Human Rights, Democracy and the Left

Jarna Petman*

There is no doubt that human rights — especially international human rights — have been a Left or a liberal Left agenda throughout the 20th century, existing alongside liberal internationalism, and an embedded anti-State rhetoric. "Ours is the age of rights," writes in a triumphant note Louis Henkin, one of the most important U.S. advocates of international human rights towards the end of the 20th century.[1] For him, the struggle for human rights is part of a grander fight for progressive causes:

> That the interest of the people is the accepted touchstone of legitimate government gives hope — even, perhaps, renders it likely — that in time more governments will be more representative, and more governments will do better by the people's rights and interests.[2]

Henkin finds the antecedents for the struggle in the way international law has always sought to provide some protection for individuals. The pedigree of modern human rights, he writes, comes from 19th-century efforts to protect ethnic or religious minorities and the fight against slavery. After the First World War, the flame was kept alight through minorities treaties in the League of Nations and the International Labour Organisation instruments. The decisive moment, however, had to wait until the Second World War.

> The war against Hitler identified violations of human rights as a major threat to international peace, and they were linked in the rhetoric of the war and in plans for the peace. Human rights were prominent in the constitutions of the new nations that began to emerge in the postwar years.[3]

---

* Professor of International Law (*ad interim*), University of Helsinki; Research Fellow, The Erik Castrén Institute of International Law and Human Rights, University of Helsinki, Finland. Many thanks for the insights and advice of Martti Koskenniemi, Zinaida Miller, Meghan Morris and Thomas Becker.

[1] LOUIS HENKIN, THE AGE OF RIGHTS ix (1990).

[2] LOUIS HENKIN, THE RIGHTS OF MAN TODAY 137 (1978).

[3] LOUIS HENKIN, HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY 230 (2d ed., 1979).

True, Henkin writes, there was much hypocrisy and the victors of the war might have been content to use human rights in order to impose regimes of their preference in defeated countries. The Cold War also made human rights occasionally an instrument of a political struggle that had little to do with the interest of individuals.

> But the existence of the United Nations (and other intergovernmental organizations), the opportunities which their procedures provided and the momentum they generated, the influence of personalities of international stature (e.g. Eleanor Roosevelt) . . . the support given their work by intellectuals and media of information, all combined to launch an international human rights movement, with law-making as one of its principal elements.[4]

Such is a Left story of human rights.

I

Three aspects of this story are noteworthy. First, it could have come from any basic introduction to international human rights law.[5] The self-understanding of human rights lawyers always looks back into the age of Victorian liberalism to construct its intellectual origins. This is no wonder inasmuch as the very idea of a professional international law arose precisely from that background.[6] It was always a part of the ethos of international law to aim to transcend itself as merely diplomatic law into a more "cosmopolitan" type of law that would find its basic objective in the protection of the rights of individual human beings. Thus, when the gentlemen of the Institute of International Law adopted a "Declaration of the International Rights of Man" in 1929, it was natural for them to proclaim that "the juridical conscience of the civilized world demands the recognition for the individual of rights preserved from all infringement on the part of the State."[7] For them, to provide international recognition of human rights was as important as it was to create the League of Nations.[8] The League Covenant had been "the first major breakaway from the traditional system of interstate relations."[9] Article 23 of the Covenant of the

---

[4] *Id.*

[5] *C.f., e.g.,* PAUL GORDON LAUREN, THE EVOLUTION OF INTERNATIONAL HUMAN RIGHTS: VISIONS SEEN (1998); THOMAS BUERGENTHAL, INTERNATIONAL HUMAN RIGHTS IN A NUTSHELL 1-20 (2d ed., 1995); CHRISTIAN TOMUSCHAT, HUMAN RIGHTS: BETWEEN IDEALISM AND REALISM 1-23 (2003).

[6] *See* MARTTI KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870-1960 *(Hersch Lauterpacht Memorial Lectures)* (2001).

[7] L'Institut de Droit international, *Déclaration des Droits Internationaux de l'Homme*, 36 ANNUAIRE DE L'INSTITUTE DE DROIT INTERNATIONAL: SESSION DE NEW YORK, OCTOBRE 1929, 110-112 ('que la conscience juridique du monde civilisé exige la reconnaissance à l'individu de droits soustraits à toute atteinte de la part de l'Etat').

[8] *See* Louis B. Sohn, *How American International Lawyers Prepared for the San Francisco Bill of Rights*, 89 AM. J. INT'L. L. 540, 543 (1995) (quoting André Mandelstam).

[9] Wolfgang Friedmann, *Human Welfare and International Law: a reordering of priorities, in*

League of Nations came close to a provision on human rights, imposing an obligation on Members of the League to "secure and maintain fair and humane conditions of labour for men, women, and children" and to "secure just treatment of the native inhabitants of territories under their control." The former task was addressed in more detail by the International Labour Organization — "the first worldwide institution concerned with the regulation and improvement of conditions of labor and social welfare on an international level"[10] — while the latter related to the mandates and guarantees for trust territories, a "sacred trust of civilisation" laid upon the League. In another radical departure from the past, the League was entrusted with the monitoring and guarantee of the provisions for group minority rights.[11] But, sadly, the "system had no teeth."[12] The Second World War would bring with it the persecution of minorities on an unprecedented scale. Genocidal practices became a facet of life. In the shadow of mass violations and catastrophic sufferings, however, the appropriate platform was created for the launch of contemporary human rights. At last, "the internationalization of human rights and the humanization of international law" began with the establishment of the United Nations.[13] So the story goes.

A second aspect is the importance given to fascism in this story. The modern human rights network appears historically and conceptually as an extension of the anti-fascist ideas and movements of the 1930s and 1940s, a prolonged song of victory for (European) resistance movements operating in Nazi-occupied territories and the political and intellectual forces that most steadfastly supported them in Europe and elsewhere. Surely, these were Left forces. This inserted an important ambiguity in the story of rights. After all, ever since Marx, the Left has been wary of rights. In his essay "On the Jewish Question", Marx argued that not only is political emancipation insufficient to bring about human emancipation, it is, in an important sense, also a barrier. Liberal rights and ideas of justice are premised on the idea that each human being needs protection from other human beings. The very *raison d'être* for liberal rights is to protect us from such perceived threats: freedom means freedom from interference. For Marx, however, such a conception of rights overlooks the possibility — the fact, for him — that real freedom is to be found in relations with other people, in community.

TRANSNATIONAL LAW IN A CHANGING SOCIETY: ESSAYS IN HONOR OF PHILIP C. JESSUP 115 (Wolfgang Friedmann, Louis Henkin & Oliver Lissitzyn eds., 1972).

[10] *Id.* at 115.

[11] *See, e.g.*, Mark Mazower, *The Strange Triumph of Human Rights, 1933-1950*, 47 THE HISTORICAL JOURNAL 379 – 98 (2004).

[12] TOMUSCHAT, *supra* note 5, at 20.

[13] Thomas Buergenthal, *Human Rights: A Challenge for the Universities,* 31 UNESCO COURIER 25, 28 (1978).

> The practical application of the human right of freedom is the right of *private property* . . . the right of personal use . . . It allows each man to find in others not the *actualisation*, but much more the *limit*, of his freedom. [14]
>
> None of the so-called human rights then goes beyond the egoistic man, beyond man as member of civil society, namely withdrawn into his private interests and his private will, separated from the community. . . The one tie that holds them together is natural necessity, need and private interest, the conservation of their property and their egoistic person.[15]

The critique of the alienating effects of the "rights of egoistic man" and their projection of the image of the citizen as the bourgeois is undoubtedly to the point. On the other hand, however, it was precisely the rhetoric of rights that provided the most powerful and the most widely acceptable basis for criticism of the totalitarian Right of the 1930s.

This transformation of Left attitudes may be seen in particular in the history of the German Left. There had of course been a social-democratic left advocating rights and the rule of law already during the inter-war period. In "Red Vienna," Kelsen had been flirting with the Austrian version of social democracy that cultivated Marxist rhetoric in a bourgeoisie fashion. Like so many around him, he was an activist for progressive causes in adult education, educational reform, and housing.[16] When delivering his first Hague lectures in 1926, Kelsen would readily assert that the fact that international law applied immediately to States and only mediately to individuals was "not inherent to international law," nor was it "a necessary character of its norms."[17] Six years later he would reiterate this point, delivering his second Hague lectures, and emphasize that while individuals could still only exceptionally be regarded subjects of international law, "[i]t is not contrary to the nature of international law that what is today an exception should one day become the rule."[18] The year was 1932, and the lectures had taken on a strong pacifist and anti-imperialist tone. In Weimar, the Social Democrat jurist Hermann Heller was speaking with increasing urgency for the integration of the working class in the social, cultural, and political structures of the nation-state.[19] In 1932 he appeared as the legal representative for the Prussian Social Democratic Party, against Carl Schmitt, in the case *Prussia* v. *Reich,* which tested the constitutional validity of the right-wing federal government's *coup d'état* against the Prussian socialist state government. In oral argument before

---

[14] Karl Marx, *On the Jewish Question*, *in* KARL MARX, EARLY WRITINGS 45 (Joseph O'Malley, ed., 1994).

