reminded of its origin in the complete responsibility for the other. This is also how Lévinas wants human rights to be understood. They are primarily the rights of the other that lie in my responsibility.

In the previous paragraph I have sketched out a transcendental structure of legitimization that is referring to evidence as its legitimizing ground. Now it is clear that this benchmark is only a usable one in theoretical reasoning. Excess and deprivation which are the main features of the ethical make it impossible to refer to such a clear measure, as they transcend and withdraw from conditions of

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[10] Deprivation corresponds to excess insofar the otherness of the other exceeds my grasping of it and shows itself as radical transcendence. That it is 'more than enough' turns that 'more' into something I am deprived of.

[11] "In der Nähe des Anderen bedrängen mich – bis zur Besessenheit – auch all die Anderen, die Andere sind für den Anderen, und schon schreit die Besessenheit nach Gerechtigkeit, verlangt sie Maß und Wissen, ist sie Bewusstsein." (Lévinas, 1978 [1998]: 344) „'Was habe ich gerechterweise zu tun?' Gewissensfrage. Es braucht die Gerechtigkeit, das heißt den Vergleich, die Koexistenz, die Gleichzeitigkeit, das Versammeln, die Ordnung, das Thematisieren, die *Sichtbarkeit* der Gesichter und von daher die Intentionalität und den Intellekt und in der Intentionalität und dem Intellekt die Verstehbarkeit des Systems und insofern auch eine gemeinsame Gegenwart auf gleicher Ebene, der der Gleichheit, wie vor einem Gericht." (Lévinas, 1978 [1998]: 343).

measurements as such. In this situation reason as the legitimizing category really has to become practical. And this means that it has to commit itself to its judgements with the awareness that even its own authority cannot guarantee or display something as an ultimate truth (Derrida, 1994 [1991]).

'Getting practical' as an imperative for reason itself is not to be understood in the sense that reason is providing the rules for the right action, but that reason is answering to its limitations. What also comes into play here is the issue of historicity which I could not cover in this essay. The appeal is shaped as well by historicity as by the response to it – it shows itself differently as well as it demands different responsibilities. We cannot claim that this, which has been considered as 'reasonable', has been the same – not even in the last two hundred years. But the reference to the formal structure in legitimization that gets its dynamic from something coming into doubt, something disturbing the order, guarantees the possibility of critique. Critique is also to be understood as an answer on the one hand to the disturbed order, on the other hand to the disturbing; the first one would be the 'negative', the second one the 'positive' attempt of critique. 'Getting practical' thus means that reason has to acknowledge its dynamics of critique (thanks to a transcendental intersubjectivity), but at the same time its limits of evidence; it has to recognize the urgency that demands to do the impossible: to compare the incomparable with a measure which is necessarily inadequate (Lévinas, 1978 [1998]: 345). How to differentiate it from pure decisionism? The 'good will' which is the crucial element of Kant's ethics is probably one guidepost, and it involves all the criteria that are demanded of a critical relation to the constitution of human rights: *commitment* to human rights as rights of the others, commitment to equality, dignity etc., with the insight that it will have been dependent on that commitment, *awareness* of the imperfection and of the urgency of the case, thus *alertness* to the disturbing, *responsivity* to and *responsibility* for it, while being aware that it can never be fully incorporated; and finally *openness* to that universality in progress (or universality to come) that keeps being constituted from the outside.

Let me summarize this chapter: For Lévinas, subjectivity is essentially shaped by the relation to the other which is a relation of responsibility to an appeal that cannot be avoided (of course it is possible to deny it but that already is a form of answering to it). Subjectivity *is* through that appeal. Its responsible answer lies in comprehending the others' appeal as their right and in constituting it (in the ambiguous sense of a political and a phenomenological constitution). This right

should not be regarded as something that exists independently of an entity of a 'person' or 'dignity' but as something that needs to be spontaneously 'invented' (Derrida, 1994 [1991]. Zeillinger, 2002). Subjectivity is, at the same time, free and spontaneous, but this freedom is not a sovereign one. It is bound back to a commitment that has not been actively given. Reason (that means freedom and structures of legitimization), is called upon in a passive situation of demand and urgency. Maybe this could also be a perspective on trying to re-think the classical 'state of nature' in a different way: as an even more original 'state of nature' *of consciousness,* which is that of intrinsic openness and of being responsive (or responsible) to an appeal – thus a 'state of nature' that is not stressing a fundamental hostility, but a fundamental responsibility. Instead of speaking of human entities that mutually exclude themselves and hold their rights in reciprocal confinement (a situation which Lévinas calls 'mauvaise paix' (Lévinas, 1987: 166), a different state of nature could be envisioned, where the one is responsible and stepping in for the other. This will not be a theory that can, or wants to give, an ultimate backbone to the human rights theory. It is rather a theory that emphasizes the challenge of judgement and that tries to get to a notion of right that implicates a way of actively undertaking an appeal which is not at disposal.

3. Conclusion: Ethics of Human Rights as a Theory of Engagement

It seems that an ethics of human rights has to renounce the universal evidence of human rights claimed via the concepts of dignity or equality – it must however endure this lack in the form of a commitment that is combined with an engagement for an inter-subjective discourse of legitimization and justification.

I followed two guiding threads: the 'transcendental' one, that should make clear that all forms of 'right' are due to our a priori normative interpretation, which is not an arbitrary one but oriented versus 'truth' or 'evidence', which means complete legitimization. It is the obligation to being receptive as such, to being open to givenness as such, that brings this appeal into conceptual, i.e. legitimizing structures. This sort of legitimization category, as a structure of our experience and an answer to an appeal, should emphasize our very own human responsivitiy and responsibility in constituting human rights. At the same time it is meant to show a meaningful connection (or: a *connection of meaning*) between man and right in the sense that it is not just a factor in a power game, but actually an intrinsic element of our apperception

of the world. Moreover, it constitutes the source of critique that lies in the dynamic of that notion. The necessity of justification and legitimization for a coherent and meaningful world (corresponding to the existential of 'understanding') implies a sort of ethics of discourse: recognizing all potential partners in discourse, listening to all potential arguments etc.

The second thread dealing with 'alterity' combines the first argument with the excessive demand of an ethical experience. In this view, justice is reminded of its ethical obligations beyond justice – human rights are not thought as mutual confinements of mathematically proportioned, mutually disinterested beings of free will, but as responsible adjudgements of involved subjectivities: as a duty for an I and as the right of the other[12]. Now, this right of the *other,* which should give the ultimate grounding and measure of every right, is exactly one that will always remain 'haunted' by the appeal of excessive immeasurable terms (and this always includes the danger to treat the other wrongly, especially in his otherness). However, an ethics of human rights must not be paralyzed by such a situation. It must undertake the responsibility of an urgent judgement that proves its engagement by its openness for a universality to come. Reason, the faculty of legitimization and judgement, is thus not a sovereign one in this case. For an ethics of discourse this means that the community of argumentation must become a commitment, too, because it guarantees the possibility of a critique and the ongoing process of legitimization (which would be a strategy to cope with historical and cultural relativism). This could open a horizon, where responding to the ethical appeal of the other becomes conceivable as an attitude of commitment which resists the totality of having everything at disposal.

Sketching these guidelines for an ethics of human rights has thus led me more towards a theory of an engagement than to an ethical 'proof'.

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[12] This could also be a perspective for a theory that can encounter the factual engagement of certain groups or people for human rights. Interestingly enough, the established theories on human rights totally ignore the phenomenon of an engagement for the other's rights and do not try to give it a theoretical basement for its understanding.

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