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# "HUMAN RIGHTS BETWEEN SOVEREIGN WILL AND INTERNATIONAL STANDARDS: A COMMENT"

**by**
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Let me, as a form of a very general comment, reflect on the nature of the tension that I do believe exists between international standards and respect for sovereign will. The European Convention on Human Rights, of course, assumes an inherent *compatibility* between protecting human rights and promoting popular sovereignty, set up as a bulwark for democracy as it was.[1] And yet, as the European Court of Human Rights started applying the Convention in practice, it soon had to note that '[s]ome compromise between the requirements for defending democratic society and individual rights is inherent in the system of the Convention'.[2] The Court thus had to conclude that there was in fact an inherent *tension* between the two, between respect for popular sovereignty and defence of rights.

No wonder, for this is the tension that characterizes liberal democracy itself. Liberal democracy is a very specific form of organizing human coexistence. It results from the joining together of two different traditions: on one side, the tradition of political liberalism with the rule of law, separation of powers and individual rights; on the other, the democratic tradition of popular sovereignty and the rule of the majority.[3] Constitutive to this political form of society is the acceptance of pluralism. With the plurality of equal voices the markers of certainty dissolve and a substantive idea of the good life comes to an end.[4] Instead, various conceptions of the good life prevail. This has important consequences for the way in which relations within liberal democratic societies are constituted, and governed. Within such societies, there is a constant need to limit the scope of collective's power so as to respect individual difference. For this, the liberal State is required to adopt a position of apolitical neutrality with regard to the various conceptions of the good life so as to ensure equal respect and concern for its citizens. But, at the same time, the State is also expected to protect and control the cultural and moral environment of the community. It is tasked with both individual and societal rights — with both group difference and homogenization. And here is the dilemma of liberal democracies: in managing the line between individual and societal rights, the State has no automatic way to choose between the two.[5] Without a general recipe for the solution of rights conflicts, the State can go wrong, at times terribly wrong.

It was, in fact, precisely because of this, because the State could fail, and prior to and during the Second World War did fail, in its role as the custodian of rights and become an instrument of oppression that the European Court of Human Rights was created. 'Never again' was the motto of the post-war political integration in Europe. In the campaign for political union, human rights soon became an important priority. When the various organizations promoting integration met at The Hague in May 1948 for the Conference of the International Committee of the Movements for European Unity, the delegates proclaimed their 'desire' for 'a Charter of Human Rights' and 'a Court of Justice with adequate sanctions for the implementation of this Charter'.[6] As the sovereign will of the people had proved to be not only the protector, but also the gravedigger of rights, it was felt necessary to give independent international bodies a watching brief over state behaviour:

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[1] For many of the founders, the very purpose of the Convention mechanism was to 'ensure that the States of the Members of the Council of Europe are democratic, and remain democratic'; Council of Europe, 2 *Collected Edition of the 'Travaux Préparatoires' of the European Convention on Human Rights* (1975) at 60; cf. also at, e.g., 4, 50 and 157.

[2] *Klass and others* v. *Federal Republic of Germany*, ECHR Series A (1978) No. 28, para. 59.

[3] See Chantal Mouffe, 'Democracy and Pluralism: A Critique of the Rationalist Approach', 16 *Cardozo Law Review* (1995) 1533, at 1534.

[4] Cf. Claude Lefort, *The Political Forms of Modern Society: Bureaucracy, Democracy, Totalitarianism* (edited and introduced by John B. Thompson, Polity Press: Cambridge, 1986) 303-305.

[5] See Jarna Petman, 'Egoism or Altruism? The Politics of the Great Balancing Act', 5 *No Foundations: Journal of Extreme Legal Positivism* (2008) 113-133.

[6] 1 *Travaux Préparatoires* at xxii.

> [W]e can now unanimously confront 'reasons of State' with the only sovereignty worth dying for, worthy in all circumstances of being defended, respected and safeguarded – the sovereignty of justice and of law.[7]

The hope seemed to be that international human rights law could simply, automatically solve the tension between homogenization and group difference once and for all. This is a hope I recognize, for this is the hope that we international lawyers are educated in.[8]

There is nothing simple and automatic about human rights, however. As legislative constructions, their creation, application and adjudication is about struggle and compromise, power and ideology.[9] Indeed, there is no authoritative catalogue of rights that would be politically innocent.[10] Think of the European Convention on Human Rights; it too came about as a deeply political document. In a classical international negotiation process, drafts were prepared, discussed, redrafted, accepted or rejected, points argued and bargained, deals struck, compromises made, issues dropped.[11] Only those rights that were successfully formulated in political bargaining were included into the Convention's catalogue — only certain aspects of reality came to be recognized as a 'human right' and afforded protection under the Convention.

