PART C: INAUGURAL LECTURE

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HUMAN RIGHTS FOR FOXES AND HEDGEHOGS

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There are two kinds of thinkers, according to the liberal philosopher Isaiah Berlin: hedgehogs and foxes.[1] Hedgehogs are those people who try to incorporate everything in the world into one single vision or over-arching truth. By contrast, foxes are people who draw on a wide range of observations, ideas and perspectives. Their thoughts are manifold and they do not try and squeeze reality into one straightjacket. Put in scientific terms: foxes easily jump from one paradigm to another without asserting that any of them represents the final truth. Berlin developed this metaphor by building on a line from the ancient Greek poet Archilochus which runs as follows: "The fox knows many things, but the hedgehog knows one big thing."[2] Dante Alighieri, Plato, and Proust are, in Berlin's view hedgehogs. Aristotle, Montaigne and James Joyce are foxes. Berlin, in his essay *The Hedgehog and the Fox*, specifically applied the metaphor to the famous Russian novelist Lev Tolstoy, author of the great 19th century novel *War and Peace*. Tolstoy was, to Berlin, the prime example of a fox who desperately tried to be a hedgehog.

So, you may wonder by now, what does this have to do with human rights? Let me assure you that you have not stepped into a lecture on Greek or Russian literature. Neither will this be a talk about animal rights. Rather, what I propose to do today is to use this metaphor of the fox and the hedgehog to look at the current state of human rights in the world and more specifically, to look at those who study human rights: that strange little tribe called academics. I will do so by addressing how a number of academic fields have engaged with human rights and their biggest academic support group: the human rights lawyers. I will argue that studying human rights from non-legal perspectives, from different disciplines, is key to acquiring new insights in the

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1 I. Berlin, *The Hedgehog and the Fox. An Essay on Tolstoy's view of History*, Weidenfeld and Nicholson: London 1967 (first edition 1953).

2 The original of Archilochus (c. 680 – c. 645 BC) reads: πόλλ' οἶδ' ἀλώπηξ, ἀλλ' ἐχῖνος ἓν μέγα.

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legal academic study of human rights. Secondly, but no less importantly, this may lead to progress in the implementation of human rights on the ground, by a better understanding of factors that contribute to or, by contrast, hinder the ways in which people can use their rights to improve their lives.

It is easy to be pessimistic about the state of human rights in the world today. Close to home in the Netherlands, cities are struggling with the legal and practical issues of giving shelter and care to irregular migrants and the decentralisation of social services. Discrimination in the police forces, lack of interest for the right to a safe living environment in the earthquake-prone North of the country, and an absence of basic human rights knowledge among youngsters are all challenges we face. In Europe, the coming together of the human rights systems of the European Union and the Council of Europe has endured a setback veiled in the shape of an Advisory Opinion.[3] And on a much more worrying global scale, the conflicts that rage across Syria, Iraq and Yemen have caused thousands of deaths. In 2014 war crimes were committed in at least 18 countries. The Mediterranean is turning into a blue graveyard. Freedom of expression and of the press are under pressure in Hungary, Eritrea, Venezuela, Russia and many other places. It is estimated that arbitrary restrictions on freedom of expression occurred in over 75% of the world's states last year. It led Amnesty International to conclude that 2014 was a "devastating year" and an "ultimate low point".[4] Should we then abandon all hope, as if entering Dante's Inferno?

Well, arguably, in the longer run, the picture does not seem that bleak. The various forms of extreme violence that catch our attention in today's news reports are not entirely representative. The psychologist and linguist Steven Pinker in his book *The Better Angels of Our Nature* has argued that history shows a somewhat irregular, yet overall steady decline of violence between human beings.[5] He ascribes this decline to various civilising and pacification processes of which one is of particular interest for us today. These are the so-called rights revolutions, as Pinker dubs them. Movements for citizens' rights started in the eighteenth century and gained particular momentum in the second half of the twentieth century. They expanded to rights movements for women, racial and ethnic minorities, sexual minorities, disabled people, and children, and yes, even to animals. One of the key factors enabling this development is a leap of imagination and empathy: the fact that we can imagine how other humans suffer from injustice and that they are in many ways similar to ourselves.