[15] *Id*. at 46.

[16] *See* Clemens Jabloner, *Kelsen and his Circle: The Viennese Years*, 9 EUR. J. INT'L L. 368 (1998).

[17] Hans Kelsen, *Les Rapports de Système Entre le Droit Interne et le Droit International Public*, 14 RECUEIL DES COURS 284 (1926-IV). For commentary, see, e.g., Charles Leben, *Hans Kelsen and the Advancement of International Law*, 9 EUR. J. INT'L L. 287 (1998).

[18] Hans Kelsen, *Théorie Générale du Droit International Public: Problèmes Choisis*, 14 RECUEIL DES COURS 170 (1932-IV).

[19] *See, e.g.,* Carlos Miguel Herrera, *Hermann Heller, Constitutionnaliste Socialiste, in* LES JURISTES DE GAUCHE SOUS LA REPUBLIQUE DE WEIMAR 69 - 1MARCarlos Miguel Herrera ed., 2002).

the Court, Heller refused to ignore the fact that the legal issues at stake were of fundamental political significance.[20] In his view, a government was not truly by the people unless it eliminated gross economic and status inequalities; the people were not sovereign unless each person was accorded basic political rights.

Perhaps the most striking case of a renewed Left commitment to rights took place when Franz Neumann and Otto Kirchheimer, key lawyers in the Frankfurt School, both had to leave Germany in the 1930s and continue their activities in the United States. Both had originally found Carl Schmitt's totalitarian model of law appealing as an answer to Weimar's ills. In their classically Marxist assumptions, Schmitt's brand of anti-liberalism came to shape the contours of their left-wing hostility to the liberal-rights tradition and, at times, provided them with the analytical tools for criticizing it. As the possibility of right-wing dictatorship began to take on very real proportions in Germany, however, Neumann and Kirchheimer transformed into perceptive and eloquent defenders of republicanism and became the fiercest of Schmitt's critics. Neumann's monumental study, *Behemoth: The Structure and Practice of National Socialism*, is an extended critique of totalitarianism. Standing "between Marxism and Liberalism,"[21] he demands that power be allowed to express itself only in accordance with a set of general norms: "Equality before the law is merely formal or negative . . . but it does contain a minimum guarantee of freedom and must not be discarded."[22] Kirchheimer too started work so as to conceive of the rule of law and human rights as core aspect of a Left that might have learned the lessons of fascism.[23] Today, the heritage of this stream of Left writing is exemplified best in the work of Jürgen Habermas, whose political and legal theory puts human rights in the centre of a structure otherwise bounded by the Rule of Law on the one side and democratic self-determination on the other.[24] In 1960s and 1970s Europe, human rights transformed the language of pre-war anti-fascism. In the United States, it became the platform on which the Civil Rights movement opposed the Vietnam War and carried out the cultural revolution.

The third aspect of the standard story of the emergence of human rights is the emphasis on international institution-building, particularly of the U.N. as the guardian of rights

---

[20] *See* David Dyzenhaus, *Hermann Heller: An Introduction*, 18 CARDOZO L. REV. 1129, 1129 (1996).

[21] *See* H. Stuart Hughes, *Franz Neumann: Between Marxism and Liberal Democracy*, *in* THE INTELLECTUAL MIGRATION: EUROPE AND AMERICA, 1930-60 (Donald Fleming & Bernard Bailyn eds., 1969).

[22] FRANZ NEUMANN, BEHEMOTH: THE STRUCTURE AND PRACTICE OF NATIONAL SOCIALISM, 1933-1944 444 (1966).

[23] *See*, *e.g.*, Otto Kirchheimer, *The* Rechsstaat *as Magic Wall*, *in* THE CRITICAL SPIRIT: ESSAYS IN HONOUR OF HERBERT MARCUSE 429 (Barrington Moore ed., 1967); *see also* WILLIAM W. SCHEUERMANN, BETWEEN THE NORM AND THE EXCEPTION: THE FRANKFURT SCHOOL AND THE RULE OF LAW 189-248 (1997).

[24] *See, e.g.*, Jürgen Habermas, *Legitimation Through Human Rights in* JÜRGEN HABERMAS' THE POSTNATIONAL CONSTELLATION: POLITICAL ESSAYS 113-29 (Max Pensky trans. & ed., 2001).

against selfish national politicians and especially against state sovereignty. According to the creed, "the sheer urgencies of civilized survival will promote the development of international legal institutions and standards."[25] This development began with the 1948 Universal Declaration of Human Rights and the process that led to the 1966 Covenants. There have, of course, been constant obstacles along the way. The history of the evolution of international human rights, the history "of the long and determined struggle for freedom and dignity," [26] is unfailingly recounted as a particularly slow and difficult course. The Cold War further complicated the process. The notion of human rights was split into more or less individualist streams, emphasis given variably to individual rights and collective rights, political rights and economic rights. Nevertheless, the U.N. and intergovernmental organizations were able to extend and develop a solid body of law, with the help of dedicated (Left) activists within the organization. Such "people serving as visionaries" included the likes of Eleanor Roosevelt, René Cassin and John Humphrey, who continue to be celebrated as the noble and heroic individuals who shamed states into action through their tireless advocacy of the cause.[27] It was they who boldly added economic and social rights to the more traditional civil and political rights; while the fundamental document for the latter was the French Declaration of the Rights of Man from 1789, for the former it was the Declaration of Rights of the Toiling and Exploited Peoples adopted by the All-Russian Congress of Soviets in January 1918.[28]

> Many human rights activists forget that the Charter considers human rights as a part of a closely related trio of objectives that also include "higher standards of living, full employment, and conditions of economic and social progress and development," as well as "solutions of international, economic, social, health and related problems," including "international cultural and educational cooperation."[29]

In the transition from a purely political conception of rights to an economic and social one, the visionaries were assisted by non-governmental organizations that represented an external power whose alignments were with left and center parties (and later green movements) in Europe and elsewhere. For Democrats in the United States, alignment with human rights went hand in hand with their support to international institutions — especially the UN — while critics on the Right tended to see international institutions and

---

[25] Friedmann, *supra* note 9, at 124.

[26] LAUREN, *supra* note 5, at 281.

[27] For such celebratory stories, see, e.g., LAUREN, *supra* note 5; see also MARY ANN GLENDON, A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS (2001).

[28] *Cf.* E. H. Carr, *The Rights of Man in* HUMAN RIGHTS: COMMENTS AND INTERPRETATIONS, A SYMPOSIUM (UNESCO) 19 (Allan Wingate, 1950) (1949)

[29] Louis B. Sohn, *How American International Lawyers Prepared for the San Francisco Bill of Rights*, 89 AM. J. INT'L L. 540, 540 (1995).

human rights as inextricable, two aspects of a left ("Communist") plot to undermine American influence in the world.

These are the three aspects of the self-image of human rights, then: first, it is based on a homogenous understanding of historical forces; second, it highlights the significance of evil (fascism) as the force that finally compelled the necessity and the direction for human rights and democracy; and third, it came with a commitment to international public institutions, international law, and especially human rights institutions, Courts, Commissions and so on.

This triple understanding is problematic. Anti-fascism inspired the urgency of human rights; in the absence of fascism, the fire seems to have flickered. Under such intellectual circumstances, the commitment to institutions tends to turn into bureaucracy. The routine first professionalizes and then demobilizes the visionaries and advocates of the cause. The commitment becomes a commitment to institutions *per se* without any clear sense of the achievement they should accomplish.[30] Eventually, inevitably, the institutions become a platform for "politics as usual." Human rights lose their absolute force; the reference to Auschwitz begins to ring hollow, even immoral.

II

In what follows, I will examine the practice of the European Court of Human Rights to illustrate some of the ways in which human rights deformalize and turn into bureaucratic administration. Why the European Court of Human Rights? I have two reasons.

Reason One: the story of human rights is essentially a European story. It is a European story even within the domestic setting of the United States, since the U.S. pioneers of international human rights were Europeans.[31] Within the international setting, the philosophical origins, early formulations, and codifications of human rights standards were dominated by European cultural and political norms. In the early years of the United Nations, the organization was effectively in the hands of the West. Most African and Asian states were absent from the U.N. because they were European colonies; the "Third World" consisted of Latin American countries whose dominant worldview was European.[32] Thus, the founding documents of the international human rights movement — the Universal Declaration and the International Covenants — came to reflect structures and values that derive from European liberalism. The pedigree has been far from

---

[30] *See*, DAVID KENNEDY, THE DARK SIDES OF VIRTUE: REASSESSING INTERNATIONAL HUMANITARIANISM 26-30 (2004).

[31] *Cf., e.g.,* David A. Caron, *Remarks on the Awarding of the 2003 Stefan A. Riesenfeld Award: Louis Henkin and the Felicitous Expression of Reason*, 22 BKLY. J. INT'L L. 1 (2004).

