PROMOTING CHANGES IN TIMES OF TRANSITION AND CRISIS:

REFLECTIONS ON HUMAN RIGHTS EDUCATION

eds.

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Promoting Changes in Times of Transition and Crisis: Reflections on Human Rights Education

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Eds. Krzysztof Mazur, Piotr Musiewicz and Bogdan Szlachta

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Man and His Rights

The experience of two world wars – and especially the memory of the systematic and centrally planned murder of millions of people in the second half of the twentieth century (which was marked by the emergence of a number of totalitarian systems) – all encourage the modern man to pay particularly close attention to the old and new manners of justifying the measures and standards aimed at ensuring that similar events will be prevented in the future. In undertaking such considerations, some people still refer to the tradition of natural law, rooted in the thought of the pre-Christian times, but also important for the tradition that has been closer to Christians, who – to a great extent – built their theoretical approach to the essentials of order on the foundations of the Greco-Roman heritage. It is also a tradition that is important to the modern Western thought, including the liberal camp, since its creators – such as John Locke – were also its followers. This tradition corresponds, to some extent, to the approaches that look to find the sources of universally valid standards in the Revelation of God; it is also associated with approaches that make no reference to either the will of God, or to the concept of the nature of the species, but rather find the source of such standards in human faculty and reason. The reference to such varied approaches reveals a major issue: the normative order is sometimes – to some extent paradoxically – also associated with a set of standards recognized or established by a body of public authority appointed for that very purpose, which, while determining the content of the rules governing the behaviour of people living in a given territory, adds to those norms and standards an element of collective coercion, applicable to the individual violating such established rules. The question of whether such a body of authority is in itself related to some standards: derived from God, from nature, or reason, is still valid, despite the fact that among the proposed approaches appears one that seems to be particularly common today: perhaps, after all, the body that constitutes the legal standards has not been established in order to align its will with some «higher standards», but rather with the boundaries set by justifiable rights of individuals (the so-called natural rights). Such rights may be due to them by virtue of their dignity, construed as possible behaviours of an individual and their right to demand certain behaviours of others under said standards. Human rights are usually derived from standards of a "higher law" – a fact that continually gives rise

to controversy. However, such an approach, close to many standpoints formulated in the second half of the twentieth century, is – to some extent – at odds with the older natural-legal tradition, according to which standards are not related to the rights of individuals (identified as prior in relation to the norms), but to the inherent faculty of any member of mankind – so important to the "normative ethics" based on the idea of the reality of a universal set of human qualities determining the content of human nature or essence. This "older approach" leads us to the hypothesis that natural human reason is capable of discerning the proclivities that guide an individual to their ultimate goal as a human being, and it also requires the reconciliation of the will of a legislative authority with known standards that protect such proclivities.

The thesis that norms are already legal in character when individuals agree to abide by them "externally" (regardless of their subjective assessment), as a result of their fear of becoming the target of coercion on the part of the state, does not rule out the reconciliation of legal norms with the requirements based on considerations concerning the proclivities of the species, but it also does not require such reconciliation. Problems related, on the one hand, with the relationship of legal norms and entitlements, and, on the other hand, with the strengthening of entitlements – still cause much debate, as evidenced by the papers presented to the Readers within this volume. These are texts that touch upon the issues of fairness of the established law and direct attention to human rights (those upheld and those violated) - which, in any case, are a major point of reference, and even have the power to bind the will of the governing bodies that create legal norms, thereby limiting their arbitrariness[1]. These texts are the fruits of a very interesting meeting held during the Third "Human Rights Education" Congress, which took place in December 2012 in Europe (after the congresses in Australia and Africa), in Krakow, Poland (at the oldest Polish university) and in Auschwitz, Poland – where the most notorious Nazi German concentration and death camp was located during World War II. Auschwitz was a place of death, where millions of innocent people were deprived of their humanity and murdered.

As Dean of the Faculty of International and Political Studies at the Jagiellonian University in Krakow, the host and main organizer of the Congress, I would like to express my gratitude to **Professor Sev Ozdowski** from Sydney, who not only contributed greatly to the excellent organization of the event, but also was always ready

[1] Such self-imposed limitation leads to the paradox indicated as early as the seventeenth century by Thomas Hobbes: sovereign, unlimited legal authority (exercised by an individual as well as a group, or the current majority, or "the people", or "a sovereign political nation"), is not only supposed to guard and ensure the enforcement of the law, but is also a source of instruction specifying the legal norms, backed by a threat of punishment, and, in fact, it the only body of authority capable of determining the limits and boundaries of its own actions – by means of law itself. Hobbes resolved the paradox by conferring full power to the sovereign and putting him above the law, which fact, however, did not necessarily entail his total arbitrariness – as the sovereign had to respect the freedom of individuals in the area where "the law was silent."

to provide the organizers with advice and assistance (also related to the subject matter). What is equally important, we could always count on his good humour. I would also like to take this opportunity to thank all the members of the team led by **Doctor Krzysztof Mazur**, whose skills and commitment I have always admired, and who is among those responsible for the success of the Congress. Finally, I would like to thank all the sponsors, without whose support it would be impossible for us to witness the immensely interesting addresses and establish close relations with representatives of academic centres from all over the world.

Prof. Bogdan Szlachta

Importance of History

Peter Hommelhoff
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Significance of Auschwitz for the Contemporary Germans[1]

1.

Auschwitz – the German name of a small Polish town on the border to Upper Silesia is inseparably bound for the peoples of Europe and of the entire world with the mass extermination of millions of Jews – professionally organised and industrially carried out without mercy by thousands of Germans.[2] Auschwitz stands for unfathomable absolute evil, the unbearable and terrible perversion of German innovation and organisational ability. Auschwitz will be a shadow for "German" and "Germany" for many generations still to come.

In today's Germany, Auschwitz means the criminal abyss into which the National Socialist regime plunged firstly its own land and then the countries of Europe in twelve murderous years,[3] the crimes in which so many Germans actively participated or looked the other way because of indifference, moral brutalisation or fear. The displacement and murder of Jews, the genocide inflicted on the European Sinti and Roma, the incarceration of the Polish elite and the enslavement of the Poles, the annihilation of Russian and Ukrainian civilians, women and children en masse, but also the murder of thousands of mentally handicapped and other groups in Germany and Austria – to describe only the terrible consequences of these deeds committed countless numbers of times by a regime criminal to its core. Auschwitz gives the discourse and the remembrance in Germany of the 21st century access not only to the holocaust here in this place, in Majdanek, Sobibor

[1] I wish to thank Prof. Dr. Edgar Wolfrum (Universität Heidelberg) and Prof. Dr. Johannes Heil (Hochschule für Jüdische Studien Heidelberg) for providing extremely helpful material.

[2] See also the Hamburger dissertation of I. Hansen, *"Nie wieder Auschwitz!" Die Entstehung eines Symbols und der Alltag einer Gedenkstätte 1945-1955*, Hamburg 2012.

[3] See also: P. Reichel, 'Auschwitz – das Synonym für die Menschheitskatastrophe der Moderne' in *Deutsche Erinnerungsorte*, hrsg. E. François, H. Schulze, Bd. 1, München 2001, pp. 600 ff, 604 ff, 618 ff.

and Treblinka, but to the criminal National Socialist regime as a whole in which millions of Germans from university professors to concentration camp minions were involved. Even in Germany, Auschwitz becomes more and more a symbol for the National Socialist crimes and the involvement of so many Germans in them.

Acknowledgement of the extermination camp Auschwitz-Birkenau, the gassing of millions of Jews and others and of the real circumstances of their murder spread in Germany relatively late. It is true that the facts were comprehensively exposed in the Nürnberg war crimes trials from 1946 onwards.[4] Nevertheless, the entire picture remained so abstract that, in Germany at first, figures were seriously and without deeper emotions disputed in public and within families. Did "only" one million Jews "die" in Auschwitz or were more than two million Jews or even five million Jews "killed" there. The turning point came in 1963 with the Auschwitz trial before a jury in Frankfurt am Main.[5] Here the terrible details were subjected to the legal procedure of the criminal law. The unloading of the railway wagons with the help of whips and dogs, the selection on the platform of those to die and those to work for a while, the herding of people into the gas chambers, their choking torment and cremation in the ovens to the removal of the ashes into the Vistula. And for those initially spared – the inhuman torments and extermination by "labour". The press reported this in detail in Germany and in the entire world, but also and above all reported about the perpetrators, the concentration camp minions – unremarkable, harmless post-war neighbours with bourgeois jobs, their past as professional murderers and their bestial sadistic murder lust unsuspected before the Auschwitz trial.

From that time, Auschwitz was and has been ever present in Germany. Many young people have intensively concerned themselves with the events in the concentration camps and then generally with the time of National Socialism and its crimes. The silence and suppression practised by fathers and grandfathers ended.[6] Only in the mid-1960s, twenty years after the end of the second world war, did the Germans begin to deal with their terrible past with commitment, and thereby began to cope with their past – a process widely spread throughout the people, consolidating Germany as a constitutional state with its fundamental rights as a democratic state under the rule of law. Viewed in this manner, Auschwitz is an important element of the foundations on which the Federal Republic of Germany is built. For that reason it was impossible in 1990 to use Auschwitz as an argument against unification with the GDR – as a number of famous intellectuals

[4] See: ibid., p. 604 ff.

[5] See: ibid., p. 613.

[6] On this above all H. Lübbe, *Vom Parteigenossen zum Bundesbürger. Über beschwiegene und historisierte Vergangenheiten*, München 2007, with his highly controversial thesis that in the early Federal Republic the "collective silence on the past" fulfilled the political function of facilitating the integration of those "with records from the past" into the *bourgeoisie* of the new Federal Republic (p. 138).

such as Günter Grass wished: the final division of Germany as the punishment for Auschwitz.

How is Auschwitz present in Germany today and how does this symbol of absolute evil, this metaphor for the human catastrophe in recent history, influence life in this country? This will be commented on in three sections: firstly, "Auschwitz in elite discourse", secondly "Auschwitz in the memory of the people", thirdly "nationalism and the holocaust in school education".

2.1.

In elite discourse, Auschwitz must be viewed above all as a subject of German politics and, within that, the Constitution of the Federal Republic of Germany, its fundamental law, must firstly be consulted. It begins with an auspicious and reverberating sentence: "Human dignity is inviolable. To respect and protect it shall be the duty of all state authority." (Art.1 Subsec. 1). This was the answer of the mothers and fathers of the Constitution to the murderous National Socialist regime[7] and thereby also and above all to Auschwitz, the monstrous terror of which, while it could be imagined by the creators of the Constitution in 1949 because of the Nürnberg trials, was still not yet known in its extent and detail at that time. With the term "human dignity", the German Constitution placed the individual, every single person and his/her dignity, whether German or not, independent of race, gender, age and religion, in the centre. Each fundamental and human right is to be seen from the individual's point of view. The human dignity of every individual is confronted by the Constitution with state power – the power of state institutions and the power of every person exercising state power. They are obliged not merely themselves to value human dignity, to respect it and to restrain themselves accordingly in the exercise of their own power: the state, its institutions and its agents are obliged to protect human dignity. Human dignity is entrusted to the power of the state, which must therefore intervene as soon as infringement or threatened infringement of the dignity of an individual by another arises.[8]

"Human dignity is inviolable." Over the years the beacon of the German Constitution has increasingly been recognised as the answer of the democratic state to Auschwitz – a beacon not in the least confined within an unbinding sentence but which even up to the present time unfolds its practical legal significance – for example in the criminal conviction of the head of the Frankfurt

[7] See: H. Dreier, *Kommentar zum Grundgesetz*, Tübingen 2004, art. 1, marg. no. 22; H. Hofmann in *Kommentar zum Grundgesetz*, hrsg. B. Schmidt-Bleibtreu, H. Hofmann, A. Hopfauf, Köln 2011, art. 1, marg. no. 1; H. Jarass, B. Pieroth, *Grundgesetz*, München 2012, art. 1, marg. no. 1.

[8] See: H. Hofmann, op. cit., art. 1 GG, marg. no. 8; H. Jarass, B. Pieroth, *Grundgesetz*, art. 1 GG, marg. no. 56.

police[9] who threatened a child kidnapper with torture unless he revealed the hiding place and thereby made the rescue of the child possible. The threat of torture used even for this purpose infringes the human dignity of the person threatened according to the German criminal courts and to the International Court of Human Rights.

2.2.

But "Auschwitz" is also present today in simple criminal law. The "Auschwitz lie" (Auschwitzlüge) is at the centre at the widely cast criminal offence of incitement. "Whoever publicly or in a meeting approves of, denies or renders harmless an act committed under the rule of National Socialism of the type indicated in Section 220a subsection (1), in a manner capable of disturbing the public peace shall be punished with imprisonment for not more than five years or with a fine (Sec. 130 Subsec. 3 Criminal Code)".[10] In German criminal law practice, the public prosecutors and the courts take this offence very seriously and have thereby put an end to all downplaying ("at most only a few thousand died") and trade-offs ("and what about the terrorist attacks on Hamburg and Dresden?").

Auschwitz has also influenced another element of German criminal law up to today,[11] namely the statute of limitations for murder (Sec. 78 Subsec. 2 Criminal Code).[12] Between 1960 and 1979, the Federal Parliament held four passionate and highly controversial debates on the question of limitation. In 1960, murders, including those in Auschwitz, Majdanek and Treblinka, were initially statute-barred. Then, however, under the influence of the Frankfurt Auschwitz trial and the trial of Adolf Eichmann in Jerusalem, the Federal Parliament extended the period of limitation to 1969 and later again for genocide to 1979. The then Federal Minister of the Interior Werner Maihofer, a criminal law professor, crystallised the political dimension of the question of limitation in the parliamentary debates: "Some time the grass grows over murder, usually already after a generation. But not over Auschwitz, not even in a hundred generations".[13] This distinction between murder and genocide was repealed by the German legislation in 1979 and a limitation period for any murder abolished.