This empathy for the other, stretching far beyond people's own circle of family and friends was nurtured, according to historian Lynn Hunt, by … the novel.[6] The eighteenth century saw this new literary genre rise and spread. Novels like *Pamela* by Richardson and *Julie* by Rousseau enabled readers on a much wider scale than ever

3 Court of Justice of the European Union, *Advisory Opinion 2/13*, 18 December 2014.

4 Amnesty International Report 2014/2015.

5 S. Pinker, *The Better Angels of Our Nature. A History of Violence and Humanity*, Penguin: London 2012.

6 L. Hunt, *Inventing Human Rights. A History*, Norton: New York 2007.

before to empathise with people who were oppressed. It is no coincidence in Hunt's view that the first declarations of human rights, with the American and French ones as the most famous examples, were created in those very same decades that these novels were read. Although human rights were not, as the title of her book claims, *invented* in the eighteenth century – the idea is of course much older and the relevance in national and international politics much more recent – Hunt does bring home an important point about human rights. They are *imagined*. Indeed, just like the country of the Netherlands (which was imagined in this very grand hall a few centuries ago in the Union of Utrecht), but also money, or Mickey Mouse, human rights are figments of our very fertile imaginations, as another historian, Yuval Harari, has put it.[7] This very capacity to imagine things is in his view what distinguishes humans from other animals. Like humans, animals may laugh or even fool each other, but imagining non-existent things is not something a single fox or hedgehog is capable of (at least as far as we humans are aware). This skill of imagination enables us to cooperate, for good or bad, in larger groups. And these products of our imagination have very real consequences in reality – people may kill in the name of their country, buy goods across the globe with their money or build entire theme parks for their favourite cartoon character.

The leap of imagination towards human rights did not happen in one go, however, and faced several setbacks after it flourished in the Enlightenment. The nineteenth century saw a turn towards nationalism which, far into the twentieth century, remained stronger in the West than universalist ideologies, whether they were about civil and political rights or the rights of workers. No wonder then that the first large-scale international rights agreements, in the period between the two World Wars, concerned the protection of national minorities: in many ways these minorities were perceived as a country's own nationals who had ended up in the wrong state. It was only after the Second World War that the universalist movement came back in full force, even if only for a short time, in the years of the drafting of the Universal Declaration of Human Rights. And even then, nationalist prejudice still lingered. The most conspicuous example is that one of the people considered to become a member of the Human Rights Commission, Hersch Lauterpacht, was rejected as an option by the legal advisor of the Foreign Office of the United Kingdom. He stated, and I quote:

> "Professor Lauterpacht, although a distinguished and industrious international lawyer, is, when all is said and done, a Jew fairly recently come from Vienna. Emphatically, I think that the representative of His Majesty's Government on human rights must be a very English Englishman imbued throughout his life and hereditary to the real meaning of human rights as we understand them in this country."[8]

7 Y.N. Harari, *Sapiens. A Brief History of Humankind*, Vintage, London 2014.

8 Legal adviser Eric Beckett, as quoted in: K. Sellars, *The Rise and Rise of Human Rights*, Sutton Publishing, Phoenix Mill 2002, p. 8.

End of quote. One of the giants of international law and author of the first book arguing for the international protection of human rights simply discarded by petty prejudice. People among you believing in the absurdity of things, may not be surprised that this legal adviser was a namesake of the famous playwright: Beckett.