[32] *See, e.g.,* Antonio Cassese, *The General Assembly: Historical Perspective 1945-1989, in* THE UNITED NATIONS AND HUMAN RIGHTS: A CRITICAL APPRAISAL 25 (Philip Alson ed., 1992); Virginia Leary, *The Effect of Western Perspectives on International Human Rights*, *in* HUMAN RIGHTS IN AFRICA: CROSS-CULTURAL PERSPECTIVES 15-30 (Abdullahi Ahmed An-Na'im & Francis M. Deng eds., 1990).

unproblematic.[33] As noted by Makau wa Mutua, the fact that human rights and Western liberal democracy "are virtually tautological" has had "serious and dramatic implications for questions of cultural diversity, the sovereignty of States, and ultimately the 'universality' of human rights."[34] Having inherited a certain outlook and a particular vocabulary as well as a certain homogenous understanding of historical forces, the human rights movement has from the start been organizing the international community in the image of the liberal, and preferably social-democratic, Europe.

It is useful to bear in mind that rights language, even as universal, is indeterminate, and that it may be used to carry and advance different policies. The assumption behind the standard story, sketched above, has been that rights presuppose a Left content, a political agenda supporting the preferences of Left actors and movements, particularly the struggle against fascism. The practice of the European Court of Human Rights, however, has been much more equivocal, especially to the extent that mere antifascism falls short of dictating the right ways to proceed. The preferences that emerge from a study of its case law are by no means always or self-evidently Left preferences. In fact, the practice seems to show that claimants before the Court have been able to present whatever claims they have had in rights-language and that the Court's response to those claims has had little to do with affirming any kind of clear programme, even less a Left programme. It has been about choosing between conflicting rights, limiting rights and creating exceptions to rights in a manner that has little in common with any conscious (or unconscious) Left project. The lesson of the European Court is that from the indeterminacy of right-language in a landscape where everyone claims their interests as rights, it follows that rights become what the institutional politics of the European Court and the Council of Europe is. This policy may be good or bad, acceptable or amenable to criticism in its details. But it is not a Left project.

Reason Two: there is one instance that is deemed responsible for the globalization of human rights and democracy, one court whose judgments are increasingly quoted by national courts all over the world and accepted by them — the European Court of Human Rights, which has been hailed as a "sort of world court of human rights."[35] Its founding document, the European Convention on Human Rights,[36] sets forth a substantive cata-

---

[33] For critique, see, e.g., MAKAU WA MUTUA, HUMAN RIGHTS: A POLITICAL AND CULTURAL CRITIQUE (2002); Anne Orford, *Contesting Globalization: A Feminist Perspective on the Future of Human Rights*, 8 TRANSNAT'L L. & CONTEMP. PROB. 171 (1998); and Hilary Charlesworth, *The Mid-Life Crisis of the Universal Declaration of Human Rights,* 55 WASH. & LEE L. REV. 781 (1998).

[34] Makau wa Mutua, *Ideology of Human Rights*, 36 VA. J. INT.'L L. 589, 595 (1996).

[35] John B. Attanasio, *Rapporteur's Overview and Conclusions: of Sovereignty, Globalization, and Courts*, *in* INTERNATIONAL LAW DECISIONS IN NATIONAL COURTS 383 (Thomas M. Franck & Gregory H. Fox, eds.); *cf.* Anne-Marie Slaughter, *The New World Order*, 76 FOREIGN AFFAIRS 183 (1997).

[36] EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS, (Nov. 4, 1950), *entered into force* Sept. 3, 1953, 213 *United Nations Treaty Series* 221, *European Treaty Series* 5, *as amended by* Protocol 11, *in force* Nov. 1, 1998, *available at* http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm (last visited March 29 , 2006).

logue of human rights and creates an intricate enforcement mechanism to permit individuals and groups to file complaints against their national governments. The Convention has become "not only the world's most successful system of international law for the protection of human rights, but one of the most advanced forms of any kind of international legal process."[37] The Strasbourg case law shapes the legal systems and the way in which rights are defined in Europe through judicial decision as well as legislative revision and administrative decree. It has also had an impact on national courts, launching a vertical dialogue between national judges and the judges of the European Court of Human Rights.[38] And it sets the minimum standard for the protection of fundamental rights in European Union law.[39]

These developments have led the Court of Human Rights to state in no uncertain terms that the Convention has become a constitutional instrument of European public order.[40] The Court itself has been described as "a quasi-constitutional court for the whole of Europe."[41] With the upheavals of 1989 in Central and Eastern Europe, the Council of Europe has assumed a pan-European dimension. In a feat of spectacular enlargement, its membership soared from twenty-three states in 1989 to forty-six today.[42] Although the Heads of State and Government of the Council welcomed "the democracies of Europe freed from communist oppression" at the 1993 Vienna Summit, they did not do so without certain statutory requirements for accession: "Such accession presupposes that the applicant country has brought its institutions and legal system into line with the basic principles of democracy, the rule of law and respect for human rights."[43]

---

[37] MARK JANIS, RICHARD KAY & ANTHONY BRADLEY, EUROPEAN HUMAN RIGHTS LAW: TEXTS AND MATERIALS 3 (1996).

[38] ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 80 (2004); *see also* Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L.1103, *1109-111* (2000).

[39] *See* CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION, Art. 52, para. 3; *see also* the conclusion of Advocate General Jacobs in *Bosphorus Hava Yollari Turizm ve Ticaret AS v. Minister for Transport, Energy and Communications, Ireland and the Attorney General*, Case C-84/95 [1996] ECR I-3953 ("for practical purposes the Convention can be regarded as Community law and can be invoked as such both by the Court and in national courts where Community law is implemented").

[40] *Loizidou* v. *Turkey*, 134 ECHR Series A (1995) 134 (preliminary objections).

[41] Rolv Ryssdall, *The Coming of Age of the European Convention on Human Rights*, 1 EUR. HUM. RTS. L. REV. 22 (1996).

[42] Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Monaco, Netherlands, Norway, Poland, Portugal, Romania, Russia, San Marino, Serbia and Montenegro, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, TFYR Macedonia, Turkey, Ukraine, and United Kingdom.

[43] Council of Europe, Vienna Declaration of 8/9 October 1993, para. 2, *reprinted in* 14 HUM. RTS. L. J. 373 (1991).

Such statutory requirements for admission are one of the ways in which Europe serves as a model for the new world order — for good or for bad. The membership requirement for the international community now hinges on respect for human rights, democracy, and market economics. Liberal capitalism and its political system, parliamentarism, are seen as the one natural and acceptable form of life. Such naturalism was injected into the European Convention from the start. When the Convention was being drafted, the Legal Committee responsible for the task asserted that its adoption would be a clear demonstration of "the common desire of the Member States to build a European Union" not only in accordance with the principles "of humanism and of democracy" but also with those "of natural law."[44] As noted by John Finnis, the idea of natural law is based on the existence of a set of "basic practical principles" indicating the "basic forms of human flourishing" and setting the basic requirements of practical reasonableness to distinguish "sound from unsound thinking," thus enabling us to formulate a set of "general moral standards."[45] It is exactly these types of basic principles and general moral standards that the Council of Europe and its Convention on Human Rights purport to represent: "the *basic* principles of democracy, the rule of law, and respect for human rights."[46] That the Convention standards are general in the sense of being applicable to anyone, not guaranteeing the rights of Europeans only, is affirmed by Article 1: "the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms" enshrined in the Convention. It is precisely because of the universalist language of human rights in the Convention that the European Court of Human Rights has become a source of authoritative pronouncements on human rights law even for national courts that are not directly subject to its authority, whether in the United States, South Africa, Zimbabwe, Israel, or Jamaica.[47] The Inter-American Court of Human Rights and the United Nations Human Rights Committee have also accepted and adopted the reasoning and interpretative methodologies of the European Court.[48]

---

[44] COUNCILOF EUROPE, 1 COLLECTED EDITION OF THE 'TRAVAUX PRÉPARATOIRES' OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 216 [hereinafter TRAVAUX PRÉPARATOIRES].

[45] JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 23 (1980).

[46] Vienna Declaration, *supra* note 43.

[47] See the United States Supreme Court (*Roper* v. *Simmons*, 112 S.W.3d 397, (Mo. 2003) *aff'd*, 543 U.S. 551 (2005)), the South African Supreme Court (*The State* v. *T. Makwanyane and M Mchunu*, Case No. CCT/3/94 (South Africa 6 June 1995)), the Supreme Court of Zimbabwe (*Ncube, Tshuma and Ndhlovu* v. *The State*, 2 *South African Law Reports* (1988) 702; *Juvenile* v. *The State*, (Criminal Application No. 156/88), Judgment No. 64/89, reported in Hurst Hannum, 'Recent Case', 84 *American Journal of International Law* (1990) 768), the Israeli High Court (H.C. 5100/94, *Public Committee against Torture in Israel* v. *The State of Israel* (6 September 1999), 36 *International Legal Materials* 1471) and the British Privy Council (*Pratt & Morgan* v. *The Attorney General for Jamaica*, Privy Council Appeal No. 10 (2 November 1993), reprinted in 14 *Human Rights Law Jornal* (1993) 338).