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[9] So-called „Rettungsfolter"; H. Hofmann, op. cit., art. 1 GG, marg. no. 18.

[10] The offence is controversial; T. Fischer, *Strafgesetzbuch*, München 2011, § 130, marg. no. 24 ff.

[11] See: P. Reichel, op. cit., p. 614 f.

[12] From the criminal law point of view: B. Jähnke, H.W. Laufhütte, W. Odersky, *Strafgesetzbuch. Leipziger Kommentar*, Berlin 2006, § 78, marg. no. 5.

[13] P. Reichel, op. cit., p. 615.

2.3.

But Auschwitz has, until this day, left its impression on political life in Germany even outside the area of law. After the speeches of Auschwitz survivors and the Polish foreign minister Władysław Bartoszewski on the occasion of the 50th anniversary of the end of the war,[14] the then President of the Federal Republic, Roman Herzog, established the 27th of January, the anniversary of the day on which the Red Army freed the extermination camp Auschwitz-Birkenau in 1945, as the official day on which victims of National Socialism should be remembered.[15] Since 1996, on this day every year the parliamentarians come together with the highest representatives of the state, the Federal President, the president of the Federal Council and of the Federal Constitutional Court to remember. A speech of one of the victims of National Socialism who survived Auschwitz is a traditional part of this meeting. The following speakers have addressed the full session of the Federal Parliament: Yehuda Bauer, head of the Yad Vashem memorial (1998), the holder of the Nobel peace prize Ellie Wiesel (2000), Bronisław Geremek, former Polish foreign minister, Simone Veil, the French president of the European Parliament (2004), Marcel Reich-Ranicki the German highly regarded and famous literary critic (2012). This list also includes the Israeli president Simon Peres (2010), who emigrated from Belarus to present day Palestine prior to the outbreak of the war. In these annual speeches, widely covered in the media in Germany, the memory of the terror regime of National Socialism, in particular in Central and Eastern Europe, and the extermination of Jews by Germany is kept alive and honoured.

2.4.

Both the print press and above all television have for a long time been central to this remembrance. The press reacts immediately, intensively and loudly to any sign of anti-Semitism – to the disfiguration of synagogues and Jewish cemeteries as well as to, fortunately occasional, recent attacks against Jewish citizens in Germany committed mostly by youths of Arab origin. The public displays by neo-Nazis and their like mobilise the press in particular. In this, the press acts in agreement with the majority of the populace. Every march and public assembly of neo-Nazis is accompanied by counter-demonstrations, the participants of which represent not only the political left wing, but the entire range and variety of the populace. The press in Germany reacts unanimously and with the greatest sensitivity to

[14] R. Sűssmuth, W. Bartoszewski, J. Rau, 'Gedenken an das Ende des Zweiten Weltkrieges und der nationalsozialistischen Gewaltherrschaft', at <http://www.bundestag.de/kulturundgeschichte/geschichte/gastredner/bartoszewski/rede_bartoszewski.html#barto>.

[15] See: G. Jochheim, '27. Januar – Gedenktag für die Opfer des Nationalsozialismus', *Informationen zur politischen Bildung*, Nr. 23 (2012), p. 1 f.

anti-Semitism and National Socialist ideas. The parliamentary investigations of the circumstances surrounding the murders committed by a group of three under the name "National Socialist Underground" against Turkish and Greek immigrants is extremely prominent in current press reports.

2.5.

The unchanged strong presence of Auschwitz in German society was illustrated some years ago by the reaction to a speech of the famous and highly-regarded writer Martin Walser in the Frankfurt Paulskirche,[16] the birthplace of parliamentary democracy in Germany. Some passages in this speech give the impression that Auschwitz should lose its lasting effects, that Auschwitz should be downplayed. Remarks such as "uninterrupted presentation of our shame", its "instrumentalisation for present purposes" and the sentence "Auschwitz is not appropriate as a routine threat, a means of silencing invoked at any time or a moral killer argument or even only an exercise of duty" produced a public scandal in 1998. Not only Ignaz Bubis, chairman of the Central Council of the Jews in Germany, protested with penetrating sharpness. In the media and in many groups in society, passionate and stormy debates broke out showing with increasing clarity more that even the generation of Germans born more than 50 years after the end of National Socialism does not intend to escape the continuing responsibility of Germany for Auschwitz.

3.

But does this acceptance of responsibility apply only to the elite? How is Auschwitz remembered among the general populace?

3.1.

This question is difficult to answer in the present year 2012, when almost all Germans who actively participated in National Socialism must already have died. The well-known title of a book in social psychology "Grandfather was not a Nazi" raises the fear that repression and denial has already been firmly established in the generation of the grandchildren. In contrast, a survey of young people in 2010[17] found that 69% claimed to be very interested in the National Socialism period,

[16] Address of thanks, 11 October 1998, <http://www.hdg.de/lemo/html/dokumente/WegelnDieGegenwart_redeWalserZumFriedenspreis>.

[17] Ch. Staas, 'Was geht mich das noch an?', *ZEITMagazin*, Nr. 45 (2010), at <http://www.zeit.de/2010/45/Erinnern-NS-Zeit-Jugendliche>.

80% considered that remembrance and memorials were meaningful and 59% felt shame for the German crimes. The Holocaust is a major issue, because, since the 1990s, it is the main subject in the discussion concerning National Socialism. However, in the experience of those with knowledge of the subject[18] there is a great danger. The result of the discourse on National Socialism and its crimes: namely, regret is too often prescribed. No one can reach the minds of the youth today by means of compulsory regret. Only socially desired talk about the time of National Socialism is communicated. The work of remembrance is thereby only pretended. While dealing with this time in current school lessons, with Auschwitz at their centre, difficult pedagogical and didactical questions are raised. In the highly sensitised schools in Poland, on the contrary, maintaining remembrance is easier. The pupils, the great-grandchildren of victims, travel to Oswiecim and encounter the horror of the extermination camp in the pictures there.

3.2.

Anyone speaking about Auschwitz at present in Germany cannot ignore Israel,[19] the state founded in Palestine by the displaced, persecuted and survivors of the National Socialist murder machine. Surrounded by deeply hostile neighbours and often attacked from their territories, the Israelis repeatedly defend themselves in a manner which meets with the disapproval and rejection of many Germans. The Israeli settlement politics in particular is always criticized here. Nevertheless, Israeli actions hardly ever lead to public protests in Germany, especially not to protests of such dimensions as those experienced in the 1970s against the USA and the Vietnam war. This remarkable reserve of the Germans has an undoubted reason: Auschwitz. The survivors and the descendants of the people that German National Socialism intended to exterminate, legitimately fight against being pushed into the sea by their Arab neighbours. Hence the acknowledgement repeated by Federal Chancellor Merkel a number of times, that the peaceful existence of Israel is an element of the self-understanding of the Federal Republic of Germany, and that any attack on Israel is an attack on Germany,[20] causes only scattered objections but no widespread protest. In our country, Auschwitz continues to be present.[21]

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[18] See: ibid.

[19] The contributions in *Deutschland, Israel und der Holocaust. Zur Gegenwartsbedeutung der Vergangenheit*, hrsg. B. Faulenbach, Essen 1998.

[20] See: G. Hofmann, 'Regieren nach Auschwitz', *Bundeszentrale für politische Bildung*, 22 April 2008, at <http://www.bpb.de/geschichte/zeitgeschichte/geschichte-und-erinnerung/39822/regieren-nach-auschwitz>.

[21] This was also clear from the reaction to the judgement of the Landgericht Cologne (inter alia, printed in *Neue Juristische Wochenschrift*, 2012, p. 2128) on the circumcision of Jewish and Moslem boys; see the contributions in *Beschneidung. Das Zeichen des Bundes in der Kritik zur Debatte um das Kölner Urteil*, hrsg. J. Heil, S. Kramer, Berlin 2012.

4.

But will this attitude continue into the future? Teaching in German schools must make a decisive contribution to resolving this issue. As early as 1966, Theodor Adorno in an article "Education after Auschwitz"[22] demanded that all political lessons concentrate on Auschwitz never being repeated. The mechanism by which individuals become capable of such deeds must be recognised. Adorno saw the roots in the inability of people to identify with others. This inability was without doubt the most important psychological condition for something like Auschwitz to be permitted by a relatively moral and harmless society. "Education after Auschwitz" therefore means two things, according to Adorno: firstly, education in early childhood and secondly, general enlightenment – creating a spiritual, cultural and social climate which makes a repetition of those events impossible.

Forty years later, Adorno's concept was translated into concrete educational guidelines by the education scientist Micha Brumlik. In reference to previous experiences in pedagogical guidance, he placed the school and external consideration of anti-Semitism in the foreground.[23] Brumlik concludes that useful strategies against anti-Semitism are based, on a methodical triangle, the reduction of information deficits, confronting the prejudices of many pupils and promoting empathy with the victims of anti-Semitic, racist and sexual discrimination and persecution. Brumlik sees the "prohibition of humiliation", which he derives from human dignity, as the background to this pedagogical triangle.

The enormity of the challenge faced by teachers in Germany in education after Auschwitz, which is necessary and actually practised, thereby becomes clear. They must explain, overcome prejudices, awaken empathy, but without prescribing further pupils' regret about the National Socialist crimes. This is achievable only with the involvement of the pupils themselves and their activation. They must work out the framework within which the National Socialist crimes and Auschwitz were possible. They must understand the political, sociological and psychological preexisting conditions, which caused individuals to join in or at least look the other way, and they must question why the individuals were capable of so little empathy for the fate of their fellows. This requires working on concrete daily situations which occurred in the time of National Socialism, because there lie the answers to the question of how the violence of Auschwitz could develop out of a rational and cultivated modern society. The teaching material required for such answers has been available in school education for a long time.[24]

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[22] T.W. Adorno, 'Education after Auschwitz' in idem, *Kulturkritik und Gesellschaft*, hrsg. R. Tiedemann, Frankfurt am Main 1977, *His Gesammelte Schriften*, Bd. 10.

[23] 'Dass Auschwitz sich nie wiederhole… Pädagogische Reaktionen auf Antisemitismus', *Bundeszentrale für politische Bildung*, 12 December 2008, at <http://www.bpb.de/politik/extremismus/rechtsextremismus/41277/dass-auschwitz-sich-nie-wiederhole->.

[24] See e.g.: K. Hildebrand, *Das Dritte Reich*, München-Wien 1979, *Oldenbourg Grundriss der Geschichte*, Bd. 17.

The basic questions of the still unfathomable events of the National Socialist rule in Germany, the basic questions to Auschwitz continue to be posed in spite of the increasing distance in time from these events. However, the efforts of answering those questions will be both more general and more fundamental. This work opens the perspective for human rights and turns out to be a contribution to their stabilisation. Perhaps we Germans can in this way today make a distinctive contribution to our own to human rights – their elucidation, their security and their implementation. One way or the other, for us Germans the words of Ellie Wiesel on 27 January 2000 before the German parliament remain valid: "To the end of time, Auschwitz will be part of your history as it is part of mine".[25]

Abstract

"Auschwitz" has become in Germany the quintessential symbol for the crimes of national socialism and the involvement of so many Germans in them. But "Auschwitz" is also a part of the foundation on which the Federal Republic of Germany as a democratic state under the rule of law is built: Human dignity is inviolable (Art. 1 of the Constitution). On the annual anniversary of the liberation of the Auschwitz-Birkenau extermination camp, the Federal Parliament remembers the victims of national socialism in a solemn session. A highly alert press also keeps the memory of those crimes present in the public mind. The coming generation is intensively involved, through the school curriculum and television, in the discussion of antisemitism and the essential conditions in which human rights are secure and asserted.

Peter Hommelhoff

Professor Hommelhoff is a former Rector of the Ruprecht Karis University (Heidelberg) and Professor of Law; specialises in legal aspects of trade and international cooperation. Professor Hommelhoff holds Doctorate Honoris Causa of the Jagiellonian University for initiating the School of the German Law at the Jagiellonian University, and Leo Baeck Award for support to the College of Jewish Studies in Heidelberg.

[25] *Rede von Elie Wiesel (27.01.2000) in deutscher Übersetzung*, at <http://www.bundestag.de/kulturundgeschichte/geschichte/gastredner/wiesel/rede_deutsch.html>.

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The Significance of Auschwitz for the Contemporary Jewish World

1.

To summarise the significance of Auschwitz for the contemporary Jewish world in a few short pages is a difficult challenge.[1] One reason for that which I should mention from the outset is that it is impossible to generalise about the contemporary Jewish world. It is very far from having a single voice or a single attitude – there is a Jewish state of Israel, and there is a Jewish diaspora spread out in very many countries across the world; and the contemporary Jewish world is divided up also between traditionally Orthodox Jews, modern Progressive Jews, and secular Jews, even atheist Jews. Even if all Jews are conscious of and troubled by the Holocaust, they do not necessarily share a consensus on how to make sense of it or assess its significance. All that I can propose here, therefore, are some reflections on different Jewish responses to Auschwitz, some of which are widely shared and others not. As for my qualifications to speak about Auschwitz, I was born in England after the war and so I am not an Auschwitz survivor; nor are there Auschwitz survivors in my extended family. But I have had a scholarly research interest in Auschwitz for twenty-five years, in particular an anthropological concern for the future of the museum there.[2] One thing I have learned about Auschwitz from many dozens of visits to the place is that the more one learns about it – what

[1] This is a modestly expanded version of a presentation originally made during a day specially devoted to Auschwitz as part of the Human Rights Education conference at the Jagiellonian University, Krakow, in December 2012; I am grateful to the conference organisers for the invitation to speak on this subject. It has not been possible here to cite (let alone analyse) the vast literature which now exists on the complex, multi-layered subject of Auschwitz; I have restricted myself in the notes to a handful of citations to document only a few specific points mentioned in the text.