The drafting of the Universal Declaration itself is a telling example of both cooperation and differences of views between different disciplines. For not only politicians and lawyers were involved, as one may expect. Both philosophers and anthropologists took an interest in the genesis of this key human rights document. This involvement was closely connected with one key question: how to produce a document that truly reflected global values, that could truly be called universal? As the drafters struggled with what to put in the text and what not, the United Nations Educational, Scientific and Cultural Organization UNESCO came to the rescue. It established a Committee on the Theoretical Bases of Human Rights, consisting of mostly philosophers. This group sent out questionnaires across the globe and across cultures asking whether the norms present in human rights could also be found in their own traditions. People ranging from Mohandas Gandhi to Aldous Huxley, author of *Brave New World*, responded. To the philosophers' delight they were able to find a range of common principles across cultures similar to many of the rights the drafters of the Universal Declaration were construing, sufficient at least to justify that a global document could be called universal. Of course, this agreement was only a common denominator and it was agreement mainly on what the norms were, not on their justification. As one philosopher on the UNESCO Committee liked to say: "Yes, we agree about the rights but on condition no one asks us why."[9] This justification problem, although it did not prevent the creation of the Universal Declaration, has continued to haunt the international human rights movement ever since. The interest of philosophers in human rights has continued to this day, amongst others here in Utrecht by the vibrant research group of our dear colleagues of the Ethics Institute.

Another discipline also took an interest in the Universal Declaration: anthropology. In a statement sent to the Human Rights Commission in 1947, the American Anthropological Association warned that the Declaration should not become a mere reflection of the values of Western Europe and America. Since each human being was not only an island in itself, but a social being functioning in a group and in her or his own culture, a truly universal document should reflect the common elements among these cultures and not, implicitly or explicitly postulate the supremacy of one culture over another. One should, the anthropologists argued, avoid to make human rights part of "the white man's burden" and thereby blemish it with all the problems of colonialism and imperialism. The anthropologists' statement has later often been misread as cultural relativism, as opposed to the universality of human rights. But the anthropologists were not claiming that creating a universally valid

[9] As quoted in: M.A. Glendon, *A World Made New. Eleanor Roosevelt and the Universal Declaration of Human Rights*, Random House, New York 2002, p. 77.

text was impossible. Rather, they added to the concerns of the philosophers about the 'why' of human rights, concerns of the 'what' and the 'how'. Not all of the norms and values about right and wrong that one may identify are shared across the globe. As the anthropologists put it, "The saint of one epoch would at a later time be confined as a man not fitted to cope with reality."[10] And the practice or expression of common ideas widely differs across cultures. The anthropological interest in human rights did not limit itself to its cradle, the Universal Declaration. Indeed, in the past decades a large amount of research has been done into how human rights are perceived, talked about, practised and yes, even imagined.[11] Where a stubborn universalist might be a hedgehog trying to fit it all into one system, many anthropologists better resemble the foxes, being very aware of the enormous variety in human rights practice. Thus even an experience I once had in the train is an example of that practice and imagination of human rights: the old couple sitting next to me complained that they were forced to take public transport as their human right to park their car in their city of destination was not guaranteed. In more academic terms, as the anthropologist Mark Goodale put it a few years ago, the meanings of human rights "are constituted most importantly by a range of social actors (…) within the disarticulated practices of everyday life."[12] And, one may add, anthropologists have also found their way to courtrooms of human rights litigation, and not as suspects or prosecutors, but to study the proceedings and their interaction with the social context in which these cases occur.

The rise of human rights later also spawned interest in other fields of research, from international relations to political science. The work of Risse and Sikkink on norms cascades and of Beth Simmons on how human rights are mobilised are just two of the many examples of theorising on how both international and national rights can become a force to be reckoned with inside states.[13] As this practice grew in both democracies and countries in transition, research on human rights also increased. A search in Google Scholar shows that in 2014 alone over 45,000 books and articles mentioning the words "human rights" were uploaded. These are staggering amounts, even for the most optimistic and voracious reader trying to stay up-to-date with the state-of-the-art on the topic.

The developments in different disciplines briefly mentioned here show that many researchers from other fields than law have shown interest in human rights. So, what

10 'Statement on Human Rights', *American Anthropologist*, vol. 49, no. 4 (1947) pp. 539–543.

11 And the American Anthropological Association has embraced to a certain extent human rights in its work, as evident from its 1999 *Declaration on Anthropology and Human Rights*: "a commitment to human rights consistent with international principles but not limited by them. Human rights is not a static concept. Our understanding of human rights is constantly evolving as we come to know more about the human condition." Available on www.aaanet.org.