[48] *See* J. G. MERRILLS, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE EUROPEAN COURT OF HUMAN RIGHTS 19 (2d ed., 1993).

In these ways, the European Court of Human Rights continues and exists as the representative of the project of universal human rights. Hence, an analysis of the practice of the Court is inevitably also an analysis of the possibilities and limits of international human rights as part of a Left political agenda.

III

The text of the European Convention for the Protection of Human Rights and Fundamental Freedoms was signed on 4 November 1950. For the then-twelve signatory governments, it represented a "code of law for the democracies." It was to "define and guarantee the political basis of the association of European nations" and accordingly to "ensure that the States of the Members of the Council of Europe are democratic, and remain democratic."[49]

To this effect, when the Convention was being drafted, several of the delegates articulated a concern about the abuse of the freedoms granted by the Convention. They warned that "human freedom, just because it is sacred, must not become the armoury in which the enemies of freedom can find weapons which they can later use unhindered to destroy this freedom."[50] While there was concern about certain individual rights infringing on the rights of others, the more pressing fear seems to have been that individuals would use their new freedoms to establish threats to the States themselves.[51] The drafters of the Convention were all too aware of the fact that both Hitler and Mussolini had come to power, at least initially, through democratic processes:

> Democracies do not become Nazi countries in one day. Evil progresses cunningly, with a minority operating . . . to remove the levers of control. One by one, freedoms are suppressed, in one sphere after another. Public opinion and the entire national conscience are asphyxicated. And then, when everything is in order, the 'Führer' is installed and the evolution continues even to the oven of the crematorium. It is necessary to intervene before it is too late.[52]

To provide for such interventions, the drafters included numerous limitations provisions. The European Convention now explicitly permits the prohibition of "any activity or . . . act aimed at the destruction of any rights and freedoms" of others (Article 17). It also states that a Member State is permitted "to take measures derogating from its obligations" in time of war and other public emergency threatening the life of the nation (Arti-

---

[49] 2 TRAVAUX PRÉPARATOIRES, at 4 (Edberg), 50 (Layton) and 60 (Ungoed-Thomas).

[50] 1 TRAVAUX PRÉPARATOIRES, at 86 (Maccas).

[51] 1 TRAVAUX PRÉPARATOIRES 118 (Maxwell-Fyfe) (referring to an address by Winston Churchill before the Assembly: "We do not desire by sentimentality in drafting to give evilly disposed persons the opportunity to create a totalitarian Government which will destroy human rights altogether.").

[52] 2 TRAVAUX PRÉPARATOIRES 157 (Teitgen).

cle 15). In addition to these general, overarching provisions, the Convention also attaches specific limitations clauses to particular rights and freedoms in Articles 8-11. While the Convention now specifies the right to respect for private and family life (Article 8), freedom of thought, conscience and religion (Article 9), freedom of expression (Article 10), freedom of assembly and association (Article 11), and the protection of property (in Protocol 1), it goes on to indicate that the State may interfere with the right in order to secure certain interests. For example, Article 11 provides that freedom of association may be subject to such restrictions that:

> are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others.

But what do such standards of deviation mean in practice? Exactly how is the Court to assess the case before it to allow derogation from guaranteed rights? States may, under the Convention, restrict the right of their nationals to form a political party for such interests as "public safety," the prevention of "disorder," the protection of "morals," or the protection of "the rights and freedoms of others," among others. Such concepts are not only extremely wide but also exceedingly political. The fact that they can only be invoked when the interference with a right is "necessary in a democratic society" does not make things any clearer nor does it do away with the politics — quite the contrary. The Court has identified such "necessity" with "pressing social need." It is difficult to think of a more socio-political concept.

Accordingly, it is for the governments to decide whether the pressing need exists in their societies. This power is potentially unlimited. Therefore, the reference to "democratic society" has been seen as qualifying it by insisting that it is for the Court to assess that every restriction imposed in this context is "proportionate" to the aim or interest pursued.[53] Again, however, this is not a very clear standard as to whether to resort to the right or to the exception. Assessing proportionality is an essentially aesthetic undertaking. As such, it illustrates the kind of rationality we should expect to encounter in deciding between the right and the derogation: proportion is self-evident to one who sees it, and can be merely asserted, with no elaboration.[54]

Such rationality of truisms relies on shared understandings, on people thinking in broadly similar ways about social and political matters. In this way, rights depend on their meaning and force on the presence of histories, cultures, religions — and institutions.[55] In assessing whether to justify reference either to the rule or the exception, the

---

[53] Handyside v. United Kingdom, ECHR Series A (1976) No. 24 para. 49.

[54] *Cf.* Susan Marks, *The European Convention on Human Rights and Its "Democratic Society"*, 66 BRITISH YB INT'L. L. 209,16 (1995).

[55] See Martti Koskenniemi, *The Effect of Rights on Political Culture, in* THE EU AND HUMAN RIGHTS 110-111 (Philip Alston ed., 1999).

right or the derogation, the Court relies on notions that are heavily contextualized in the socio-political self-understanding of post-War European democracies.

Directly after the Second World War, the understanding in Europe was that the rights of antidemocratic actors within democracies had to be curtailed. Since then, the problem of democracy's self-defense has been ever-present. While the Convention, set up as a bulwark for democracy, assumes an inherent compatibility between promoting democracy and protecting human rights, the Court has also always recognized an inherent tension between the two. It has affirmed that: "Some compromise between the requirements for defending democratic society and individual rights is inherent in the system of the Convention."[56] But how far may the democratic self-defense go? May democracies resort to undemocratic means to defend their existence? At what point do such means turn into oppression?

The totalitarian history of the continent has resulted in profound skepticism about the power of political competition to delegitimize extremist groups. In many European countries, national legislation now provides that political parties which do not conform to democratic principles are unconstitutional.[57] This is the principle of "militant democracy" (*wehrhafte* or *streitbare Demokratie*), the militancy of which refers to the readiness to take an active stance in restricting the human rights of anti-democratic actors to ensure that democracy does not become "the Trojan Horse by which the enemy enters the city," as the man who coined the term, Karl Lowenstein, put it.[58]

The German Basic Law was the first European constitution to recognize the principle of "militant democracy."[59] In the drafting process of 1948-49, several provisions were inserted expressing the principle. In accordance with those provisions, two prominent and (until then) non-violent parties were declared unconstitutional in the 1950s: the Nazi-like *Sozialistische Reichspartei* was dissolved in 1952 and the German Communist Party in 1956. The latter case was brought before the European Commission of Human Rights.[60]

---

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

[57] *See, e.g.,* the references in Gregory H. Fox & Georg Nolte, *Intolerant Democracies*, 36 HARV. INT'L L. J. 1, 22-36 (1995). Most new constitutions of Europe either take Article 6 of the Spanish Constitution or Articles 9, 18 and 21 of the German Basic Law as the basis of their regulation of political parties. *See* G. Brunner, *The Treatment of Anticonstitutional Parties in Eastern Europe, in* HUMAN RIGHTS IN RUSSIA AND EASTERN EUROPE: ESSAYS IN HONOUR OF GER P. VAN DEN BERG 17 et seq. (F. Feldbrugge & W.B. Simons eds., 2000).

[58] Karl Lowenstein, *Militant Democracy and Fundamental Rights: Part I*, 31 AM. POL. SCI. REV. 417, 424 (1937); *see also* Part II of the article in 31 *AM. POL. SCI. REV.* 638 (1937); *see also* Karl Lowenstein, *Autocracy Versus Democracy in Contemporary Europe: Parts I and II,* 29 AM. POL. SCI. REV. 571, and *Part II,* 29 AM.POL. SCI. REV. 755 (1935); and Karl Lowenstein, *Legislative Control of Political Extremism in European Democracies: Part I*, 38 COLUM. L. REV. 591 (1936) 591 and *Part II,* 38 COLUM. L. REV. 725.

[59] *Cf., e.g,* David E. Weiss, *Striking a Difficult Balance: Combatting the Threat of Neo-Nazism in Germany While Preserving Individual Liberties*, 27 VAND. J. TRANSNAT'L L. 899 (1994).