[2] See, for example: J. Webber, *The Future of Auschwitz. Some Personal Reflections*, Oxford 1992; idem, C. Wilsack, T. Świebocka, *Auschwitz. A History in Photographs*, Bloomington–Warsaw 1993 (for the Auschwitz-Birkenau State Museum, Oświęcim); J. Webber, 'Lest

happened there and what it represents – the more difficult and the more challenging one finds it to be.

Why is that so? Probably the main reason is that Auschwitz today is a place of paradoxes and contradictions. It is an immense cemetery (probably the largest that the world has ever known), and yet it isn't a cemetery. It was never dedicated as a cemetery. In an ordinary cemetery, the people who are to be buried are dead, whereas in Auschwitz people were brought there in order to die. In an ordinary cemetery, people are laid ceremonially to their rest, whereas in Auschwitz their ashes were simply scattered or dumped unceremoniously in one of the ponds in Birkenau. So Auschwitz is a cemetery, but it isn't a cemetery. Nor is it today presented architecturally as a cemetery – but rather as the carefully conserved, partially restored ruins of the original Nazi German concentration camp, on two separate sites (the Auschwitz main camp and the Auschwitz-Birkenau camp three kms away). Auschwitz has been officially preserved as a museum, but it is not like any ordinary museum. It is a place of pilgrimage and it is a place of mass tourism (now with more than 1.4 m visitors a year),[3] but it is not like any ordinary place of pilgrimage or mass tourism. We do not have a word to describe what this place is. Auschwitz is a place of great contradictions. Some see Auschwitz as relevant only to themselves, others see it as relevant to all of humanity. It is located in Poland, and maintained and interpreted today by Poles; but it was established as a concentration camp during the Second World War by the German occupiers of the country. Some would say that Auschwitz is about the death of God; others would say that Auschwitz is about the need to believe in God, and to have faith in a future redemption from tragedy and catastrophe.

People often speak about what Auschwitz symbolises, but it is very, very different from being merely a symbol. It is a real place. The mass murders really happened here. Auschwitz is an open wound, and like any open wound it is very hard to deal with – the horrifying events here, the appalling fate of the terrified victims, the colossal force and scale of the systematic mass murder, a place of extreme suffering and of an unimaginably vast number of dead – round about one

We Forget! The Holocaust in Jewish Historical Consciousness and Modern Jewish Identities' in G. Abramson (ed.), *Modern Jewish Mythologies*, Cincinnati 2000, pp. 107-135.

[3] More than one million visitors have been coming to Auschwitz annually since 2007, reaching a figure of 1,430,000 in 2012 – a record number since the museum was established in 1947. They come from around the world (Polish visitors account for only about 30% of the total), indicating that visitor interest in Auschwitz is far from waning; on the contrary, in the last decade Auschwitz has clearly become a major destination (for these figures, which also include details of visitor numbers from other countries, see the Auschwitz Museum website <www.auschwitz.org>, under 'News'; 15 January 2013). Particularly during the midsummer tourist high season, the museum is packed with huge crowds of people – contrary to some popular images of Auschwitz as a lonely, desolate place (a stereotype that may be encouraged by present-day photos focusing on such features as the symbolic entry gates, i.e. not showing the crowds of visitors).

million Jews, together with a mosaic of other victim groups, including well over 100,000 Christians, consisting mainly of ethnic Poles, but also Soviet prisoners of war and Sinti and Roma Gypsies.[4] Auschwitz is not a symbol. It is a real place – for example, people tend to speak about visiting "Auschwitz" rather than visiting "the Auschwitz museum", as if in some sense the site is still so totally authentic that it possesses its original meaning, whatever that may be. Even so, for many people it may be completely impossible to grasp – in that sense, perhaps the very opposite of a symbol. Some see this real place as indeed full of meaning, with a great deal to be learnt from a visit or from close study of what happened there. For other people, Auschwitz is meaningless, and for them there is nothing to learn there – it is a waste of time to try to make sense out of the complete meaninglessness of the industrialised mass murder committed there.

2.

Given that background, how can I summarise the significance of Auschwitz for Jews? Positioning themselves in front of the tremendum of the Auschwitz catastrophe, the ultimate nothingness, the vast pit in which the Jews of Europe found themselves during the Holocaust, many have said that there is no language to describe this adequately, there is no voice, there is nothing to say, nothing to be said, there can be only silence.[5] All that the present-day visitor to the Auschwitz site can find left behind there are just silent fragments representing the horror and the terror and the evil. The entry gates to Auschwitz-Birkenau (with its watchtower and railway line) and to the main camp of Auschwitz (with its infamous inscription

[4] For more than forty years after the war, the total number of Auschwitz victims was considerably exaggerated, for a variety of reasons. The figures (and the breakdown into groups) given here rely on the authoritative work by the head of the Auschwitz museum's historical research department: see F. Piper, 'Estimating the Number of Deportees to and Victims of the Auschwitz-Birkenau Camp', *Yad Vashem Studies*, Vol. 21 (1991), pp. 49-103.

[5] The idea that silence is the only appropriate and respectful response to the horrors of Auschwitz, and in that sense conveys the intrinsic incommunicability of its meaning (such as it may be), is particularly associated with the view of the well-known Auschwitz survivor Elie Wiesel, although since the end of the war many other survivors have indicated that they cannot or will not speak or write about their experiences. But it is not so simple: Wiesel has himself written numerous books about Auschwitz and the Holocaust, and there is today a vast library of memoirs produced by survivors, as well as an equally vast secondary literature on all aspects of the Holocaust. Some would say that the call for silence is thus only a symbolic call, reflecting a sense of dumbstruck numbness at the scale of the tragedy, not at all the same thing as insisting literally on muteness; or it is an evasion of responsibility, yielding the field to falsification or even to Holocaust denial, and thus clearly contrary to the desperate wish of those who were dying that their fate be remembered. For a brief review of these complex issues see for example: I. Wollaston, *A War Against Memory? The Future of Holocaust Remembrance*, London 1996 (especially chapt. 2: 'Mystifying the Holocaust?').

"Arbeit Macht Frei"), together with the barbed wire, the lengthy ramp alongside the railway lines in Birkenau, many watchtowers, the surviving barracks, and all the other physical installations (including a large number of buildings in Birkenau, particularly the gas chambers, that are in ruins), are certainly important because of their historical authenticity, helping people today to connect with the place and ask the questions. But they tell us very little about the worlds that Auschwitz destroyed or about the nothingness it created, let alone the agony of the victims. There is nothing here to explain why the people who died there should not have died. Yet today's realities are all that there are to be seen at this site.

Auschwitz is significant for Jews because one million Jews were murdered there. But who were they? They were Jewish men and women from virtually every country in German-occupied Europe, from the north of Norway to the south of France and the Greek islands, Ashkenazim and Sephardim of every conceivable social origin and occupation, wealthy Jewish businessmen, Jewish clockmakers, Jewish doctors and lawyers, Jewish musicians, Jewish dancers and opera singers, Jewish tailors, butchers and bakers, poor Jews of the working class, Reform Jews, Orthodox Jews, Yiddish Bundists, assimilated Jews, Christian Jews, Zionist Jews, secular Jews, scholars and teachers, hasidic rabbis, yeshiva students, and a very great number of Jewish children (probably as many as 185,000 Jewish children).[6]

So what Jews are confronted with in coming to Auschwitz is primarily the need to mourn, and to learn what it is to mourn a catastrophe that affected a complete civilization. In so doing they recall the immensity not only of the number of victims but also the immensity of that huge range of social and cultural origins of those victims, from all countries of German-occupied Europe. Once those Jews had arrived there, the murderers did not care who they were or what they believed in. They were all taken together, as members of a single people, to be murdered in the gas chambers, or (if they were deemed to be sufficiently able-bodied) worked to death.

But Jews today fulfil the need to remember who they were and what they believed in – as is clear from the content of their Holocaust commemoration ceremonies, particularly through the recollections of survivors, routinely given an honoured role at the podium on such occasions. They lament the extraordinary diversity and creativity of the great Jewish civilization that flourished in Europe for centuries and then came to its bitter end here. What Auschwitz symbolises

[6] The mass murder of children is surely the ultimate defining mark of a genocide. In some places they have their own mass graves – for example, when 800 children from the Jewish orphanage in the city of Tarnów (approx. 130 kms east of Auschwitz) were taken away in the summer of 1942 to a nearby forest in order to be brutally murdered. To Auschwitz, however, Jews were generally deported as families, if not as entire communities, rather than as individuals (as was the usual case with some other victim groups, such as ethnic Polish political prisoners), and amongst them were large numbers of children. On this subject see: H. Kubica, 'Children' in I. Gutman, M. Berenbaum (eds.), *Anatomy of the Auschwitz Death Camp*, Bloomington 1994, pp. 412-427.

for Jews is the village after village and the town after town where the synagogues were looted and then set on fire; the holy Torah scrolls they contained, which were ripped out, trampled on, and desecrated; the thousands of Jewish cemeteries whose tombstones spanning many centuries were smashed to pieces or else stolen in order to pave local roads or simply sold by the truckload for use as building materials – even the Jewish dead were not left in peace. The remains of the countless synagogues they left behind often still lie in ruins, even today, with gaping holes in the roof. After the war, sometimes the remains were demolished, or else those synagogues were converted, often unrecognisably, into some other practical present-day use, such as a cinema, bakery, or fire station; in one case in northern Poland (in the city of Poznań) a synagogue converted by the Germans into a swimming pool is still used for this purpose today. And the cemeteries lie forlorn and abandoned, desperately overgrown with no one to look after them, or with a few remaining kerbstones, like amputated stumps. The living Jewish world in literally thousands of towns and villages is an ever-present absence – all the way across Europe, and particularly in Poland. Gone are the libraries, the social clubs, the old age homes, the seminaries of talmudic studies, the Jewish community centres, the Jewish theatres and daily newspapers, the Jewish sports clubs. If Auschwitz is the symbol of the Holocaust, then these are the things that Jews would have in mind at Auschwitz.[7] This is what the genocide meant in practice, and for all these things Jews weep, and Jews mourn.

But above all, the physical contact with Auschwitz should make Jews meditate on the victims; if they are religious, they will say their prayers for the souls

[7] As a symbol of the Holocaust, Auschwitz certainly has considerable power – it was the largest single site of the mass murder of Jews, and in terms of victims it was the most international. It also possesses today (almost uniquely in Poland, i.e. other than at Majdanek) substantial remains of what is sometimes called the architecture of crime; and the museum authorities at Auschwitz have been deliberately minimalist in imposing modern museological techniques (such as multi-media installations), which they believe would interfere with the raw feelings of unmediated contact that visitors should have with the authentic site. It is probably the literary legacy of those great survivor writers such as Elie Wiesel and Primo Levi who contributed to Auschwitz (as opposed, say, to other death camps at Treblinka or Bełżec) being seen as the epicentre of evil, and in that way as symbolic of the Holocaust. But in other respects, Auschwitz as a symbol is historically rather misleading – it accounts for a relatively small proportion (about one-sixth) of the Holocaust total of six million Jews. More Jews were murdered in the hundreds of mass shootings by the Einsatzgruppen in German-occupied Soviet territory than at Auschwitz (approx. 1.25 m, the figure given in I. Gutman (ed.), *Encyclopedia of the Holocaust*, vol. 1, New York 1990, p. 438). Auschwitz was furthermore the final destination of victims who prior to their arrival there had endured enormous privations and humiliations – the wearing of yellow stars and the exclusion from normal public life, the round-ups, the ghettos, the destruction of the synagogues and other Jewish community institutions, the confiscation of personal possessions, the hunger, the deportations in overcrowded, unsanitary trains, and much else besides – none of which can be adequately symbolised by what there is to be seen at Auschwitz itself.

of those who were murdered here. Those people may indeed have no one else to say prayers in their memory unless today's Jews do it themselves. I suggested before that some would say that in Auschwitz there can be only silence. So this is perhaps yet another contradiction: the need to say prayers for the souls of those who were murdered. Through those prayers and meditations, and through the memory of their achievements in life, and the meditations on what those people might have achieved if they had been allowed to live, today's Jews can have the opportunity to do their part to let the dead rest in peace, and to commit themselves to practising good deeds (for example, giving money to charity) in the memory of the dead. According to Jewish tradition, it is that commitment to practise good deeds and improve the world – a concept known in Hebrew as Tikkun Olam – that can provide comfort after a death. Memorialising the dead is not just an end in itself; it is supposed also to generate Tikkun Olam; and in one way or another it is understood and practised across the full spectrum of Jewish society, including by socially aware Jews who are secular or atheist. In the case of Auschwitz it would mean finding the faith and the confidence that moral decency and ethical integrity, which in any case constitute the true Jewish message to the world, should be restored to humanity. Learning from the horrors of the evil and inhumanity of what happened at Auschwitz means taking the necessary steps to protect and repair the highest moral values for the future. That is why Human Rights Education is of such importance. If that message of Tikkun Olam – which all Jews should be able to agree on – could go forth from this place, then that is what would bring peace to the souls of those who were murdered at Auschwitz, as well as enabling Jews to find comfort as they rebuild their own shattered world. The important thing is to rebuild civilised values and to protect the dignity, legal rights, and the spiritual and moral potential, of all human beings.[8] Perhaps it is yet another of those paradoxes and contradictions, but maybe, in the kingdom of death, people can find the meaning of life.