12 M. Goodale and S. Engle Merry (eds.), *The Practice of Human Rights. Tracking Law Between the Global and the Local*, Cambridge University Press, Cambridge 2007, p. 5.

13 T. Risse, S.C. Ropp and K. Sikkink, *The Power of Human Rights. International Norms and Domestic Change*, Cambridge University Press: Cambridge 1999; B. Simmons, *Mobilising for Human Rights. International Law in Domestic Politics*, Cambridge University Press, Cambridge 2009.

about the lawyers? The rise of international human rights after World War II meant that apart from constitutional lawyers, legal researchers in the fields of international and European law started to study the issue. Later on, researchers in criminal law and private law joined them. Critical legal studies, feminist, utilitarian, Marxist, and other critiques on human rights have all helped to point out and gradually decrease the blind spots of Lady Justice. These critiques have shown, for example, that the initial human rights treaties were too focused on the public rather than the private, and on, for example, torture rather than domestic violence.

Thus, human rights have increased in numbers, pervaded more fields of law, and gained traction in a large number of countries. Their understanding has increased from a negative approach to one in which positive obligations for states are prominently represented, ranging from protection against threats to life to fostering equality, as legal scholar Sandra Fredman has convincingly shown in her work.[14] This broadening of human rights has come at a price, however. The very extension of the number of rights, which we can call human rights proliferation, may have extended protection or at least attention to new groups, but it has also led to criticism that the wide scope of rights is rather a sign of inflation, detracting from a supposed traditional core group of rights which would be more important. Eric Posner, for example, in his recent book with the ominous title *The Twilight of Human Rights*, argues that the very multiplication of rights will lead to their demise. He contends that attaching a rights label to an increasing number of societal claims is counterproductive. According to Posner, [and I quote] "the idea of a rigid legal framework will gradually dissolve into a soup of competing and unresolvable claims about which interests deserve human rights protection, which interests do not and how much weight should be placed on each of them."[15] [end of quote] He contends, moreover, that many of the international human rights protection systems have remained ineffective. Along similar lines, Stephen Hopgood traces the, in his view, fatal problems facing human rights, in his *The Endtimes of Human Rights*.[16] Human rights are part of the Western liberal tradition and power. The demise of that power, especially of the United States, weakens human rights. Nationalism and religion reflect a resurgence of different values and it is not just rogue states like Syria or North Korea who challenge the human rights system, but also large, emerging powers. If one would follow Posner or Hopgood, one would not even need to consult *Nostradamus* to believe the end is near.

Indeed power balances in the world are shifting. Indeed the United Nations human rights system is not the most effective legal system the world has ever seen. And indeed the proliferation of rights causes new dilemmas of dealing with competing claims taking the shape of human rights. International human rights are not an iron

14 S. Fredman, *Human Rights Transformed. Positive Rights and Positive Duties*, Oxford University Press, Oxford 2008.

15 E.A. Posner, *The Twilight of Human Rights Law*, Oxford University Press, Oxford 2014.

16 S. Hopgood, *The Endtimes of Human Rights*, Cornell University Press, Ithaca 2013.

shield but rather a frail safety net that can break if stretched too far by those trying to attack it. But Posner and Hopgood miss out on a number of crucial points. Even if in international relations the balance of power changes, human rights continue to make inroads in many countries, also less-liberal ones, by way of active courts and justiciability of rights, and human rights education. Even if the global human rights system is not the strongest, several regional ones are relatively effective, including the Strasbourg-Luxembourg twins here in Europe – even if they do not always acknowledge they are close family. As for the increasing number of competing claims, lawyers have long devised and are still devising new and practical ways of dealing with them. And even on those points where these critical authors are partly right about the weaknesses of human rights practice – Posner mentions the lack of empirically-informed approaches – matters should be improved not left to fade into a twilight zone. Put differently, if human rights protection systems are like an ambulance stuck on the road, we should repair the engine, not discard it. Fighting illegal and arbitrary action by states and non-state actors alike is simply too important.