[60] Until November 1, 1998, the European Commission of Human Rights first conducted an

According to the Commission's findings, the Communist Party's express declarations envisaged a period of dictatorship by the proletariat during which rights and freedoms under the Convention would be destroyed.[61] This was found to be incompatible with the Convention. The Commission further noted that the fact that the Party directed itself towards attaining power by constitutional means did not signify that it had renounced any its aims. The ban of the Party was upheld. It thus appeared that the restriction of anti-democratic parties did not require justification by any threshold of proof: a ban was deemed valid by virtue of being applied to anti-democratic actors. This is one of the dangers with militant democracy: governments can deprive a political actor of rights merely by labeling it anti-democratic; the label "anti-democratic" may be used as a pretext for banning those whose political activism amounts to no more than a challenge to the dominant national ideology.[62]

When Turkey dissolved the United Communist Party of Turkey in 1992 as unconstitutional, and the case was brought before the European Court, it sought to rely on the fact that the use of certain names for parties was proscribed in Western legal systems. It referred especially to the German, Polish and Portuguese Constitutions. Turkey argued:

> By choosing to call itself "communist", the [Party] perforce referred to a subversive doctrine and a totalitarian political goal that undermined Turkey's political and territorial unity and jeopardised the fundamental principles of its public law, such as secularism. "Communism" invariably presupposed seizing power and aimed to establish a political order that would be unacceptable, not just in Turkey but also in other member States of the Council of Europe.[63]

The Court considered, however, that a political party's choice of name could not, "in principle," justify a measure as drastic as dissolution, in the absence of other relevant and

---

investigation into the merits of a complaint that it had found admissible and then issued a report on the case, expressing an opinion whether or not there had been a violation of the Convention. Final decisions on cases on which the Commission had reported were made by the Committee of Ministers, or the Court of Human Rights. From November 1, 1998, onwards, the Commission and the Court have been replaced by a new permanent Court, which handles both the admissibility and merits phases of application. The sole role of the Committee of Ministers is now to supervise the execution of judgments.

[61] Kommunistische Partei Deutschland v. Federal Republic of Germany (Application No. 250/57), 1 YRBK OF THE EUR. CONV. ON HUM. R.TS. 222 (1957). The readiness of the Court to endorse German constitutional provisions restricting the activities of the Communist Party can also be seen in *Glasenapp* v. *Germany*, ECHR Series A (1987) 104, 9 EHRR 25, where it upheld the requirement that probationary civil servants could only take up permanent positions if they guaranteed that they would espouse the free constitutional system of the Basic Law; members of the Party were thus prevented from working as civil servants.

[62] Paul Harvey, *Militant Democracy and the European Convention on Human Rights*, 29(3) EUR. L. REV. 407, 409 and 414-15 (2004).

[63] United Communist Party of Turkey and others v. Turkey, 26 EHRR (1998) 121, para. 20.

sufficient circumstances. It noted further that unlike the German Communist Party, which had been dissolved in 1956, the Turkish Communist Party "was not seeking, in spite of its name, to establish the domination of one social class over the others, and that, on the contrary, it satisfied the requirements of democracy, including political pluralism, universal suffrage and freedom to take part in politics."[64] Obviously, "Communism" as a label of a party was no longer self-evidently regarded a threat that would justify a derogation from the Convention rights. In its holding, the Court laid special emphasis on the essential role of political parties in ensuring pluralism and the proper functioning of democracy:

> The free expression of the opinion of the people in the choice of the legislature . . . is inconceivable without the participation of a plurality of political parties representing the different shades of opinion to be found within a country's population. By relaying this range of opinion . . . at all levels of social life, political parties make an irreplaceable contribution to political debate, which is at the very core of the concept of a democratic society.[65]

Nevertheless, it was the very concept of "democratic society" that led the Court to find in the case of *Refah Partisi (Welfare Party) and others* v. *Turkey*[66] that Turkey had legally dissolved the applicant political party. While the threat of Communism has waned, a new threat has stepped into the Court's interpretations — namely, Islam.

IV

The Welfare Party was the fifteenth political party to have been compulsorily dissolved by the Turkish Constitutional Court in the 1990s. It was also the fourth in the succession of cases before the European Court involving such dissolution.[67] It was, in terms of its political significance in Turkey, by far the most important of the four cases. The other three parties were not just relatively small, but essentially in their infancy at the time of dissolution. By contrast, the Welfare Party had been in existence for nearly fourteen years before proceedings were brought to dissolve it. In that period it had grown to become one of the largest political parties in Turkey, with a claimed membership of over 4.3 million people. At the time of its dissolution in 1998, the Welfare Party held the majority position in the legislature with 158 of the 450 seats and it had been in power for a

---

[64] *Id*. at para. 54.

[65] *Id*. at para. 44.

[66] Refah Partisi (Welfare Party) and others v. Turkey (Applications Nos 41340/98, 41342/98, 41343/98 and 41344/98) (Grand Chamber Judgment of Feb. 13, 2003). The case was referred to the Grand Chamber by the Chamber that delivered its Judgment on 31 July 2001. Both decisions are available through http://www.echr.coe.int.

[67] The previous cases were *United Communist Party of Turkey and others* (26 EHRR (1998) 121), the *Socialist Party and others* (25 EHRR (1999) 51), and the *Freedom and Democracy Party*, available through http://www.echr.coe.int.

year as part of a coalition government. While in the other three cases the Parties had been dissolved on the grounds that the statements made on behalf of the party served to undermine the integrity and unity of the Republic by providing support for a right of self-determination of the Kurds, the sole ground for dissolution of the Welfare Party was that it had become "a 'center' of activities contrary to the principles of secularism" which were guaranteed by the Constitution.[68]

As the basis of this rationale, the Government cited a long list of activities, public statements, and policies of the party and its leaders, which were characterized as threats to the secular State. Included on this list were the wearing of Islamic headscarves by party leaders during official actions, statements by the leaders and others advocating the establishment of a theocratic regime based on Islamic law *Sharia* and a multijuridical system in which citizens are governed by the laws of their respective religions, incitement of the public to a *jihad*, statements allegedly inciting the people to a violent overthrow of the government, and other similar acts and statements.[69] The Government alleged that these facts illustrated a threat to the social order, and perhaps also to the national security of the State, and that therefore dissolution was necessary. In its submission, the Government stated that "the fact that Turkey was the only Muslim country where there was a liberal democracy after the Western model was due to the strict application of the principle of secularism."[70] Having pointed to the history of the Republic that "had been founded as a result of a revolutionary process which had changed a theocratic State into a secular State,"[71] it noted that the concept of "militant democracy" and the possibility of repressing political groups which abused freedom of association and freedom of expression were included in the Constitutions of European States such as Germany and Italy by virtue of their history. It further submitted that "militant democracy required political parties, its indispensable protagonists, to show loyalty to democratic principles, and accordingly the principle of secularism."[72] As the Turkish population was more than 95% Muslim, political Islam was in the view of the Government a threat to, and a potential danger for, Turkish democracy.

In holding that the dissolution was not a violation of Article 11, the European Court rejected the applicants' assertions that the statements were taken out of context and assumed that the incitements to establish a new form of theocratic government were real. It further concluded that the party's threats and political aims were "neither theoretical nor illusory but achievable."[73] Three of the seven judges dissented on the grounds that there was nothing in the Party programme to suggest that the Welfare Party was anything but

---

[68] Refah Partisi (Welfare Party) and others v. Turkey (Chamber Judgment of July 31, 2001) para. 11.

[69] *Id.* at paras 11, 25, 59-63.

[70] *Id.* at para. 61.

[71] *Id.* at para. 59.

[72] *Id.* at para. 62.

[73] *Id.* at para. 77.

democratic, nor was there anything in the Party's actions, once it was in power, to suggest anything but democracy. Dissenting judges further asserted that the statements that the majority had relied on were abstracts from longer addresses made in 1993, well over four years before the Party was dissolved. At the request of the applicants, the case was referred to the Grand Chamber.

The Grand Chamber unanimously held in February 2003 that there had been no violation of Article 11.[74] It reiterated the primordial role that political parties played in democratic order, but emphasized their "capacity to influence."[75] Referring to lessons from history, it noted that totalitarian movements could prosper under democratic regimes: "no one must be authorized to rely on the provisions to weaken or destroy the ideals."[76] It also noted that a Party's true intentions are not necessarily revealed in the party programme but rather rendered by political experience. The Court offered a clear reendorsement of militant democracy:

> A State cannot be required to wait, before intervening, until a political party has seized power and begun to take concrete steps to implement a policy incompatible with the standards of the Convention and democracy, even though the danger of that policy is sufficiently established and imminent.[77]

The Court considered the dissolution of the party to have met a "pressing social need."[78] There was pressing need because of opinion polls: the polls showed in 1997 that within four years, the Welfare Party was likely to win 67% of the votes and could thus seize power without being restrained by coalition compromise demands. According to the Court, each Contracting Party could oppose such political movements in the light of historical experience.

One of the concurring judges found the use of opinion polls "which would be natural in a political analysis, rather strange in a legal text."[79] But, of course, the resort to political analysis is not a mistaken position about rights. Rather, it is a position that is unavoidable, for rights do not exist as such — "fact-like" — outside the structures of political deliberation. They can only receive their meaning through political deliberation. The scope of rights is thus conditioned by choices that seem justifiable only by reference to alternative conceptions of the good society. In the conception of the European Court, that "good society" (European democracy), is based on Christian principles and values. Given the history of the continent, it could hardly be otherwise. Islam has been the an-

---

[74] Refah Partisi (Welfare Party) and others v. Turkey (Applications Nos 41340/98, 41342/98, 41343/98 and 41344/98) (Grand Chamber Judgment of Feb. 13, 2003) *available through* http://www.echr.coe.int.