3.

Perhaps it is this, therefore, that can give us the clue about what Auschwitz can symbolise for contemporary Jews – the need to work together with the different religions and nations of the world. When I first visited Auschwitz I was puzzled

[8] A discussion of Jewish ethical teachings as regards a sense of mission to other nations, cultures, and religions is clearly beyond the scope of this short paper. But it is worth noting here that on the basis of texts in the Hebrew Bible the Talmud elaborated seven principles applicable to the whole of humanity (the so-called "seven duties of the descendants of Noah", or "Noahide law"), of which the first principle is the duty to establish courts of law – a vision, in other words, of universal social justice where human rights are protected by the rule of law (for a detailed review see: D. Novak, *The Image of the Non-Jew in Judaism. The Idea of Noahide Law*, Oxford 2011).

why Jews tended to think of it as a place of uniquely Jewish significance, but at the same time wanted all the world to know about it. I used to wonder how Jews could say that Auschwitz represents the Holocaust and only the Holocaust, but at the same time say that Auschwitz has universal significance. But the answer, I think, is that there has to be a clear universalist message arising from Auschwitz – both for the sake of the victims and also for the sake of the whole world itself.

The irony (at least from a Jewish point of view) is that the task is made much easier for Jews just because there were so many non-Jewish victims of the murder machine at Auschwitz. Just as there was a mosaic of victims, so too there is today a mosaic of memories. Different victim groups see Auschwitz differently, in terms of their own histories and cultural perspectives. The "mosaic" metaphor is thus perhaps a fruitful one: a mosaic not only consists of lots of small pieces but there is also a larger picture, and one cannot see that larger picture properly without all those little pieces being there. So to focus only on the little pieces may miss the point: it is only the larger picture that can reveal the full truth. Through an awareness of that larger picture Jewish educators can perhaps understand the need to teach Jews to share in the grief of others at the colossal disaster that also befell others in Auschwitz – well over 100,000 of them, especially Polish Christians and including many Catholic priests, who suffered and were murdered there, alongside the Jews. The work of repairing the world thus by definition must rely on that larger picture, so that it can truly be a joint project. Tikkun Olam is a Jewish commitment, but it should also be a Christian project, a European project, and indeed a universal project. Jews need to preserve their own Jewish traditions of remembrance, and they are also entitled to their own cultural privacy, to nurse their grief and recover from the overwhelming ignominy[9] – to focus on what I have called "the little pieces"; but at the same time Jews are enhanced, enriched, and deepened by their contact with all those active in this work of universal Human Rights Education.

Let me put that point another way: I believe that it is essential for Jews to recognise that even if Auschwitz was the greatest catastrophe that has ever befallen the Jews, one of the main Jewish responses has to be to work with other faith traditions and other peoples to help them commemorate their own victims and,

[9] Although no specific liturgy or fast-day has been instituted to mark Jewish remembrance of the Holocaust, there is no doubt that the sense of ignominy has characterised an important element of the Jewish remembrance of massacres in past times. They are recalled in the Tachanun (supplication) liturgy of the standard weekday prayers, as follows: "O Lord … look down from heaven and see how we have become an object of scorn and derision among the nations. We are regarded as sheep led to the slaughter, to be killed, destroyed, beaten, and humiliated. Yet, despite all this, we have not forgotten Your name. Please do not forget us…"/ It needs to be added, however, that there is a large range of Jewish religious responses to the Holocaust: although some say that Auschwitz poses no theological questions that are essentially new, others have found many important new issues requiring comment and explanation; see for example: S. Katz (ed.), *The Impact of the Holocaust on Jewish Theology*, New York 2005.

thereby, to be involved in the work of repairing the world after Auschwitz. After all, peace between nations and protecting human rights universally have to be the best objectives that can be instituted in the memory of the victims.[10]

4.

It is especially on this point that many Jews would disagree with me. They may not always say it publicly, but from their speeches and writings it seems that they do not see the relevance of universal human rights issues at all. What Auschwitz may symbolise for Jews is not so much man's inhumanity to man, but rather man's inhumanity to the Jews.[11] In the middle of the nineteenth century nearly ninety per cent of the Jews of the world lived in Europe,[12] and there were significant modernising movements among the Jews of Europe encouraging them to identify with majority society, whether as Frenchmen, Hungarians, or Germans. But the Holocaust turned all that upside down; it was often the local police, not just the SS, who under German orders organised the round-ups and pushed the Jews onto the trains to Auschwitz. The Holocaust not only turned innocent, unarmed Jews into victims; it also undermined the collective Jewish belief that they could find social acceptance and a long-term future in the European societies where they lived.

The consequences of innocent victimhood are extremely profound and long-lasting in terms of identity politics. For despite the scale of the catastrophe, there were survivors, and many of them lived on after the war in their home countries

[10] This would in any case seem in principle to be largely agreed by non-Jewish educators. From an educational point of view, the conventional assumptions regarding the 'meaning' that can be attributed to Auschwitz today hinge on the idea that it is best understood in a universalist, humanist frame of reference – in particular, that its role is to remind the world of the dangers of intolerance, fascism, and state-sponsored violence in general. Religious values (whether Jewish or otherwise) are not part of the standard Auschwitz education; on the contrary. Following protracted Jewish complaints in the late 1980s and early 1990s over the presence of a convent near the main camp at Auschwitz and, later, over the presence of crosses in Birkenau, secular Jewish leaders succeeded in convincing religious Christian leaders that there should be no religious symbols, religious messages, or religious presence whatever at the site of Auschwitz, although in practice this is not rigorously observed. For details of the ambiguous, contested status of religion there, see: J. Webber, 'Memory, Religion, and Conflict at Auschwitz. A Manifesto' in O.B. Stier, J.S. Landres (eds.), *Religion, Violence, Memory and Place*, Bloomington 2006, pp. 51-70.

[11] For example, in contrast to interfaith liturgies specially composed for Holocaust commemoration, which take a universalist approach and so include explicit reference to non-Jewish minority groups targeted for persecution and murder by the Nazis (see for instance: M. Sachs Littell, S. Weissman Gutman (eds.), *Liturgies on the Holocaust. An Interfaith Anthology*, Valley Forge, PA 1996), the standard Jewish memorial prayer for the Holocaust dead, as recited in the synagogue regularly throughout the year, includes no such reference.

[12] For this figure see: S. DellaPergola, 'An Overview of the Demographic Trends of European Jewry' in J. Webber (ed.), *Jewish Identities in the New Europe*, London 1994, p. 62.

(although large numbers emigrated to Israel, the UK, or the USA). Even today, there is not a single European country occupied by the Germans during the war, and from which Jews were deported and murdered, which does not possess its own Jewish community. All the way across Europe are these reconstructed communities of Holocaust survivors, with their Jewish identities reconstructed out of the pathetic remnants of their pre-war existence and the physical, psychological and demographic wreckage of destruction. It has been a tortuous and in many ways a tragic human history of accommodation and adaptation in a variety of post-Holocaust circumstances. The trauma thus lives on, not far below the surface; indeed, many Jews seem to base their Jewish identity on the Holocaust, emphasising their losses and their tragedies, and imagining that the whole world is against them and is fundamentally antisemitic. Hundreds of thousands of young Holocaust survivors grew up after the war without parents, without uncles or aunts or cousins, without siblings; and they transmitted their trauma to their children and grandchildren. Fears of renewed victimhood rise to the surface each time a European Jewish cemetery is defaced with a swastika, or when an Arab rocket lands near Tel Aviv. For many Jews, visiting Auschwitz is not a tourist experience at all – it is to visit the real place where so many of their family members were actually murdered. Auschwitz is what happened to their family, and the traumatic realisation that they themselves could have ended up there as well. So what Auschwitz may symbolise for present-day Jews is as the constant, nightmarish reminder of where even some relatively simple antisemitic incident can lead. Week in, week out, throughout the year, the Auschwitz museum today is visited by large groups of Israeli soldiers, Israeli teenagers, and Jewish schoolchildren from round the world, whose educators and guides see it as their duty to emphasise Jewish victimhood, and to explain how Europe stopped functioning as the major home for the Jews of the world, and how this role is fulfilled nowadays by the State of Israel. In 1939, on the eve of the Second World War, when there was no State of Israel, Europe's Jewish population numbered nine and a half million; today it stands at less than one and a half million. In 1939, the largest Jewish community in Europe was that of Poland, with about three and a half million Jews; today the largest Jewish community in Europe is that of France, with less than five hundred thousand Jews.[13] To speak about a transformation in European Jewish identities over the past seventy-five

[13] The figure of 3.5 m Jews in Poland in 1939 is the one conventionally used by historians, although the last population census prior to that date was in 1931, when 3,136,000 Jews were recorded (see: J. Marcus, *Social and Political History of the Jews in Poland, 1919-1939*, Berlin–New York 1983). For a detailed presentation of contemporary Jewish populations in Europe, which at the end of the war in 1945 accounted for 35% of the world Jewish population (S. DellaPergola, 'An Overview…', p. 62) but today have declined to a mere 11%, the key authoritative source is S. DellaPergola, 'World Jewish Population, 2010', North American Jewish Data Bank 2010, pp. 16, 46-51, at <www.jewishdatabank.org/Reports/World_Jewish_Population_2010.pdf>, 20 January 2013. For a variety of reasons elaborated by the author, Jewish population figures can only be estimated; the figure he gives for France in 2010 is 483,500.

years would be an absurd understatement. It would be more accurate to say that the entire face of European Jewish life has changed – its major centres of population, its longest established communities and traditions, its identity in the most basic sense.

All this is what many Jews would say is what Auschwitz symbolises for the contemporary Jewish world – which is why there are so many Jewish school trips nowadays to the Auschwitz site, constantly reinforcing the twin ideas of victimhood and self-defence as major Jewish preoccupations. For the past twenty-five years, there has been a major annual event in spring-time at the Auschwitz museum, on a date in the Jewish calendar fixed long ago by the Israeli parliament as Holocaust Remembrance Day (the widespread European use today for such purposes of another date – 27 January, the anniversary of the liberation of Auschwitz by the Red Army in 1945 – came in comparatively recently). Known as the March of the Living, this event now attracts about ten thousand teenage Jewish participants from around the world, waving Israeli flags, chanting Am Yisrael Chai ("the Jewish people lives on"), and listening to patriotic Jewish speeches that emphasise "the triumph of life over death", i.e. post-Holocaust Jewish survival and, in particular, post-Holocaust Jewish achievements in the State of Israel.

As I indicated at the beginning, the Jewish world is far from being united. There is no single Jewish voice. Some Jews would say that all this revaluation of Auschwitz symbolism into an optimistic message emphasising Jewish survival and achievements, and the need for a strong state of Israel, is nothing less than a manipulation of the Auschwitz site – a manipulation for political purposes, similar perhaps to the way in which the Auschwitz site was manipulated by the Polish communist government for forty years after the war for public anti-fascist demonstrations and other anti-fascist political purposes.[14] On the contrary, some Jews, especially traditionally Orthodox Jews, see Auschwitz simply as one vast cemetery, principally a Jewish cemetery, where the dead should be left in peace, and where if anything visitors should meditate with a strong sense of humility on the existence of evil and the total incomprehensibility of the genocide. In this view, Auschwitz is entirely the wrong place for hosting political messages of any kind. It should not present itself merely as an educational museum giving detailed descriptions of

Approximately 85% of the world's Jewish population of 13.4 m in 2010 lived in Israel and North America (USA and Canada), almost exactly half-and-half in each location (ibid., p. 16).

[14] Manipulation is a strong word, implying conscious and wilful distortion. A softer, less oppositional view, and one that might be favoured in an anthropological approach, would be to present these as mythologizations – complete with their simplifications, dechronologizations, taboos, confusion over the aims of memory, fetishization of specific objects and ruins, and contradictions of all kinds. The advantage of looking at such issues in this way is that it can be inclusive (as I go on to argue below); on the other hand, it is also true that single-issue or party-political perspectives have indeed characterised some of the debates about Auschwitz (for example, the role of religion there, as previously noted), and in that sense the accusation of manipulation does reflect how some parties to the debates have engaged in the subject.

Nazi German atrocities but rather be reconstructed as a cemetery, exclusively in memory of the dead.[15]

5.