What can academic researchers do to engage in these issues and to help and improve matters on the ground without turning into activists themselves? Mixing activism and research where one weakens the other, is indeed a perennial risk for human rights researchers. You may not be surprised that legal research infused by insights from other disciplines is what in my view is necessary. Lawyer-hedgehogs need hedgehogs from other disciplines, and a few foxes amongst themselves, to connect the lot of them. For indeed, the metaphor of the foxes and the hedgehogs of Isaiah Berlin, with which I started this lecture, cannot just be applied to literature and writers, but also to academia.

There are researchers who try to incorporate everything they find into one all-encompassing system. And others who apply a variety of methods to critique various models and systems, not particularly bothered by a striving for unity or coherence. This is not simply a contrast between deductive science and inductive, empirical research. Nor is fox science automatically better than hedgehog research or the other way around. Great thinkers can be found among both groups of academic animals. Rather, it has a lot to do with each researcher's personal preferences.

The metaphor can be applied to legal thinkers too. The famous book *A Theory of Justice* of John Rawls is an attempt at a coherent whole and could be compared to the work of a hedgehog.[17] Michael Walzer's *Spheres of Justice* was partly a reaction to the ideas of Rawls.[18] Walzer constantly engaged with and criticised the catch-all theories of others and argued that there are no ready-made solutions for just societies. This makes his work more that of a fox. His thinking can be read as a plea for a more complex and layered egalitarianism. Finally, Ronald Dworkin explicitly identified

17 J. Rawls, *A Theory of Justice*, Belknap Press, Cambridge Massachusetts 1971.

18 M. Walzer, *Spheres of Justice. A Defense of Pluralism and Equality*, Basic Books, New York 1983.

with one animal in his book *Justice for Hedgehogs*.[19] In his work, he tried, not always successfully[20], to argue for a coherent notion of what human dignity would entail.

What is important for law, in my view, is to supplement the almost inherent quest for coherence and system-building that lawyers display – a hedgehog endeavour – by an openness to other perspectives, insights and disciplines – to become a bit like foxes when necessary.

So what should happen in academia, in research? I am not arguing that other disciplines should start to show some interest for human rights. They have. Nor am I saying that lawyers should finally start going beyond black letter law. Many do, including a great number of colleagues present here today. We need both those who deepen the knowledge deep in the trenches of their specialisation and those who build bridges across those very trenches. What I would say, rather, is that we should all become a bit more aware of each other's work, the lawyers and the non-lawyers. To connect the legal study of human rights more firmly with insights and research on those same rights by other disciplines. By establishing a chair on human rights in a multidisciplinary perspective, Utrecht University shows commitment to this aim of connecting the dots. None of us should lock ourselves up in our own field like pedantic, know-it-all hedgehogs. But most of us researchers also do not have the time and means to become foxes who can easily jump from one disciplinary perspective to another – few are, in other words, like Roald Dahl's fantastic Mr Fox. Even combining just two disciplines takes years of study. That is why we have to join forces to solve problems that cannot be tackled by one discipline alone. And we can do so through cooperation.

Let me give you one example from my own research on how to bring insights from other disciplines to bear on law. This concerns the issue of freedom of expression in relation to violent conflict escalation.[21] Put differently, the question of when do words kill? Freedom of expression is, like most human rights norms, an open norm. But some norms are more open than others. What is seen as acceptable speech widely differs from one society to another and what shocks, offends, or disturbs is different for each individual. Explicit commercials, the cartoons of *Charlie Hebdo*, or the comments of politicians may all stay within, or cross, the limits of freedom of expression, depending on whom one asks. However, there is one almost universally accepted limitation to free speech and that is speech that incites to or otherwise causes violence. This rarely concerns instances in which someone literally gives orders to shoot, as a commanding officer would shout to a soldier. Most situations do not lead

19 R. Dworkin, *Justice for Hedgehogs*, Belknap Press, Cambridge Massachusetts 2011.

20 For a critique, see: R.D. Sloane, 'Human Rights for Hedgehogs? Global Value Pluralism, International Law and Some Reservations of the Fox', *Boston University Law Review*, vol. 90, 2010, pp. 975–1009.