[75] *Id*. at para. 87.

[76] *Id*. at para 99.

[77] *Id.* at para. 102.

[78] *Id.* at para. 132.

[79] *Id*. at para. 48-49 (concurring opinion of Judge Kovler).

tithesis of Christian Europe for centuries. However, this conception raises concerns about the ability of Muslims to live comfortably within the European system. There are over 53 million Muslims in Europe; many a European is a Muslim. In the international community of Europe, it is not unproblematic that the European Court of Human Rights should be such an unreflective carrier of the traditional self-image of human rights; as the very incarnation of the commitment to international human rights institutions, it continues to advocate the homogenously Western understanding of historical forces and to defend the significance of evil as the force that compels the necessity and the direction for human rights. In recent years, the Court has come to replace the traditional opponents of the Convention — Fascism and Communism — with the newly threatening post-Cold War, post-9/11 adversary: Islamic fundamentalism — which the Court, in a Manichaean fashion, equates with Islam in general.

While the actual holding of the *Welfare Party* case turns largely on the extreme nature of the acts committed by the Welfare Party, and not the Islamic nature of those acts as such, the Court did treat important Islamic doctrines in ways that had troubling implications. It was the Court's idiosyncratic — idiosyncratic to the liberal West — construction of several Islamic principles that led to the conclusion that the Welfare Party posed a threat to the sovereignty and security of Turkey. For example, the Court defined the term *jihad* as a doctrine "whose primary meaning is a holy war, to be waged until the total domination of Islam in society is secured."[80] While the Court obviously relied on several statements by Welfare Party officials, in which they described the concept of *jihad* as a potentially violent campaign, the Court failed to recognize that this was an extreme minority view. Most Islamic scholars agree that there are at least two, and perhaps several, possible definitions of *jihad*.[81] Its most common definition is a "struggle," usually a struggle for justice, righteousness, or a better way of life. Choosing to ignore this more popular form of *jihad*, the Court only spoke of violent "holy war." Similarly prejudiced assumptions about the concept of the *sharia* led the Court conclude that it was "incompatible with the fundamental principles of democracy."[82] "It is difficult to declare one's respect for democracy and human rights while at the same time supporting a regime based on *sharia*."[83] Ironically, while the Court emphasized the importance of democracy, the very motive for its holding in the *Welfare Party* case was to overrule the will of the people that it feared would materialize, democratically, in the upcoming elections.

With its broad condemnations of both *jihad* and *sharia*, the Court came to include many activities within the more peaceful definitions of those terms which pose no threat

---

[80] Refah Partisi (Welfare Party) and others v. Turkey (Chamber Judgment of July 31, 2001) para. 74.

[81] *Cf., e.g.,* ENCYCLOPEDIA OF POLITICS AND RELIGION 425 (Robert Wuthnow ed., 1998).

[82] Refah Partisi (Welfare Party) and others v. Turkey (Grand Chamber Judgment of Feb. 13, 2003) para. 123.

[83] *Cf.* Refah Partisi (Welfare Party) and others v. Turkey (Chamber Judgment of July 31, 2001) para. 72, reiterated in Grand Chamber Judgment of February 13, 2003, para. 123.

to "public safety," "public order," "health" or "morals," or the "rights and freedoms of others." In its condemnations of *sharia*, the Court was particularly critical of the lack of recognition for the principles of pluralism. Facing the Islamic faith, however, the Court itself has been prepared to subordinate the substantive value of tolerance to the protection of the substantive value of the Christian faith.

V

According to the Court, "freedom of thought, conscience and religion is one of the foundations of a 'democratic society' within the meaning of the Convention":

> It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it.[84]

This freedom includes freedom to manifest one's religion or belief.[85] The Court has, however, demonstrated a definite lack of empathy for certain believers: why, for example, should it be "necessary in a democratic society" that the children of the Jehova's Witnesses are required to attend a militaristic parade against their pacifist belief?[86] In assessing the interferences of the right to freedom of religion, the Court has to step down from the apparently universal value of this freedom to a contextual assessment of the merits of what the applicant and the government represent in the particular struggle. Thus, it is compelled to present an external ideal, or a principle, of the good life by reference to which its understanding of "freedom of religion" is justified — and the case turns out to be about which religion to prefer.

The applicant in the *Dahlab* case was a teacher in a Swiss state school for four- to eight-year-olds.[87] She converted to Islam and began wearing a veil to school. Although there was no evidence that she had spoken about religion to her pupils, the Court held that the Swiss authorities were justified in forbidding her from wearing the veil at work, consistent with their policy of maintaining religious neutrality in schools.[88] The Court held that seeing their teacher wearing the veil might have a "proselytizing effect" on chil-

---

[84] Kokkinakis v. Greece, ECHR Series A (1994) No. 260-A, 17 EHRR 397, para. 31.

[85] *Id.*

[86] *Cf.* Valsamis v. Greece (Application 21787/93) (Judgment of 18 December 1996), 24 EHRR (1997) 294.

[87] Dahlab v. Switzerland (Application 42393/98) (admissibility decision of Feb. 15, 2001) *available through* http://www.echr.coe.int.

[88] *Cf.* Vogt v. Germany, ECHR Series A (1995) No. 323, 21 EHRR 205 (finding a violation for a teacher having been dismissed because of her active membership in the Communist Party as she had not let her political beliefs affect her professional conduct in any way).

dren at a young and impressionable age,[89] and would transmit negative messages to children about the lack of equality between the sexes. It does not appear to have given much weight to the argument that the experience of being taught by a woman in traditional Islamic dress might have passed on to the children positive messages about the equality of different religious and cultural groups. Human rights are not necessarily about inclusion and recognition of difference; human rights may also be about the violence of exclusion and the denial of human rights.

In June 2004, the Court again considered "the impact which wearing such a symbol [as the Islamic headscarf], which is presented or perceived as a compulsory religious duty, may have on those who choose not to wear it."[90] The applicant, Leyla Şahin, comes from a traditional family of practicing Muslims and thus considers it her religious duty to wear the Islamic headscarf. In 1998, as she was studying at the Faculty of Medicine of the University of Istanbul, the University authorities issued a circular stating that those students who wore the Islamic headscarf and those with beards were not to be admitted to classes. After Şahin failed to comply with the rules on dress, she was suspended from the University. The Court found that the interference with the applicant's right to manifest her religion had been "necessary in democratic society."[91] Putting the actions of the Turkish authorities in their "legal and social context" and examining it "in the light of the circumstances of the case,"[92] the Court emphasized that the religious symbol of the headscarf had in recent years acquired political significance in Turkey, a secularist country with an Islamic majority, where "there are extremist political movements . . . which seek to impose on society as a whole their religious symbols and conception of a society founded on religious precepts."[93] In the Court's view, the interference had, rightly, been based on "two principles — secularism and equality — which reinforce and complement each other."[94] Secularism is "the guarantor of democratic values."[95] Therefore, furtherance of "the values of pluralism, respect for the rights of others and, in particular, equality before the law of men and women" require opposing "that women students cover their heads with a headscarf while on university premises."[96] The emphasis on the equal rights

---

[89] While the Court did not specify in *Dahlab* what it meant by "proselytism", it has, in its earlier case-law, interestingly, made a distinction "between bearing Christian witness and improper proselytism" — the former corresponding, in the view of the Court, to "true evangelism" and the latter representing "a corruption or deformation of it." *Kokkinakis* v. *Greece*, ECHR Series A (1994) No. 260-A, 17 EHRR 397, para. 31.

[90] Leyla Şahin v. Turkey (Application 44774/98) (Judgment of June 29, 2004) para. 108, *available through* http://www.echr.coe.int.

[91] *Id*. at para. 114.

[92] *Id*. at para. 103.

[93] *Id*. at para. 109.

[94] *Id*. at para. 104.

[95] *Id*. at para. 105.