In conclusion, let me suggest my own view. I think Jews should support a compromise position, where all these different perspectives can find their place. After all, Auschwitz is essentially a place of contradictions: Auschwitz is a historical event, Auschwitz is a cemetery, Auschwitz is today a museum, and Auschwitz is also a symbol – all these different things together, at the same time. Surely, therefore, room needs to be found for both remembrance and education. Remembrance is at present side-lined in the physical installations at Auschwitz. More needs to be done to remember the victims with dignity – for example, by permitting the erection of tombstones for individuals who were murdered in Auschwitz, and arranging part of the site as a cemetery, with a formal architecture as to be found for example in a military cemetery. In the interest of preserving the historical landscape of the site, the Auschwitz museum authorities (and the leaders of the Jewish world) have resisted such an intervention; but the contradiction does need to be institutionalised – people should have the human right to erect such tombstones in memory of their family. But what I mean by compromise is also something much larger than that. It means the need for Jews to be aware of all the victim groups involved – ethnic Poles, Sinti and Roma, Catholic priests, communists, homosexuals, Jehovah's Witnesses, even present-day Germans – to learn how they situate Auschwitz in their own histories, to meet each other in a spirit of tolerance and understanding, and to undertake ethically informed social action and peacebuilding together. A universalist Human Rights Education is thus the key strategy here. Perhaps it might be said that it is also in its own way a manipulation of the Auschwitz site, but if presented in a balanced way alongside remembrance it will succeed, and very powerfully so. And it has succeeded: after all, the shock provoked by the cruelty of the unashamed dehumanisation of the victims during the Holocaust accelerated an awareness of human rights as perhaps no previous event

[15] Even if the post-war museum at the Auschwitz site was funded and preserved by a communist government for political purposes and disseminating its official history of the war (largely due, it should be said, to pressure from Polish survivors who had been incarcerated at Auschwitz as political prisoners of the Nazis, and who saw Auschwitz as a key symbol of the atrocities of the German occupation of their country), nevertheless the democratic, post-communist government of Poland has built on this legacy and has clearly maintained its moral and financial commitment to the preservation and strengthening of the site and its museum – even if its "meanings" and messages may today have undergone modification. The museum no longer proclaims itself as a memorial to "the struggle of the Polish and other nations" [*sic*] as it used to before 1989, although the old emphasis on Nazi German crimes is still largely as it was, in accordance with the secular, universalist humanist view noted above (at n. 10).

had ever done. One immediate result, in the aftermath of the Second World War, was the Universal Declaration of Human Rights proclaimed by the United Nations in 1948.[16]

We are all affected by Auschwitz, each of us in our different ways and perspectives and histories. The twenty-first century must continue to build a post-Auschwitz dialogue aiming at cultural healing, social action, and repair of the world, with a universal concern for all people. Transnational, intercultural, and interfaith understanding can be created only if we work together and listen to all the voices coming forth from the ground at Auschwitz. Only if we remember and educate ourselves about the deep traumas left behind at Auschwitz can we be convincing about our sincerity to take social action to build a better world – to see what it is that unites people, not only what divides them. After all, the challenge of the Auschwitz memory today, i.e. to mobilise the lessons of the Holocaust, is surely not just to fight for one's own rights but to find ways of extending a sense of the universe of moral obligation in which the suffering of all those involved would find itself represented, so as to protect universal human rights for the future. The challenge for Jews is to transcend their own ethnic or religious horizon and to de-

[16] Whilst there is probably no direct historical link between the Holocaust and the Universal Declaration of Human Rights (and none is stated there), the preamble to the declaration does include a reference to "disregard and contempt for human rights [which] have resulted in barbarous acts which have outraged the conscience of mankind"; and it is still a common theme for leading politicians visiting Auschwitz to position the declaration as a major response to the human cry that emanated from there (see for example the News archive for 5 December 2008, i.e. on the sixtieth anniversary of the declaration, in the Auschwitz Museum website). In recent years the United Nations, specifically in the context of its concern with massive violations of human rights by oppressive regimes, began to encourage Holocaust remembrance. That phrase from the 1948 preamble was recalled in a resolution by the UN General Assembly in 2005 (A/Res/60/7) to designate 27 January "as an annual International Day of Commemoration in memory of the victims of the Holocaust"; and the resolution specifically urged member states "to develop educational programmes that will inculcate future generations with the lessons of the Holocaust in order to help to prevent future acts of genocide". Since then the UN has established an Outreach Programme which includes annual ceremonies, exhibitions, and other events on or about 27 January; and in a follow-up to that UN resolution, UNESCO officially committed itself in 2007 to educational activities that encourage people to learn about the Holocaust – although UNESCO had in any case added the Auschwitz site to its World Heritage List as long ago as 1979.

Whether Auschwitz should inform Jewish attitudes to present-day conflicts – notably an enhanced awareness of the damage to Palestinian human rights in the territories occupied by Israel – is, however, something that only a relatively small minority of Jews have felt it appropriate to take up, arguing that the preoccupation with their own victimhood during the Holocaust has in fact desensitized Jews to the sufferings of others (thus for example the theologian M. Ellis, *Ending Auschwitz. The Future of Jewish and Christian Life*, Louisville, KY 1994). The conventional Israeli discourse prefers to focus instead on the Palestinian demonization and delegitimization of Israel, which in its own way is seen as also having an Auschwitz sub-text, albeit of a rather different kind as noted above.

velop an enhanced vision – to be faithful to the history and memory of their own people but also, at the same time, to see beyond it.

We all need continuously to work at widening the circle of those who feel that Auschwitz is relevant to them, responding to their needs, giving credit to those who work together at peace, reconciliation, and human rights education. The main thing about the Auschwitz memory, especially for young people, is to send out a message of hope for the future. We must strengthen the grassroots educational centre that has already been established at the Auschwitz museum and the grassroots interfaith dialogue centres that now exist in the town. Auschwitz has a commanding voice when it comes to teaching the world about the dangers of genocide. Our responsibility is to use that voice wisely and effectively, so that it will continue to be heard. Only then do we meet our responsibilities to all those who died at Auschwitz, only then will there be real substance to the popular slogan, "Never Again".

What of the contradictions that I have mentioned? Probably the best answer to that is that one should look at them positively, as a form of organic tension. Think of it the other way round: surely we would object if at Auschwitz we were still presented today with one official history, one set of memories to take home with us. Far better to have here the democratic entanglement of voices, a series of paradoxes and contradictions, a feeling that we must continue to remain challenged by what Auschwitz *was*, and what Auschwitz means for us today. Human Rights Education certainly helps people internalise a profound sense of unease about genocide and its utter abnormality. But we need to be disoriented even about the basic fact that Auschwitz ever existed at all. It means that we must be encouraged to ask open-ended questions and not just walk out of the place thinking that we have ticked the box – "been there, done that" – and now know everything there is to know about Auschwitz. We need to feel that visiting Auschwitz is – or at least could be – a life-changing experience. The museum will doubtless continue to reappraise its strategy, its exhibitions, its presentation of the site, and its overall policy; and it is likely that each generation will introduce changes in the future, especially in the area of promoting peace-building between nations. The work of making sense of Auschwitz will be with us for a long time to come; it will probably never be finished.

Abstract

It is a substantial challenge to make sense of Auschwitz, or to specify with any precision what its significance might be for the contemporary Jewish world, which in any case is very divided on this as on many other matters. The main problem is that Auschwitz is a place of paradoxes and contradictions: it is a symbol of historical events, it is a vast cemetery, and it is a museum visited by great numbers of tourists – all these different things together, at the same time. Different people understand the place differently: some say that Auschwitz is about the death of God; others say that Auschwitz is about the need to believe

in God, or at least in some universal moral principles by which the world is governed or ought to be governed. People often say that Auschwitz is a symbol of the Holocaust, but seeing it as a symbol obscures the fact that it is a real place, where the extreme suffering and the mass murder of well over one million people really happened.

So what is the significance of Auschwitz for Jews? There is no single answer. Some Jews, conscious of the incomprehensibility of this colossal catastrophe, prefer to keep silent. Others feel the need to mourn or to pray for the souls of those who were murdered. Many Jews see Auschwitz as symbolising Jewish victimhood in a fundamentally hostile world, and so focus their identity on Jewish losses and tragedies. They might also find comfort in the existence of a Jewish homeland in the State of Israel, and so take an optimistic view, stressing that the Jewish people did in fact survive Auschwitz and then went on to accomplish important new achievements in building up their own country. But the redemptive significance of Auschwitz can go beyond victimhood or the need for nationalist sentiment: in the Jewish tradition, a dedication to doing good is both an appropriate mode of memorialization as well as a source of comfort and healing.

In the spirit of that last response, the true Jewish response to Auschwitz would be to focus on restoring moral decency and ethical integrity to humanity. Learning from the horrors of the evil and inhumanity of what happened at Auschwitz means taking the necessary steps to protect and repair the highest moral values for the future. If that message could go forth from this place, it would surely bring peace to the souls of those who were murdered at Auschwitz – through the commitment to rebuild civilised values, to promote a culture of healing through dialogue and social action with others, and to protect the spiritual and moral potential of all human beings. Perhaps it is yet another of those paradoxes, but maybe it is through the contact with the kingdom of death that people can find the meaning of life – and the importance of Human Rights Education.

Jonathan Webber

Jonathan Webber is a British social anthropologist now living in Krakow, where he is a professor at the Institute of European Studies at the Jagiellonian University. He previously taught for twenty years at the University of Oxford and then for eight years as the UNESCO Chair in Jewish and Interfaith Studies at the University of Birmingham, from which he retired in 2010. His publications have focused on modern Jewish culture and society, Holocaust studies, and Polish-Jewish studies; he has held visiting fellowships in Australia, France, Germany, Hungary, and the USA, and has given invited lectures at forty academic institutions worldwide. He was a founder member of the Polish government's International Auschwitz Council advising the Auschwitz-Birkenau State Museum, and served on that Council for twenty-three years (1990-2012). In 1999 he was awarded the Gold Cross of Poland's Order of Merit for services to Polish-Jewish dialogue.

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Asylum Advocacy

How Historians and Lawyers Can Partner to Advance Human Rights

Grace[1] has been in the United States since 1994, though she travelled periodically back to Zimbabwe to visit her daughter and mother. In 2004, her brother was murdered after he defended Grace's daughter against charges she supported the opposition party, the Movement for Democratic Change (MDC). Three years later, her daughter was murdered after participating in a prayer rally sponsored by the MDC in the capital of Harare. Armed youth gangs now visit Grace's mother, asking when Grace will return. Grace filed for asylum in the United States, and her case is pending before an immigration judge in December.

According to the 2011 figures released by the United Nations High Commissioner for Refugees, almost 900,000 people filed for political asylum in 171 nations around the world. Zimbabwe, a focus of this paper, is the largest source of asylum seekers, followed by Afghanistan, Somalia, and the Ivory Coast. South Africa received the greatest number of applicants, amounting to more than 10% of the global total, followed by the United States, France, Germany, and Italy.[2] Many of these asylum seekers possess little money, few family connections, and real knowledge about how to apply for asylum. They often cannot hire lawyers (or at least lawyers who are not out to swindle them), they miss critical legal filing deadlines, and they lack witnesses testifying on their behalf. Therefore, they risk deportation, despite often compelling narratives of mistreatment, discrimination, and danger that they have endured or may yet suffer if returned to their country of origin. Although Article 14 of the Universal Declaration of Human Rights guarantees that "everyone has the right to seek and to enjoy in other countries asylum from persecution",[3]

[1] Real names have been changed to protect asylee identities.

[2] 'Asylum Seeker Numbers Nearly Halved in Last Decade, Says UNCHR', 28 March 2011, at <http://www.unhcr.org/4d8cc18a530.html>, 26 July 2012; *A Year of Crises. UNHCR Global Trends 2011*, at <http://www.unhcr.org/4fd6f87f9.html>, 15 November 2012.

[3] The Universal Declaration of Human Rights, Art. 14, at <http://www.un.org/en/documents/udhr/index.shtml>, 15 November 2012.

under these circumstances, asylum-seekers face rejection due to circumstances that often have little to do with the legal merits of their case. German novelist and poet Horst Bienek describes their predicament in stark terms in his poem 'Exodus':

> They drove us out
> On nights when moons died
> Patiently we bore the cross
> They had made for us
> Out of lies, violence, and torture
> And beneath the blows of their rifle-butts
> We broke down more than thrice-
> On the endless road of graves
> We met no Simon of Cyrene.[4]

As an historian of international human rights law and Zimbabwe Country Specialist for Amnesty International USA, I have testified as an expert witness in over three dozen asylum cases. Each claimant is different, of course, but they all need three critical types of support when making their asylum case. First, they need someone with knowledge of Zimbabwe's political past and human rights record in order to verify, to the maximum extent possible, specific examples of suffering that they endured in their native land. Second, they need an expert witness to validate the possibility of future persecution if they are deported back to Zimbabwe. Third, lawyers need a critical and independent review of the asylum seeker's affidavit to highlight unanswered questions, posit new angles of inquiry, and explore undeveloped claims in order to make the argument for asylum as strong and accurate as possible. In outlining the role that historians can play as asylum advocates, this paper has three sections. A brief overview will explain the right to asylum as a matter of international law and compare the asylum processes in the United States, Canada, and the European Union. It will then describe concrete ways historians can use their research and writing skills to assist asylum-seekers. Finally, it will identify several important lessons learned in my work in this arena over the past decade.

Leonard is 30 years old and has been in the United States since 2000 on a valid visa. He is an active blogger who comments regularly on politics in Zimbabwe in a non-partisan but critical fashion. His large audience reads and submits comments on topics ranging from human rights violations, corruption, gay and lesbian rights, and the rule of law. His cousin was beaten violently by militias associated with the ruling party ZANU-PF, and a close school friend was tortured by the Central Intelligence Organization. He fears that deportation will lead to persecution due to his outspoken views, which he would not silence even if returned.