As time has gone by and the values of European societies have changed, also the conception of what might qualify as a 'right' has changed: additional aspects of life have become characterised in terms of human rights as the Convention's catalogue of rights has been enriched by additional protocols. In this process too, only selected problems have been characterized in the language of 'rights'. As before, such selectivity has not been dictated by any essential nature of those problems. Rather, it has been a matter of political preference.

What in the end is called a human right is the outcome of the contextual balancing of different priorities and alternative notions of the good life. Quite the same applies to the notion of who the 'human' is whose rights the Convention protects. Should asylum seekers be included? What about divorcees? Or transsexuals? Should homosexuals have the right to marry and found a family? In different times we have had different answers to the above questions. Our conception of rights does not hold for all times and all places.[12]

In a sense, we are aware of that already when we legislate rights into being. We know, there and then, that like all legal rules, human rights will cover cases we did not wish to cover and leave uncovered cases that we think should have been covered had we only come to think of them when formulating the rule.[13] This is because we only have our past as the basis on which to legislate. But whatever took place yesterday, today, will not be enough for us to even begin

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[7] 1 *Travaux Préparatoires* at 48-50.

[8] Cf. David Kennedy, *The Dark Sides of Virtue: reassessing international humanitarianism* (Princeton University Press, 2004).

[9] Cf. Frederick Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (Clarendon Law Series, Clarendon Press: Oxford, 1991).

[10] See, e.g., Makau wa Mutua, *Human Rights: A Political and A Cultural Critique* (University of Pennsylvania Press, Philadelphia, Pa., 2002).

[11] See, e.g., A. W. Brian Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (Oxford University Press, 2001); Ed Bates, *The Evolution of the European Convention on Human Rights: From Its Inception to the Creation of a Permanent Court of Human Rights* (Oxford University Press, forthcoming in 2010).

[12] See Petman, 'Egoism or Altruism', *supra* note 5 at 113.

[13] Cf. Schauer, *Playing by the Rules*, *supra* note 9 at 31-34; cf. also Martti Koskenniemi, *From Apology to Utopia: the structure of international legal argument (Re-issue with new Epilogue)* (Cambridge University Press, 2005) at 589-592.

to imagine what we might face tomorrow. As the future remains unknown and the experience of the past is insufficient to grasp it, we do not know what we might come to hope to be either included in or excluded from the application of the rule. So, we need an exception to govern this uncertain future. Accordingly, rights are always supplemented with exceptions. While the scheme of right/derogation is inevitable, it is at the same time also insufferable, for there is no definite rule or standard that would set out when to apply the right and when the derogation.[14] Rights are, to be sure, a product of a political community.

And so, the human rights that the Europeans set about creating in 1948 could only be created through negotiations, as legislative/political compromises. As such, they came to reflect the interests and values of liberal democratic societies that negotiated them into being — as did the European Court of Human Rights. The Court was to adopt a position of apolitical neutrality with regard to the various conceptions of the good life so as to ensure equal respect and concern for the various European states; while, at the same time, it was to protect and control the cultural and moral environment of Europe. It would guarantee *both* group difference *and* homogenization, *both* sovereign will *and* international standards. Soon enough it would find out that 'some compromise between the requirements for defending democratic society and individual rights' was needed.[15] And it could have no automatic way to decide between the two.

So it is, that the European Court of Human Rights now is in a paradoxical situation in carrying out its tasks as a bulwark of democracy. It must be prepared, at times, to subordinate the sovereign will as expressed in referenda, or the values of pluralism, tolerance and broadmindedness (that it has defined as a core of a democratic society[16]), to the protection of other, more important, more 'European' values.[17] It must be able to conceive democracy merely as an instrument of such superior values — whatever they are.