21 For the full argument, see my article '"Fear Speech," or How Violent Conflict Escalation Relates to the Freedom of Expression', *Human Rights Quarterly*, vol. 36, no. 4, 2014, pp. 779–797.

to an easy 'I know it when I see it'. After all, the links between a specific speech on television, a cartoon in a newspaper, or a radio broadcast on the one hand and the escalation of violence between groups on the other are not always as self-evident as during the Rwandan genocide.

Yet, freedom of expression cases in relation to violence do reach courts and are subject to legislation and policy-making. Moreover, most judges may believe that they need to call in an expert when they are dealing with a medical case, but they often see freedom of expression cases as falling within their own area of expertise. A consequence of this has been a somewhat misguided emphasis on utterances of *hatred* as somehow leading up to violence. It is no coincidence that the legal notion of hate speech has become used so much in the past decades. But is that truly the key to correctly assessing such matters? And if we accept that context somehow matters, which context should judges and policymakers consider?

It is here that the open norm of freedom of expression needs some fleshing out, aided by insights from a field in which the escalation of violence has been a core theme of research: conflict studies. As I have argued in my research over the last few years, these insights may contribute to better legal and political decision-making in three different ways.

First, conflict researchers have shown that in many violent conflicts between groups, instilling fear, especially a fear of being lethally attacked, has been found to be an important factor in the process leading to violence. Such fear may lead to the acceptance of the use of violence as a legitimate means to solve a perceived inter-group problem. Thus what I have dubbed "fear speech," expressions aimed at instilling (existential) fear of another group, rather than "hate speech" may be more relevant when assessing violent conflict escalation. Hatred is not irrelevant, but it is not as such the triggering factor. The emphasis of lawyers, including human rights lawyers, on hate speech may thus be an example of looking for a solution to a legal problem in the wrong direction.

Secondly, context matters. This is not something lawyers would deny, but they would have to concede that it is not always easy to identify which factors are relevant. In a human rights test of free expression, contextual factors mostly appear in the third leg of the three-pronged test of limitations, as for example in Article 10 of the European Convention on Human Rights: the test of necessity in a democratic society. It may be clear to anyone that if someone outside on the Dom Square calls for the extinction of all blue-eyed people in Utrecht, it may have little effect. A similar call to violence against religious minorities may, by contrast, be very effective in the midst of a town square in Syria or Iraq today. Again, insights from conflict studies may help to see which factors – the position of the speaker, the medium used, or the exact wording chosen – are truly relevant. Again, a judge may or may not look at the relevant factors.

Thirdly, we know that a very good indication for the outbreak of violence is recent earlier violence. While this fact in itself is not very helpful, it does become a tool for analysis if we use framing theory to look at this earlier violence. For indeed, the way

in which an earlier incident of violence is framed in the media or through gossip – as an instance of thug violence or as an attack of one ethnic group on another – may pave the way respectively for law enforcement or violent conflict. The chosen wording or imagery in an expression is thus important, as it may explain, justify or motivate violence. Framing theory insights provide useful tools of analysis here.

What this single example of freedom of expression and violence shows is that legal scholarship and practice may be usefully assisted by insights from other bodies of knowledge, if translated and handled with care.

In conclusion, what I propose to do in my own research in the coming years is to try and build and extend the bridges to other disciplines. The example of fear speech is an illustration of this. In this way, I will try to be a fox, bringing in different perspectives whenever that can enrich and further our legal understanding of human rights. On the other hand, part of my work will also remain very much that of the hedgehog looking for consistency of the system, in the more positivist, legal study of the European Convention on Human Rights and other human rights treaties. Never the twain shall meet? Well, maybe hedgehogs and foxes at times can. Just like Tolstoy was a fox desperately trying to be a hedgehog.

And finally, each of you may now start to wonder whether you are yourself more of a fox or a hedgehog.