The touchstone for outlining the asylum process is the 1951 Convention Relating to the Status of Refugees, which currently has 145 signatories. It defines

[4] H. Bienek, 'Exodus' in C. Forché, *Against Forgetting. Twentieth-Century Poetry of Witness*, New York 1993, p. 468.

a refugee as someone "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his [*sic*] nationality and is unable or, owing to such fear, is unwilling to avail himself [*sic*] of the protection of that country".[5] Article 33 of the same treaty bans the expulsion of any refugee if "life or freedom would be threatened"[6] on account of the five grounds listed above. Not all refugees are asylum seekers; the latter term applies to someone who wishes to apply for legal protective status in the country where he or she currently lives. The necessary fear of persecution for asylum seekers does not have to be present when they left their home country for the last time. Many of my cases have involved Zimbabweans who came to the United States temporarily to work or obtain an education, but changed circumstances in Harare led them to file for asylum. The most important questions for asylees center on the standards of evidence for proving past harm or the likelihood of future persecution, as well as the definition of "a well-founded fear of being persecuted".[7] As feelings of fear are by definition subjective and their authenticity is hard to prove, asylum seekers must present objective evidence to substantiate allegations of harm. This can be difficult, as applicants rarely possess official records that can prove evidence of mistreatment, such as medical records, death certificates, sworn eyewitness statements, or media accounts.

National courts of the United States, Canada, and Europe have provided inconsistent guidance on this issue. The United States Supreme Court has issued few interpretations of asylum law. In the 1987 case of *Immigration and Naturalization Service v. Cardoza-Fonseca*, the court ruled that an asylum applicant's need to show a "reasonable possibility" of persecution can be met by demonstrating past mistreatment and/or "good reason" to fear future bad acts.[8] This decision overturned a verdict from just three years prior stating that an asylum applicant had to prove a "clear probability of persecution", meaning that the applicant's fears had to be "supported by evidence establishing that it is more likely than not that the alien would be subject to persecution on one of the specified grounds".[9] This need to prove a 51% likelihood of future persecution was too high a burden for Justice John Paul Stevens, who wrote the majority opinion in *Cardoza-Fonseca*. He reasoned that:

One can certainly have a well-founded fear of an event happening when there is less than a 50% chance of the occurrence taking place. As [Norwegian lawyer and refugee scholar Atle Grahl-Madsen] has pointed out:

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[5] Convention Relating to the Status of Refugees, Art. 1, at <http://www.unhcr.org/3b66c2aa10.html>, 15 November 2012.

[6] Ibid., Art. 33.

[7] Ibid., Art. 1.

[8] Immigration and Naturalization Service (INS) v. Cardoza-Fonseca, 480 U.S. 421 (1987), pp. 449-450. See also: R. Germain, *Asylum Primer. A Practical Guide to U.S. Asylum Law and Procedure*, Washington, DC 2010, pp. 25-26.

[9] INS v. Stevic, 467 U.S. 407 (1984), pp. 429-430.

> Let us […] presume that it is known that in the applicant's country of origin every tenth adult male person is either put to death or sent to some remote labor camp. […] In such a case it would be only too apparent that anyone who has managed to escape from the country in question will have "well-founded fear of being persecuted" upon his eventual return.[10]

Canadian courts have been guided by the liberal Supreme Court of Canada's opinion in *Canada (Attorney General) v. Ward*. To meet the asylum threshold, an applicant need only prove that he or she has a "well-founded" fear of persecution. While the potential source of that fear might be the state, it could stem from individuals fearing that the state could not protect them from attacks by others. In other words, if the claimant can prove the inability or unwillingness of the state to protect him or her from mistreatment, and the likelihood of harm stems from "well-founded" fears, the presumption is that persecution is likely and therefore asylum is granted.[11] The differences between the liberal Canadian standard and the more conservative American one led a Canadian judge in 2007 to refuse to enforce a treaty mandating that any asylum seekers who entered Canada from the United States had to face an asylum hearing in the United States. The judge reasoned that the American guidelines for determining the credibility of persecution fell below recognized international standards. However, a year later, a Federal appellate court overturned the verdict, and in 2009, the Supreme Court of Canada refused to hear the case. So while Canadian standards are more generous, only those who flee directly to Canada can take advantage of them.[12]

The nations of the European Union, in an attempt to standardize asylum procedures, approved the Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted, otherwise known as the EU Qualification Directive of 2004.[13] Articles 4 through 10 lay

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[10] INS v. Cardoza-Fonseca, p. 432. The Supreme Court has also ruled that those seeking asylum on grounds of political persecution have to prove the veracity of their own political opinions, and that trying to stay neutral and uncommitted was not a valid basis for an asylum claim. INS v. Elias-Zacarias, 502 U.S. 478 (1992).

[11] Canada (Attorney General) v. Ward, 2 SCR 689 (1993); A. Macklin, 'Asylum and the Rule of Law in Canada. Hearing the Other (Side)' in S. Kneebone, *Refugees, Asylum Seekers, and the Rule of Law. Comparative Perspectives*, Cambridge–New York 2009, pp. 93-94.

[12] Canadian Council for Refugees, Canadian Council of Churches, Amnesty International and John Doe v. The Queen, 2007 FC 1262 (29 November 2007); A. Macklin, 'Asylum…', pp. 109-119; 'Refugee Rights – Safe Third Country Agreement Charter Challenge', at <http://www.councilofchurches.ca/en/Social_Justice/human-rights-refugee-rights.cfm>, 16 November 2012.

[13] For the text of the Qualification Directive see: <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004L0083:EN:HTML>, 16 November 2012. For commentary by the U.N. High Commission for Refugees on the document, see: 'UNHCR Annotated Comments on the EC Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons

out asylum eligibility guidelines to an unprecedented degree. While the document does not lay out a single evidentiary standard, it offers comprehensive lists of bad acts, perpetrators, and reasons for mistreatment that qualify for asylum consideration. Asylees do have to show that they *as individuals* face mistreatment if returned to their country of origin rather than simply proving that they are part of a persecuted group. Reflecting the *Ward* precedent, the Directive allows for asylum in cases where a government has refused or been unable to provide security to the individual in question. The European Court of Human Rights has subsequently ruled that asylum applicants must prove any allegations of past mistreatment "beyond a reasonable doubt"[14] and that there are "substantial grounds"[15] for fearing future persecution. The Court has also granted asylum when governments have failed to prevent violence done by non-state actors.[16] Unlike in the United States, as discussed later, questionable or false claims by an asylee that do not undermine the main allegations of the case are not grounds themselves for expulsion.[17]

Terrerai is a former government development officer within the Ministry for Women's Affairs. After seeing widespread corruption, he went to several MDC meetings and joined the party at a large rally in Harare. While keeping his membership a secret, he took a leave of absence from his job to travel to the United States on a Salvation Army fellowship. He returned to Zimbabwe after a year and was immediately suspected a being an American-trained spy for the MDC. Police officers repeatedly visited his house and beat his father, and so Terrerai went into hiding. He made it back into the United States on another Salvation Army grant and immediately applied for asylum.

While courts can debate the standards under which asylum is granted, the ability of asylum applicants to navigate procedures often determines the outcome. They are already disadvantaged by living in a foreign space, navigating unknown legal terrain, possessing a skepticism or even fear of government officials, and knowing that their very lives might be on the line. Therefore, a process designed to be uncomplicated and flexible or burdensome and obstructive can make

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Who Otherwise Need International Protection and the Content of the Protection Granted', at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=4200d8354>, 16 November 2012; 'Asylum in the European Union. A Study of the Implementation of the Qualification Directive, <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=473050632&page=search>, 16 November 2012. For the revised directive, see: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:337:0009:0026:EN:PDF>, 16 November 2012.

[14] Muradova v. Azerbaijan, application no. 22684/05, judgment of 2 April 2009.

[15] Saadi v. Italy, application no. 37201/06, judgment of 28 February 2008.

[16] See: Ahmed v. Austria, application no. 25964/94, judgment of 17 December 1996; H.L.R. v. France, application no. 24573/94, judgment of 29 April 1997; Salah Sheekh v. the Netherlands, application no. 1948/04, judgment of 11 January 2007.

[17] R.C. v. Sweden, application no. 41827/07, judgment of 9 March 2010. For more information, see: N. Mole, C. Meredith, *Asylum and the European Convention on Human Rights*, Strasbourg 2010.

a difference between asylum and deportation. My experiences place the American asylum process somewhere in between these opposing characterizations.[18]

The first phase, or the Affirmative Asylum Process, starts when an applicant fills out a request for asylum. This application must be filed within a year of arrival in the United States or before the expiration of a legal residency permit. If this is not done, the individual can face deportation regardless of the merits of his or her case. The one-year bar can be waived, though, and the case can proceed on merits, if the asylum seeker can show either that changed country conditions now prevent a return or that extraordinary circumstances prevented a timely application filing. After receiving the document, the United States Citizenship and Immigration Services (USCIS) schedules an interview in a field office. The interview, which is supposed to be non-adversarial in nature, takes place within 45 days. The applicant can bring a lawyer, any family members seeking derivative asylum, and an interpreter if necessary. The meeting typically lasts about an hour, and within two weeks, the applicant is notified whether he or she has received asylum.

Gaining asylum through this first step has become increasingly rare, especially after the 11 September 2001 attacks. According to a study by the University of Baltimore Law School, from 2001 to 2007, USCIS officials rejected from 32% to 45% of asylum applications in the affirmative stage, and the trend of rejection is clearly on the rise.[19] Several factors explain the increased numbers of unsuccessful cases. One is that the number of asylum applicants is rising faster than the number of asylum officers, so that greater caseloads prevent a more thorough examination of individual cases. Moreover, only about a third of applicants have lawyers in affirmative proceedings (since they have to bear the cost themselves), and having a lawyer greatly increases the possibility of a favourable outcome. Finally, statutory barriers can cause summary rejections without any judgment on merit. Asylum seekers who cannot overcome the one-year bar, who had settled even temporarily in a safe third country before arriving in the United States, and who provided "material support" in any way to groups accused of terrorism face denial. Moreover, due to the 2005 Immigration and Nationality Act (or REAL ID Act), an applicant can be denied due to suspected deception on even insignificant details. Under this law, an immigration officer can evaluate the

> […] demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant's or witness's account, the consistency between the applicant's or witness's written and oral statements […] with other evidence of record […] and any inaccuracies or falsehoods in such statements, *without regard to whether an*

[18] For an overview of the American process, see: <http://www.uscis.gov>, 17 November 2012; R. Germain, *Asylum Primer…*, pp. 159-289.

[19] R. Settlage, 'Affirmatively Denied. The Detrimental Effects of a Reduced Grant Rate for Affirmative Asylum Seekers', *Boston University International Law Journal*, Vol. 27 (2009), pp. 61-113.

> *inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim*, or any other relevant factor.[20]

Therefore, immigration officials and judges can deny asylum simply based on suspicions that the applicant is not credible, even if the grounds for such a determination are trivial to the main facts of the case itself.

Since most asylum seekers fail at the affirmative stage, they face a prolonged defensive proceeding run by the Executive Office of Immigration Review. Some cases go directly to this stage, such as those arrested for a crime in the U.S., those who tried to enter the country without proper legal documents, or those found in violation of immigration status. In this adversarial process before an Immigration Court judge, an attorney from Immigration and Customs Enforcement (ICE) represents the government against the individual (and his or her lawyer if present). The actual hearing is both formal and informal. Asylum seekers can present any written evidence and call any witnesses they desire, though all witnesses can be cross-examined by the ICE attorney. At the end of the hearing, the judge often issues a decision from the bench. Asylum granting rates at this stage have risen since 2001, from a low of 30% in 2002 to a high of 46% in 2007. Rachel Settlage, who collected these statistics, sees a correlation between more individuals failing at the affirmative stage but succeeding at the second stage. It is now up to judges to catch those deserving of asylum who did not receive fair consideration during the initial interview. Due to a heavy backload of cases, hearings are scheduled months in advance, sometimes even more than a year, and postponements are common. Applicants might then wait several years for their day in immigration court, though the official timeline calls for a court verdict within 180 days of the initial application filing.[21]

Asylum applicants receive either a grant of asylum, withholding of removal, or deportation. Asylum requires proving a "well-founded" fear of persecution, while withholding demands that the applicant meet a tougher standard that persecution "is more likely than not." The difference here is proving the possibility of persecution (asylum) versus the probability of persecution (withholding). Both statuses allow the individual to work while in the United States, but only an asylee can apply for permanent residency after one year (and then citizenship five years later). Those who receive withholding typically cannot overcome the one-year bar or have been convicted of minor crimes that disallow asylum. The danger remains, though, that asylees who are not a permanent residents or anyone granted withholding can be deported if country conditions change or if the reasons for claiming persecution no longer exist (such as if they resign from a political party).

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[20] Immigration and Nationality Act, § 208(b)(1)(B)(iii), 8 U.S.C. § 1158 (b)(1)(B)(iii) (2006).

[21] R. Settlage, 'Affirmatively Denied…', pp. 76-78. See the webpage for the USCIS for an outline and chronology of the asylum process: <http://www.uscis.gov>.

Julia is 36 and worked for a business that gave credit to large commercial farmers. When the Zimbabwe government launched a violent, chaotic, and illegal land reform program, ZANF-PF members saw her as an enemy of the revolution. She was beaten and raped by members of the ruling party in an ambush on her way home from work. She joined the MDC and became a local party organizer. After her parents and sisters began receiving harassing and threatening phone calls, she left Zimbabwe and applied for asylum in the United States.

Over the past decade, I have submitted written or oral testimony in more than three dozen asylum cases, all involving applicants from Zimbabwe. This is due to my role as a Country Specialist for Amnesty International USA, a volunteer position that requires daily human rights monitoring, publicizing human rights abuses, and working on asylum referrals. The latter come from attorneys who either contacted the national offices of Amnesty or who found my name on several immigration resource lists. The attorneys send me their client's asylum application and supporting narrative affidavit that details personal history and evidence of past and/or future persecution. After reading the materials, I conduct preliminary research about any allegations I might be able to independently verify, and I generate a list of clarifying questions about people, places, and events mentioned by the client. I run these queries by the attorneys who usually allow me to speak with their clients directly by telephone. Following these written and oral communications, I draft my own affidavit and send it to the lawyers for comment. The resulting suggestions often result in bargaining (see below) on specific language. After completing my final written statement, the attorneys decide if I should also testify via telephone or in person as an expert witness in the defensive Immigration Court hearing. Over ninety percent of the asylees I work with have already been rejected at the affirmative stage. I accept no compensation for my work, for I feel that would undermine my independence and impartiality (though if asked, I recommend a donation directly to Amnesty International USA).