[96] *Id*. at para. 110.

of women is intriguing given the fact that non-Muslim students had not been subjected to disciplinary proceedings; since Christian students were not prohibited from wearing the crucifix or Jewish students the skullcap,[97] the Court in effect affirmed a discriminatory practice against Muslim women.[98] "Secularism," in this picture, does not mean "equal distance from all religions and beliefs."[99]

While the Court has deemed the Islamic faith a threat to pluralistic values in a democratic society, it has deemed pluralistic values a threat to the Christian faith. In *Otto-Preminger-Institute* v. *Austria*,[100] the Court upheld a ban on the showing of a film found offensive by the majority-Catholic population of the Tyrol area of Austria. The film, "Council in Heaven," portrays God the Father as old, infirm, and ineffective, Jesus Christ as a "mummy's boy" of low intelligence, and the Virgin Mary, who is obviously in charge, as an unprincipled wanton. With the help of the Devil, they decide to punish mankind for its immorality with syphilis; first among those who represent worldly power, then among the court of the Pope, then the bishops, the convents and monasteries and finally among the common people. The Austrian authorities seized the film before it could be shown. The Court found them to have acted in ways that were "necessary in a democratic society" so as "to ensure peace in that region and to prevent that some people should feel the object of attacks on their religious beliefs in an unwarranted and offensive manner."[101] It gave little or no weight to the facts that the movie was shown in a small art house attended largely by subscribers, that the advertising was designed to discourage those that might be offended from viewing the film, and that seeing the film required paid admission from those who chose to attend. Instead, it expressly agreed that the government could legitimately restrict speech to protect the majority's religious feelings and to prevent disorder when those offended threatened to disrupt the cinema. This was in contradistinction to its stated view that information and ideas must be tolerated, even if they offend, shock, or disturb the State or any sector of a population, because such are the demands of a democratic society. Artistic impressions are often conveyed through images which may (or are intended to) shock or disturb the feelings of "a person of average sensitivity" in a form of political participation.[102] In *Otto-Preminger-Institute*, however, the Court quite

---

[97] *Id*. at para. 88.

[98] Contrast this with the Court's holding in *Refah Partisi (Welfare Party) and others* v. *Turkey* (Chamber Judgment of July 31, 2001), para. 70 ("A difference in treatment between individuals in all fields of public and private life according to their religion or beliefs manifestly cannot be justified under the Convention.").

[99] *Cf.* the Turkish government's definition of secularism in *Refah Partisi (Welfare Party) and others* v. *Turkey* (Chamber Judgment of July 31, 2001), para. 59.

[100] Otto-Preminger-Institute v. Austria, ECHR Series A (1995) No. 295-A, 19 EHRR 34.

[101] *Id*. at para. 56.

[102] *Cf. id*. at para. 5 (Lohmus, J., dissenting).

bluntly noted that "offensive" expressions about religion "do not contribute to any form of public debate capable of furthering progress in human affairs."[103]

In the *Wingrove* case,[104] the Court considered a short experimental video work entitled "Visions of Ecstasy" which had been written and directed by the applicant, Nigel Wingrove. According to Wingrove, the idea for the film was derived from the life and writings of Saint Teresa of Avila, the sixteenth-century Carmelite nun and founder of many convents, who experienced powerful ecstatic visions of Jesus Christ. In the film Saint Teresa is represented by a youthful actress dressed as a nun — albeit in a rather loose habit showing her naked breasts. During the eighteen-minute video, Saint Teresa has two erotic fantasies. First, with another near-naked female, said to represent Saint Teresa's psyche; then, with the body of Christ, fastened to the cross lying upon the ground. Much kissing, licking, and writhing ensues. And then:

> For a few seconds, it appears that he responds to her kisses. This action is intercut with the passionate kisses of the psyche already described. Finally, St Teresa runs her hand down to the fixed hand of Christ and entwines his fingers in hers. As she does so, the fingers of Christ seem to curl upwards to hold with hers, whereupon the video ends.[105]

The video was refused a certificate for distribution by the British Board of Film Classification. The Board did not refuse the certificate because of the sexual imagery being beyond the parameters of the "18" category; "it is simply that for a major proportion of the work's duration that sexual imagery is focused on the figure of crucified Christ. If the male figure were not Christ, the problem would not arise."[106] The certificate was therefore refused on the grounds that it appeared to contravene British blasphemy law, in that the Board considered that its public distribution would outrage and insult the feelings of believing Christians.

Having viewed the film itself, the Court concluded that the reasons given by the British authorities to justify the measures taken could be considered both relevant and sufficient for the purposes of them having been "necessary in a democratic society" under Article 10 to protect "the rights of others" and, more specifically, to provide protection "against seriously offensive attacks on matters regarded as sacred by Christians." The

---

[103] *Id.* at para. 49.

[104] Wingrove v. United Kingdom, 24 EHRR (1997) 1.

[105] *Id.*

[106] *Id.*, at para. 13. Later, in a concurring opinion at the European Court of Human Rights, Judge Pettiti was at pains trying to assure that the question was not religious as such: "the use of a figure of symbolic value as a great thinker in the history of mankind (such as Moses, Dante, or Tolstoy) in a portrayal which seriously offends the deeply held feelings of those who respect their works or thought may, in some cases, justify judicial supervision." "The decision not to grant a certificate might possibly have been justifiable and justified if, instead of St Teresa's ecstasies, what had been in issue had been a video showing, for example, the anti-clerical Voltaire having sexual relations with some prince or king. In such a case, the decision of the European Court might well have been similar to that in *Wingrove* case." This seems highly unlikely.

Court stressed that the State had not been attempting to suppress critical discussion of religious subjects; it was only the highly offensive manner of presentation that justified the State's actions.[107] In this respect, the judgments of *Wingrove* and *Otto-Preminger-Institute* may be contrasted with the Court's earlier statement that "Article 10 protects not only the substance of the ideas and information expressed but also the form in which they are conveyed."[108]

Dissenting judges pointed out that at issue was a "pure case of prior restraint," a form of interference which in their view was wholly unacceptable in the field of freedom of expression. Prior restraint entails interference by the authorities with freedom of expression even though the members of the society whose feelings they seek to protect have not called for such interference. The interference is based on the opinion of the authorities that they understand correctly the feelings they claim to protect. The actual opinion of the individuals remains unknown. Accordingly, said the judges, interference could not be said to correspond to a "pressing social need,"[109] and thus could not be regarded as "necessary in a democratic society."

The distinctive feature of blasphemy laws, distinguishing between different categories of expression and the display of special hostility towards specific biases, is precisely what the freedom of speech is supposed to protect us from. Selectivity of this sort creates the possibility that governments may seek to handicap the expression of *particular* ideas. In Britain, the law of blasphemy only protects the Christian religion and, more specifically, the established Church of England. This was confirmed by the British courts in 1991, ruling on an application for a judicial review of a refusal to issue a summons for blasphemy against Salman Rushdie and the publishers of *The Satanic Verses*. According to the domestic courts, the law "does not extend to religions other than Christianity."[110] Prior to the decision, in 1989, the then-Minister of State at the Home Department sent a letter to a number of influential British Muslims, in which he stated *inter alia* that "an alteration in

---

[107] Wingrove v. United Kingdom, 24 EHRR (1997) 1, para. 60.

[108] *Cf.* Oberschlick v. Austria, ECHR Reports (1991) No. 204, 19 EHRR 389.

[109] *See* Wingrove v. United Kingdom, 24 EHRR (1997) 1 (dissenting opinions of Judge De Meyer (para. 1) and Judge Lohmus (paras 3-4)). Compare the partly dissenting opinion of Judge De Meyer (concerning prior restraint), joined by Judges Pettiti, Russo, Foighel and Bigi in *The Observer and The Guardian* v. *United Kingdom*, ECHR Series A (1992) No. 216, 14 EHRR 153: "Under no circumstances . . .can prior restraint, even in the form of judicial injunctions, either temporary or permanent, be accepted, except in what the Convention describes as a 'time of war or other public emergency threatening the life of the nation' and, even then, only 'to the extent strictly required by the exigencies of the situation'."

[110] *Quoted in* Wingrove v. United Kingdom, 24 EHRR (1997) 1, para. 28. The British court continued: "We think it right to say that, were it open to us to extend the law to cover religions other than Christianity, we should refrain from doing so. Considerations of public policy are extremely difficult and complex. It would be virtually impossible by judicial decision to set sufficiently clear limits to the offence, and other problems involved are formidable." *Id.*

the law could lead to a rush of litigation which would damage relations between faiths," adding,

> I hope you can appreciate how divisive and how damaging such litigation might be, and how inappropriate our legal mechanisms are dealing with matters of faith and individual belief. Indeed, the Christian faith no longer relies on it, preferring to recognize that the strength of their own belief is the best armour against mockers and blasphemers.[111]

In the view of the European Court, "the uncontested fact that the law of blasphemy does not treat on equal footing the different religions practised in the United Kingdom [did] not detract from the legitimacy of the aim pursued in the present context."[112]

VI

Like all legal rules, human rights cover cases that we did not wish to cover and leave uncovered cases that we think should have been covered. Accordingly, rights must always be supplemented with exceptions. While the scheme of right/derogation is inevitable, it is also insufferable, for there is no definite rule or standard that would describe when to apply the right and when the derogation. This deformalizes human rights and makes their application a matter of bureaucratic administration. As we have seen, rights are a product of a political community; their administration and adjudication is about struggle and compromise, power and ideology.