Indeed, when the Court sets out to evaluate whether a State has violated human rights because that was 'necessary in a democratic society', it must first choose which contested conception of democracy to uphold. Here, it has two alternative ways to go about this choice. It can either look into the jurisprudence and practice of the Member States and try in an empirical or aesthetic fashion to sketch the contours of an emerging Euro-consensus, a European community in aggregate; or it can rely on rational choice and simply assume that it knows what Europeans think or should think of matters. Do consider the notion of 'margin of appreciation', for example. It is a fundamentally aesthetic metaphor,[18] as such signalling the kind of rationality we can expect to encounter in this domain — a rationality of truisms that relies on shared understandings, on people thinking in broadly similar ways about matters social and political regarding that particular context. It is only after the Court has chosen a notion of democracy that it can determine whether that is best served by the right enshrined in the Convention or the State's derogation from it, by the international standard of the sovereign will of the people. [19]

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[14] See Martti Koskenniemi, 'Human Rights, Politics and Love', *Mennesker & rettigheter* (2001) 33-45; see also his 'The Effect of Rights on Political Culture' in Philip Alston et al. (eds.), *The EU and Human Rights* (Oxford University Press, 1999) 99-116.

[15] See *supra* note 2 and the accompanying text.

[16] See, e.g., *Handyside* v. *United Kingdom*, ECHR Series A (1976) No. 24, para. 49; and *Lehideux & Isorni* v. *France*, ECHR Series A (1998-VII) No. 2864, para. 55.

[17] See, e.g., *Open Door and Dublin Well Woman* v. *Ireland*, ECHR Series A (1992) No. 246-A, paras 28-35 and 64-80; *Otto-Preminger-Institute* v. *Austria*, ECHR Series A (1995) No. 295-A, 19 EHRR 34, paras 49 and 56; *Wingrove* v. *United Kingdom*, 24 EHRR (1997) 1, para. 60; *Refah Partisi (Welfare Party) and others* v. *Turkey* (GC) ECHR (2003-II) paras 107-136; *Leyla Şahin* v. *Turkey* (GC) ECHR (2005) paras 100-123.

[18] Cf. Susan Marks, 'The European Convention on Human Rights and Its "Democratic Society"', 66 *British Year Book of International Law* (1995) 209 at 216.

[19] See Jarna Petman, 'Human Rights, Democracy and the Left', in 2 *Unbound: Harvard Journal of the Legal Left* (2006) 73-90.

Whether the judges sketch 'democracy' through empirical or rational moves, they rely on their own experience, on their own European self-understanding. There is no one notion of 'democracy'. Different groups in the international community of Europe understand that notion differently. When the Court uses the notion of 'democracy', it participates in the societal debate over the meaning of the term and over the hierarchies of values through which it should be understood. In deciding upon conflicting understandings, it necessarily becomes a political actor, taking the side of some groups against other groups and values. And when it does so, it is not in bad faith: none of the judges, none of us, has an authentic connection to universal truths — none of us lives in an abstraction, cut off from history and context. Judges are also fully aware that they need substantive choices between contested political practices to realize the rights enshrined in the Convention: the authority and the power of the Court is dependent on the legitimacy that the States bestow upon it. It must ensure its power through political manoeuvres.

In liberal democracies rights are defined and applied in a pluralist cacophony in which equal but different claims compete against each other. Sometimes the claims cancel each other out; other times, most of the time, the claims are such that with the limited resources at our disposal only one of them can be met. With pluralism, there is no general solution to such conflicts, however, for there is no single vision of the good life that rights could express. How, then, to administer the conflicting claims emanating, say, from popular sovereignty and international standards? The response, as we have seen, hinges on the appreciation of the context. This does not mean that conflicts could be resolved in any which way. In all institutional contexts there is, there must be, a constellation of forces that relies on some shared understanding of what the relevant values and rights are and how they should be applied.[20] There is such a structural bias at work within the European Court of Human Rights too. While the existence of the bias as such is not an outrage, its workings can sometimes be exactly that. To be sure, in sketching 'democracy' the judges of the European Court of Human Rights have, at times, opted for lethargy or reproduced societal structures in an uncomfortably conservative and unreflective manner: as if the way some groups — perhaps the majority — used to think about the society and the good life was to be taken to be the way we should always think. But what if that majority opinion was based on ignorance or superstition or misunderstanding? Which is why it is essential to be aware of the bias and its consequences. What does it do? How does it affect the distribution of benefits and values? Who does it privilege?

The choice between international standards and the sovereign will is exactly that, a choice. Accordingly, the question we must keep asking is not whether a choice is to be made but who is empowered to make the choice: 'who will decide?' Importantly, without a single vision of the good life, without a general recipe for conflict resolution, those who do decide are completely at a loss, completely perplexed — and, accordingly, completely responsible. *This* is a wonderful thing.

[20] Cf. Duncan Kennedy, *A Critique of Adjudication: fin de siècle* (Harvard University Press: Cambridge, Mass., 1997).