After graduating from high school, Ezekiel interned in the office of two lawyers with high contacts in the government. He attended an MDC demonstration that resulted in police beating demonstrators, causing him to seek shelter with others in the lawyers' office. When his bosses found out, they called the police, and Ezekiel was arrested. He witnessed fellow detainees being tortured with fists and batons. A few weeks later, the police beat him and his father severely in their home, and his sister was raped by local militias for joining the MDC. He fled to the United States in 1998. Since then, his parents have both disappeared and are presumed deceased, and his uncle was arrested and later found dead due to head trauma. After being arrested for DUI in the United States, he was detained and subsequently filed for asylum to avoid deportation.

My academic skills as a history professor are particularly relevant to this work in two general ways. My academic specialty is the history of international human rights law, so I am familiar with global standards, treaty enforcement mechanisms, and the responsibilities of governments to protect their citizens from human right

abuses. This knowledge is important at times, but one does not have to have a human rights specialization to assist in asylum work. What is more important is a deep understanding of a nation or a region: its history, current government, economy, social groupings, and quality of life. Over time, I have discovered how best to keep track of day-to-day events through internet news sources, personal contacts, reports of respected NGOs, and governmental publications. I maintain a large database of human rights reports by non-governmental organizations on Zimbabwe. I also utilize print, internet, and human sources, including the paid research staff within Amnesty's world headquarters in London. My goal is to acquire and update a flexible, reliable, credible, and diverse set of resources that I can call upon quickly in response to asylum referrals. Over the past ten years, I have gained some insights in three particular areas that may be helpful to those wanting to aid asylum seekers as expert witnesses. These include interviewing asylum seekers, working with immigration attorneys, and preparing testimony.

The most important principle to keep in mind when working with asylum seekers is that they are survivors of suffering. In many cases, they have experienced unspeakable harm, lost loved ones to violence, and left families behind, including spouses and children. Their lives might be at stake if they are deported. Yet often they are very reticent in describing what they have endured. This might be due to shame (especially for women who have experienced sexual violence), lasting symptoms of Post-Traumatic Stress Disorder (PTSD),[22] natural shyness, or worries about home governments finding out about their allegations and seeking revenge against relatives. Due to past experiences, they correlate government officials, and judges in particular, with corruption, abuse of power, violence, and arbitrary verdicts. The rule of law can also be a foreign concept, so they may view their lawyers as kind and considerate people likely to fail against a system fixed against them. Given this context, it is very important to ask sensitive questions, to be willing to accept ambiguous answers, and to understand that memories are often incomplete and sometimes incorrect. Lawyers, not being country experts, often do not know what details might be important for validating allegations, and so it falls on me to ask probing questions about people, places, and events. For example, knowing the names of police stations or police officers, the locations and exact dates of demonstrations, and the types of torture allegedly performed can help to authenticate claims made in asylum applications. Yet answering these queries brings the danger of re-traumatizing survivors, or embarrassing them, or making them fearful about why someone needs to know, especially if the questioning is done in a way that smacks of an interrogation.

One way to proceed carefully is to work closely with immigration attorneys. I have found the vast majority are hard working, compassionate, and effective advocates. They know their clients much better than I do, and so in my initial con-

[22] For a good layperson's overview of PTSD, see: J. Herman, *Trauma and Recovery. The Aftermath of Violence-from Domestic Abuse to Political Terror*, New York 1997.

versations with them, I will ask about the physical and emotional health of their clients. I will inquire about their personalities and ability to be forthright, as well as their sensitivities, credibility, and memory. My goal is to understand what kinds of questions I can safely ask the asylees and which ones to avoid or ask in a later conversation (or leave it to the lawyers to ask). I will inquire as to whether I can talk to the client directly by phone, and if the attorneys would rather be in on the call as well. In almost every case, lawyers have granted the phone interview, though I make sure that they contact the client first and fill him or her in on who I am and my role in their case. This provides me with some credentials and a level of trust with the client.

While my role is to provide testimony for the asylum seeker, it is important to recognize that the attorneys and I have differing and at times contrasting roles. A good immigration lawyer will raise multiple reasons as to why his or her client deserves asylum, and some of them may be based on nothing but pure speculation. Faced with such conclusions, and despite oftentimes my heart's desire to empathize toward the asylee, I have to be true to my role as an independent expert. My duty is to testify only to that which I can document and to be honest when confronted with information that I believe is unreliable, misleading, or factually wrong. Moreover, as an historian, I am very hesitant to speculate about the future, such as the likelihood of persecution if the client is deported back to Zimbabwe. Inevitably, given these differences, amendments to my affidavit become bargaining sessions during which lawyers and I toss words back and forth. How certain am I about the likelihood of future mistreatment? If not certain, how likely? Very likely? Probable? Possible? More likely than not? Can such qualifiers be quantified into a percentage? Sometimes this delicate wordsmithing seems surreal given what is at stake, but it is important. Before testifying in court, I take a sworn oath to tell the truth, and I take that pledge seriously.

There are undeniably strong and weak candidates for asylum, given the need to prove a "well-founded fear of persecution." The most obvious cases are those who fled Zimbabwe after facing mistreatment themselves. A bit harder to prove are clients whose families, but not themselves, have been mistreated by authorities, unless the reasons as to why they were singled out also apply to the client. For example, if a client's relatives have been assaulted due to their membership in an opposition party, and the client is likewise an active party member in the United States, the conclusion that he or she faces similar treatment if returned would not be hard to argue. The most difficult cases to defend are asylum seekers who have never faced persecution personally, but argue that their partisan or human rights activities in America make them likely targets if deported. This is problematic because foreign governments often pay no attention and could care less about what most expatriates do, as they are pre-occupied with domestic issues. Former clients have disagreed and asserted that exile groups are infiltrated by Zimbabwean government spies who report directly to the embassy in Washington. I have seen no evidence of this, and I am skeptical due to the natural

presence of many factions in exile groups, which can often lead to false accusations of disloyalty and subterfuge.

The final important aspect of asylum work is testifying in court. In order to be certified as an expert witness, the client's lawyer presents my credentials as contained in my resume, the government's attorney has the opportunity to question them (but usually does not), and the judge ultimately rules. A favourable ruling does not prevent cross-examination of any actual testimony offered, however, but it allows written and oral pleadings to be considered with heightened credibility. Keeping a current resume organized around my human rights and country-specific qualifications is a necessary accompaniment to my written affidavit.

After all of the research is done, conversations with lawyers and the client completed, and the affidavit written, testifying in court often seems anti-climactic. This can be especially true if the lawyers have practiced with me shortly before the hearing. I usually insist on doing the review, as it ensures that the lawyers are prepared for my answers (which can also lead to more bargaining over word choices). As an academic, I am aware that I can give lengthy answers to general questions, and so I ensure that the queries from lawyers are specific and direct to avoid my going off on tangents or giving long speeches! The main unknown, then, is what role the government's attorneys will play. Will they simply stipulate to my written testimony, thereby foregoing the need to speak at all in court? Will they stipulate to my testimony only after I testify in court? Or will they cross-examine what I have given in writing or orally? In most cases, the client's lawyers will have talked to the government's attorneys a few days before the hearing, and so I will have some idea of what I am needed to do. Yet in a minority of cases, the government's lawyers are unreachable, non-committal, or simply unprepared to say anything before the court date. Actual cross-examination has proven to be rare indeed, as government lawyers do not bring country experts to court and in general they know very little about Zimbabwe. The questions I have been asked were very limited in nature, either asking for clarification or gently probing my conclusions to try to make them seem more tenuous and speculative. In these cases, I try to be honest about my assessments and readily admit what I can prove and what is educated conjecture.

Agatha had no plans to stay in the United States when she came in 1996 to attend college at the age of twenty. Yet when the MDC formed and her close neighbour back in Harare became a leading activist, she began to worry. Her entire family back home publicly joined the MDC and suffered as a result. Her parents were beaten in their home by ZANU-PF supporters, her stepfather was detained, interrogated, and beaten for publishing pro-MDC articles in his magazine, and her uncle was assaulted in his home. As her visa had expired, a relative told her not to file for asylum as she would be deported as an illegal alien and face persecution as an MDC member. She waited twelve years to file, during which time Zimbabwe fell into political and economic disarray. She decided to file for asylum given these changed country circumstances.

The rewards for serving as an asylum advocate are many. In the human rights work that I do for Amnesty International, it is not often that I see a clear and specific impact. When I become part of a team in an asylum case, a favourable verdict provides immense satisfaction. In the three dozen asylum cases in which I have taken part, all but one of the clients have received asylum or withholding of removal in the United States (the one exception fled to Canada before his trial, believing correctly that Canadian law gave him a greater chance of success). This record is not due to my work, but rather reflects first of all the extraordinary courage and inhumane suffering of asylees coupled with the tireless work of their dedicated, compassionate, and insightful lawyers.

Another benefit is the acquisition of new and fascinating friends. I still keep in touch with some of the asylees, one of whom has become a very close and dear friend. Another is a member of Thomas Mapfumo's band in exile in the United States; Mapfumo is a musical legend in Zimbabwe whose anti-government lyrics led to death threats and exile.

Working with asylees and lawyers can also restore faith in humanity and the capacity of humans to do good. There has been very little positive human rights news from Zimbabwe over the past twelve years, and it is easy to become cynical and jaded. Asylum work helps to restore a balance, especially if asylees successfully apply for their spouses and children to come from Zimbabwe or, if they are already in the United States, to claim derivative asylum.

Yet the numbers at the beginning of this paper demonstrate that only a small number of refugees obtain asylum globally. Those that cannot do so need allies, including academics and lawyers, to assist in ending their flight from suffering. If we do not answer, as the Polish poet Zbigniew Herbert reminds, us, we are little different in our inter-connected world than those who caused the turmoil in his apocalyptic poem, 'Report from the Besieged City':

> and so in the evening released from facts I can think about distant ancient matters for example our friends beyond the sea I know they sincerely sympathize they send us flour lard sacks of comfort and good advice they don't even know their fathers betrayed us our former allies at the time of the second Apocalypse their sons are blameless they deserve our gratitude therefore we are grateful they have not experienced a siege as long as eternity those struck by misfortune are always alone the defenders of the Dalai Lama the Kurds the Afghan mountaineers now as I write these words the advocates of conciliation have won the upper hand over the party of inflexibles a normal hesitation of moods fate still hangs in the balance cemeteries grow larger the number of defenders is smaller yet the defence continues it will continue to the end and if the City falls but a single man escapes he will carry the City within himself on the roads of exile he will be the City we look in the face of hunger the face of fire face of death worst of all – the face of betrayal and only our dreams have not been humiliated.[23]

[23] C. Forché, *Against Forgetting…*, pp. 463-464.

Yet not all hope is lost. We as academics, lawyers, social workers, and human rights activists must then unite to advocate on behalf of this man or woman in exile, who carries the hopes, values, and dreams of the individual, the community, and the country. He or she embodies the dignity common to all human beings. He or she needs refuge from the physical and mental scars born of the terrifying acts that members of our species do to one another. If we as good people collaborate, we will fulfill what is stated in the Mishnah Sanhedrin, "Whoever saves a life, it is considered as if he saved an entire world".[24]

Abstract

According to the 2010 figures released by the United Nations High Commissioner for Refugees, over half a million people filed for political asylum in the industrialized world of Europe, North America, and Australia. The United States received the greatest number of applications, amounting to more than 10% of the global total.[25] Many of these asylum seekers lack lawyers, miss critical legal deadlines, and have no witnesses testifying on their behalf. They risk deportation, therefore, despite often compelling narratives of mistreatment, discrimination, and danger that they have endured and/or may yet suffer if returned to their country of origin.

As an historian of international human rights law and Zimbabwe Country Specialist for Amnesty International USA, I have testified as an expert witness in over three dozen asylum cases. Each claimant is different, of course, but they all need three critical types of support when making their asylum case before an immigration judge. They need someone with knowledge of Zimbabwe's political past and human rights record in order to verify, to the maximum extent possible, specific examples of suffering that they endured while living in their native land. Second, they need an expert witness to testify about the possibility of future persecution if they are deported back to Zimbabwe. Third, lawyers need a critical and independent review of the asylum seeker's affidavit to highlight unanswered questions, posit new angles of inquiry, and explore undeveloped claims in order to make the document as complete and accurate as possible. My academic skills are particularly relevant to this work. I maintain a large database of human rights reports by non-governmental organizations on Zimbabwe, use and evaluate print, internet, and human sources, craft carefully written affidavits, and (when needed) defend my findings in open court. Every client I have submitted an affidavit on behalf of has received asylum, which is both testimony to the power of strong historian-lawyer-client partnerships as well as to the terrible human rights conditions in Zimbabwe that we are able to bring to light.

My paper for the conference will outline best practices when working with asylum seekers and their attorneys. It will discuss how to balance being an impartial and independent expert witness while concurrently serving as an advocate for asylum seekers. Specific topics will include how to interview sometimes traumatized asylum seekers, steps to

[24] Mishnah Sanhedrin 4:5; Babylonian Talmud, Tractate Sanhedrin 37a.