The European Convention for the Protection of Human Rights and Fundamental Freedoms was established in 1950 as a bulwark of democracy. It was to define and guarantee the political basis of the European community and, accordingly, to "ensure that the States of the Members of the Council of Europe are democratic, and remain democratic."[113] In carrying out this particular task, the European Court of Human Rights is in a paradoxical situation. It must be prepared to subordinate the substantive values of "pluralism, tolerance and broadmindedness" that it has defined as a core of a "democratic society"[114] to the protection of other, more important, more "European" values, such as the protection of the rights of Christians. It thus conceives democracy merely as an instrument of such substantive values.[115]

When the Court evaluates whether a State has violated human rights because it was "necessary in a democratic society," it must first choose which contested conception of

---

[111] *Quoted in id.*

[112] *Id.* at para. 50.

[113] COUNCIL OF EUROPE, 2 COLLECTED EDITION OF THE 'TRAVAUX PRÉPARATOIRES' OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS (1975), at 50 (Layton) and 60 (Ungoed-Thomas).

[114] *See, e.g.*, Handyside v. United Kingdom, ECHR Series A (1976) No. 24, para. 48; Lehideux & Isorni v. France, ECHR Series A (1998-VII) No. 2864, para. 55.

[115] *Cf.* Harvey, *supra* note 62, at 408-409.

democracy to uphold. 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 a Euro-consensus, a European community in aggregate; or it can rely on rational choice and simply assume that it knows what Europeans think of matters. Only after having chosen a notion of democracy can the Court determine whether the concept is best served by the right enshrined in the Convention or by the State's derogation from it. In justifying reference to the rule or the exception, the Court will use notions such as "public order" or "morals." Such language reveals that the characterization of social objectives in terms of the "rights" of their beneficiaries adds little to the administrative pattern of dealing with them. Rights involve political give-and-take and ad hoc decision-making.

Whether the judges sketch "democracy" through empirical or rational moves, they rely on their own experience and 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. Undoubtedly, for example, both "pluralism" and "tolerance" are part of democracy — but equally clearly, both notions must have some limits, and those limits are drawn differently depending on what values one regards as hierarchically superior. When the Court uses the notion of "democracy," it participates in the societal debate over the meaning of that 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 ensures its power through political maneuvers. The danger in this is, however, that in sketching "democracy," the judges come to reproduce societal structures in an uncomfortably conservative and unreflective manner; thus, the way some groups — perhaps the majority — used to think about society and the good life becomes the way we should always think. But what if that majority opinion was based on ignorance, superstition, and misunderstanding? Our democracy would be based on retrograde principles such as racial and religious hatreds if left uncriticized.

It is precisely because of their political nature that human rights offer us the language of critique.

VII

The foregoing sections recounted a story of the development of the European Convention from a bulwark against Fascism into an intergovernmental administrative process in which rights are recognized, limited, weighed against each other, and overruled as a

matter of routine. In Strasbourg too, human rights have become institutionalized as a banal, everyday administration of the liberal State.

This has been both a blessing and a curse. It is a blessing because the anti-fascists have won. It is very hard, if not well nigh impossible, for any European State to try to turn into the kind of totalitarian order that interwar fascist States were. It is a curse inasmuch as it has abandoned the "human rightists"[116] in a limbo, equipped with a language that was supposed to be revolutionary but which now in fact celebrates the most mundane and down-to-earth practices of their States and the institutions representing them at an international level.

Inasmuch as most *droit de l'hommists* are men and women of the Left, they too have been abandoned in a limbo. Can the commitment to human betterment really be transfigured into the call for support for the Strasbourg judges? Hannah Arendt would have known better: the revolution lasts while it lasts; the moment of politics — of real, Left and Right politics — is brief and gone before you notice. That is the point at which well-dressed men and women begin meeting at rooms with high ceilings and talking to each other from behind enormous piles of paper. That is the moment of institutionalization, routine, stasis. At that point, the language of rights starts to intermingle with the language of per diems, allowances, and flight schedules; before long, the next meeting will be about co-ordination of the meetings that will follow. Long live the Revolution! The Revolution is dead.

The Left cannot survive at such meetings. What transpires in them, the conditions of possibility that they create, are averse to the Left. Nothing has done away with Marx's critique: rights individualize. This is not bad in itself. But it is inadequate. The meetings in Strasbourg are about individuals claiming rights; only occasionally can any collective good be expressed there, and even then in a truncated form. The Left commitment is a commitment of *solidarity*. This is a collective commitment that looks for and accepts the reality — the irreducible reality — of the collectivity. The Left task is to make the collective alive to its sense as such — not as a mere aggregate of individuals pretending they make "rational choices" within a collectivity that is merely a context for playing games in which to realize individual interests. This is why Harold Laski warned, studying in a 1947 UNESCO Committee of Experts the theoretical problems raised by the then-drafted Universal Declaration of Human Rights, that any attempt to formulate such a declaration in individualist terms "would quite inevitably fail": "[i]ts effect would be to separate, and not to unify, the groping towards common purposes."[117] For him, such attitude would only produce individuals who could not, "in any serious way, become re-

---

[116] The term '*droit-de-l'hommisme*' was apparently coined by Alain Pellet. *See* Alain Pellet, *La Mise en Oeuvre des Norms Relatives aux Droits de l'Homme*, *in* DROIT INTERNATIONAL ET DROITS DE L'HOMME: LA PRATIQUE JURIDIQUE FRANÇAISE DANS LE DOMAINE DE LA PROTECTION INTERNATIONALE DES DROITS DE L'HOMME 126 (Hubert Thierry and Emmanuel Decaux eds., 1990).

[117] Harold J. Laski, *Towards a Universal Declaration of Human Rights*, *in* HUMAN RIGHTS: COMMENTS AND INTERPRETATIONS, *supra* note 28, at 82-83.

sponsible citizens in a democratic society."[118] Here, then, is the properly Left place for rights.

The language of rights is that of universal rights. It is the language of rights that creates the collectivity — it rises from interest to right, private to public. To say "this is my right" *is* radically different from saying "this is in my interest."[119] In the former statement, I exist as a member of a community; in the latter, as an egoistic individual. In the former statement I have a claim; in the latter, a privilege; the former speaks the language of solidarity; the latter, the language of strategy. The meaning of right, for the Left, is in the act of *claiming* it, not in administering it. To claim it, it must be claimed against somebody. It is not a tool in an impersonal "management" of something, least of all, the management of private interests in a utilitarian game of maximal interest-fulfillment. This is a Lockean concept of rights; this is not a Left concept. And this, as has been pointed out by Jürgen Habermas, is where the French Revolution differed from the American one.[120] With their recourse to rights, the French wanted to legitimize the overthrow of the *ancien régime*; whereas the American colonists wished to legitimize their independence from the British Empire. For the Americans, Locke's conclusions as to the right to life, liberty, and property had already become commonplace, presenting the practical laws of the good life and prudent action. And so, in constructing what was practically an inventory of the existing rights possessed by British citizens, they sought to protect the private autonomous sphere of social intercourse against state intervention. The sole aim was to limit political power to a minimum. This is an essentially unrevolutionary tradition. The appeal to common sense in America corresponds to the appeal to philosophy in France. Without a rights tradition, any recourse to rights in France had first to form the *opinion publique*. It compelled philosophic insight to prepare for revolutionary action, philosophers acting as legislators for a fundamentally new system. With this, a different construction arose, inspiring "a revolutionary self-understanding in the politically active citizen."[121] The understanding was that the desired harmony among competing individual interests would only come from *the enlightened self-interest within the society* — society was "the subject which organizes the interrelationships of human life as a whole."[122] While the American Revolution advocated Lockean individualism, the French Revolution took to the streets for European republicanism in collectivity.[123] The former is the language of the Right; the latter is the language of the Left.

---

[118] *Id*. at 82.

[119] *Cf.* Martti Koskenniemi, *Human Rights, Politics and Love*, 4 MENNESKER & RETTIGHETER 33, 43 (2001).

[120] *See* JÜRGEN HABERMAS, THEORY AND PRACTICE 82-120 (1977).

[121] *Id*. at 96.

[122] *Id*. at 103.

[123] *See* LUC FERRY AND ALAIN RENAUT, PHILOSOPHIE POLITIQUE 3: DES DROITS DE L'HOMME À L'IDÉE RÉPUBLICAINE (3d ed., 1992).

Applied in the context of international human rights work, the conclusion shifts the focus away from tinkering with the institutional management of rights-regimes. Regimes are not unimportant but they are insufficient alone. They can be part of a Left project about solidarity and community only once they are embedded in a live culture of claiming rights. What is needed, on the Left, is awareness that rights alone can mean anything and that when embedded in a particular institutional context such as the European Court of Human Rights (and they are always in some institutional context), they come to mean whatever the policy of the institution is. And there is, as we have seen, no intrinsic guarantee that a human rights institution always aims to advance a Left policy. To respond to claims of solidarity and community, rights and rights-institutions need to be accompanied by political work that expresses critique and contestation of international institutions from such perspectives.

If there is no sense of solidarity in the community, no rights will save us. Rights operate in an acceptable way only once their meaning and limits, and the weight we give to them, is inspired by the ideal of solidarity.