[25] United Nations High Commissioner for Refugees, 'Asylum Seeker Numbers Nearly Halved in Last Decade, Says UNCHR' <http://www.unhcr.org/4d8cc18a530.html>, 26 July 2012.

take when crafting expert testimony, what to expect in courtroom cross-examination by prosecutors, and how lawyers and historians can collaborate despite different evidentiary standards and purposes for the protection of human rights.

Rowland Brucken

Dr. Rowland Brucken is an Associate Professor of History and Chair of the History and Political Science Department at Norwich University. His forthcoming book, entitled *A Most Uncertain Crusade: The United States, the United Nations, and Human Rights, 1941--1953,* is to be published by Northern Illinois University Press. He has taught undergraduate classes on Prosecuting Human Rights Abuses, Genocide in History, and American Civil Rights Movements. At the graduate level, he created and regularly teaches an on-line seminar, "Human Rights and Conflict," for students pursuing a Master of Diplomacy degree from Norwich. He is also the Zimbabwe Country Specialist for Amnesty International USA (AIUSA), which involves daily human rights monitoring, publicizing AI reports and press releases, and testifying on behalf of asylum seekers in immigration court. He has won two national awards from AIUSA for his asylum advocacy.

Periods of Transition

Reinhild Otte
Council of Europe (France)

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The Period of Transition in Central, Eastern and South-Eastern Europe

The Role of the Council of Europe in Promoting Education for Democracy and Human Rights

Dzień dobry! Good morning.

Excellencies, distinguished audience, dear colleagues,

What an interesting and – for many of us – also emotionally touching session this morning, which evokes in mind the developments of more than 20 years ago in Europe that have influenced so strongly not only Europe itself, but also many regions of the world.

Let me first express our gratitude to the organizers (especially His Magnificence Prof. Nowak, his predecessor Prof. Musioł and the convenor Prof. Szlachta) for having invited the Council of Europe – which I have the honour to represent – to take part in this debate. It is my pleasure to transmit best greetings from the Secretary General of the CoE, Mr. Jagland, and the Director of Democratic Citizenship and Participation, Ms Olafsdottir, who wish you every success for this conference.

Thank you also for the perfect preparation, the most challenging programme and the impressive and promising opening yesterday. I am convinced that – after the excellent conferences we have had in Sydney and Durban (thanks to our friends Prof. Ozdowski, the "Spiritus rector" of these conferences, and Prof. Mubangizi) – also the 3rd one here in Krakow will be a milestone in the development of international co-operation in the field of human rights education.

My contribution could perhaps be called a "historical walk" through the period of transition in Central, Eastern and South-Eastern Europe in the field of Education for Democracy and Human Rights, seen through the eyes and from the perspective of the CoE.

I'd like to invite you very warmly to join me on this walk, which recalls how we tried to react to the new challenges and demands since 1989, and to share with me our experience. Although the experience has its origin in Europe it can of course also be used as food for reflection in other parts of the world where we can also see most important and encouraging developments of transition to democracy.

Krakow is, indeed, an excellent place to start our walk. Not only because so many developments in the transition period originated in Poland – let us think only of the foundation of Solidarność. Poland is also an outstand'ing example for a successful and peaceful transition to democracy to be very proud of.

Also many important events in the field of Education for Democracy and Human Rights have taken place here. Among them are here in Krakow in 2000 the 20th Session of the CoE Standing Conference of Ministers of Education or in Warsaw in 2005 the 3rd Summit of Heads of State and Government to name but a few. They all gave strong support to the work in democracy and human rights education on which the CoE has been working for many years.

Allow me before we start our walk to tell you – especially our colleagues from outside Europe – a little about the history and the role of the Council of Europe.

- It is the oldest European intergovernmental organization (1949).
- It comprises today 47 member states (more than 800 Mio people, all of geographic Europe).
- Its core mission: the protection of human rights, democracy, and the rule of law.
- Its most significant and famous achievement is the European Convention on Human Rights (adopted 1950) implemented by the European Court of Human Rights.
- Its headquarters are in Strasbourg/France.

The CoE has been working for Democracy and Human Rights in general since its foundation. In the field of Education its most important activity is the project:

'Education for Democratic Citizenship and Human Rights (EDC/ HRE)', which is quite often called its "flagship initiative."

This project (which officially started in 1997) cannot be seen without its historical and political background. Even more: it is the CoE's response to the new challenges in Central, Eastern and South-Eastern Europe since 1989.

Let me go back to 1987, when we started a big project 'Adult Education and Social Change'. As indicators and target groups for change we identified the elderly and the long-term unemployed.

But in the middle of this project we saw that the real and most important change was a different one, namely the political and economic collapse of the communist system in Europe.

As a consequence the CoE was confronted with a strong demand from the countries in transition to assist them on their path to democracy.

For education this meant that although these countries had a very high level of education, this system was not well equipped for the transition to democracy and human rights.

Among the most urgent challenges were:

- how the populations could best become acquainted with democracy/human rights in and outside school;
- who should teach (certainly not the former teachers of Marxism/Leninism);

- which curricula and textbooks would be needed;
- whether new legislation would be necessary etc.

Now I'd like to mention only some examples of our activities which may be seen as milestones:

The first step was a conference in Belgrade/Yugoslavia in 1990. Here, for the first time in the history of the CoE, representatives from western as well as from central and eastern European countries (Bulgaria, Czechoslovakia, Hungary, Poland, Rumania) were brought together for a conference on 'Adult Education and Social Change with Special Emphasis on Reducing Unemployment'.

Let me just illustrate this first step with some quotations.

While the Yugoslav Minister of Labour spoke mainly about "the gravity of the situation at the end of 1989 and the need to transform our society, economy and labour market," there were also suggestions (e.g. from the convenor of the conference, the chair of the Institute for Pedagogy and Andragogy of the Belgrade University) for "new opportunities for Adult Education in Europe to further man's highest values, human rights and freedom". And the representative of the CoE insisted in the "link between unemployment, social cohesion, education and democracy".

As many of you are coming from universities, I'd also like to mention our activities in the field of Higher Education.

In 1991, with the Iron Curtain gone, the Higher Education Committee of the CoE set up a special programme (which some of you perhaps remember) to monitor and support the legislative reforms to a democratic system which the transition countries were carrying out in the field of higher education and research.

One of the most important questions was: "How can one make the transition from rigid, centralized planning to academic autonomy and freedom of research?". (We need to remember that also higher education and research under socialism were governed entirely by a plan!) The CoE's approach was both open and pragmatic; the aim being to help but not to impose particular solutions.

It consisted of advisory missions, thematic workshops, multilateral study visits (to give specialists from the east a chance to see democratic systems in action), and a series of publications with Pan-European comparative analysis.

Next step and stop of our walk:

A Conference in Stuttgart/Germany in 1992, jointly organized by the CoE and the Ministry of Education Baden-Württemberg (my former ministry), on 'Adult Education and Social Change in the Light of New Developments in Europe'.

The conference again brought together western as well as central and eastern experts to discuss especially the situation and challenges in adult education during the transition period.

A Recommendation was adopted requesting that:

> A follow up project should focus on Adult Education as an element of democratization and economic reform and should pay special attention to the developments

in the countries of Central and Eastern Europe but also take into account the closer relations among all countries of Europe.

One year later this Recommendation found its way into the Final Conference of the Adult Education Project, which looked into "[…] the socio-economic changes in Europe and existing links between Adult Education and Human Rights".

One of its Round Tables was entitled: 'Adult Education, Democracy and Human Rights'. There was a consensus among all member states that a new project should focus on strengthening pluralistic democracy and human rights. The Recommendation laid also a specific focus on "[…] providing the countries of Central and Eastern Europe with the services necessary for the construction of democratic political regimes". The following years from 1993-1996 were characterized by an Interim Phase and period of intense preparation for a new project to respond to the new challenges and demands. The main questions to answer were:

1. how to put together school education, higher education and adult education in the field of EDC/HRE and
2. how to combine the different interests of "old" and "new" member states.

Out of the wealth of workshops, seminars, study visits, bilateral programmes and pilot projects that took place to find out what was really needed, I'd like to mention only two:

1. Demosthenes Bis-Education, a bilateral cooperation Programme with Russia 1994-1995 with advisory missions to different regions of Russia to analyse the current situation and to develop strategies to foster the reform process.
2. The Project 'Democracy, Human Rights, Minorities: Educational and Cultural Aspects' (1993-1997).

At the request of various states five pilot activities (in the Czech Republic, Estonia, Hungary, Romania and Slovakia, especially for their minorities) have been set up. The goal was to develop knowledge, skills and attitudes which people need to become democratic, active citizens who care about human rights and respect them. I also should not forget to mention two developments during this period which gave a strong backing to all our efforts, namely the enlargement of the CoE and political support. By 1995 the CoE had grown from 23 to 35 member states, most of them coming from the former communist system (1990 Hungary, 1991 Poland, 1992 Bulgaria). And 43 states had already signed the Cultural Convention and therefore were able to participate in all activities in education and culture. As regards political support, the most important events during this period were:

- Vienna/Austria 1993: First Summit of Heads of State and Government of the CoE which looked forward to a Europe "where all our countries are committed to pluralistic and parliamentary democracy, the indivisibility and universality of human rights, the rule of law and a common heritage enriched by its diversity".
- The Conference of Ministers of Education in Madrid/Spain in 1994 put it in concrete terms and "[…] asked the CoE to intensify its activities promoting

education for democracy, human rights and tolerance […] in school, adult education and teacher training".

The next step of our walk:

In Strasbourg in 1996, a broad consultation meeting took place, the result of which was that a new project should look for innovative paths with the following elements:

- lifelong Learning (all age groups);
- formal, non-formal and informal education;
- a holistic approach (all sectors of society);
- inter-institutional (close cooperation with other international organizations);
- Pan-European character (new and old member states).

In February 1997: a project *steering group* was set up.

In June 1997, in their conference in Kristiansand, Norway, the European Ministers of Education renewed their support for EDC/HRE.

Finally, in October 1997, the Second Summit in Strasbourg requested in its Action Plan "the launch of an initiative on Education for Democratic Citizenship and Human Rights". This was the official start of the EDC/HRE Project.

I am very grateful to have had the privilege to participate in designing, establishing and steering this project. It was designed to help young people and adults play an active part in democratic life and exercise and defend their democratic rights and responsibilities in society. It aims to promote the CoE's core values (democracy, human rights and the rule of law).

During this programme the CoE has adopted reference texts, developed political frameworks, supported networks and produced a wealth of materials in the area of democratic citizenship and human rights. There is no time today to look in depth into this project and its results during its different phases from 1997 up to now including the 'European Year of Citizenship through Education 2005' with its slogan "Learning and living democracy".But let me just highlight two events during this time which took place in Poland.

First, in 2000 the European Ministers of Education, meeting in Krakow, called for a Committee of Ministers *Recommendation* in this field which was adopted in 2002. Second, the Third Summit in 2005 in Warsaw, when the Heads of State and Government requested "increased efforts by the CoE in the field of education […] aimed at promoting inter alia comprehensive human rights education". At the global level, I'd like to mention that the CoE assists the United Nations with the implementation of the World Programme for Human Rights Education in Europe in the framework of a formal agreement. And the cooperation with international organizations (OSCE/ODIHR, UNESCO, UN-High Commissioner for Human Rights, EU, ALESCO etc.) has been further formalized in an 'International Contact Group on Citizenship and Human Rights Education'.

Last but not least I'd also like to draw your attention to one of the main outcomes of our work, the 'Recommendation of the Committee of Ministers on a CoE Charter on Education for Democratic Citizenship and Human Rights Education'

adopted in May 2010 which aims to codify best practice in EDC/HRE. An evaluation conference of the Charter just took place in Strasbourg last week.

The Charter which we already presented in Sydney and Durban is available on the CoE website in different languages and now also in a child-friendly version.

We are happy to be able to say that it has proved to be a good basis and instrument to work with in the field of democracy and human rights education not only in Europe but also worldwide. And we will be more than happy to join you also in other regions of the world on your path and work in this field.

Thank you very much. Dziękuję!

Abstract

The speech recalls the role of the Council of Europe (CoE) during the period of transition in Central, Eastern and Southeastern Europe in the field of education for democracy and human rights. It can be called an "historical walk" through this period, seen from the perspective of the CoE.

After a short introduction to the work of the CoE as a human rights watchdog and guardian for democracy and the rule of law, it will be structured around the initiative "Education for Democratic Citizenship and Human Rights (EDC/HRE)" and its historical and political background and developments. In a nutshell: It is the CoE´s response to the challenges in the countries of transition since 1989 when it was confronted with a strong demand from these countries to assist them on their path to democracy in the field of education. The contribution illustrates by some examples which can be seen as milestones in the development from the first vision of an EDC/HRE activity to a concrete concept that met the interests of all CoE member states. It reflects the background of the enlargement of the CoE as well as the political support by Ministerial Conferences and Summits of Head of State and Government of the CoE, and it also highlights the role of Poland and Krakow in particular during this process. Finally it gives an overview of the essential content and outcomes of the project on "EDC/HRE" – which has become a "flagship project" of the CoE – with special focus on the "Recommendation of the Committee of Ministers on a CoE Charter on Education for Democratic Citizenship and Human Rights Education" adopted in May 2010. This recommendation has proved to be a good basis and instrument to work with in the field of education for democracy and human rights in Europe and worldwide.

Reinhild Otte

Dr. Reinhild Otte has a background in economics, law and social sciences. She has professional experience in industry in Germany and abroad, in vocational training, as well as in university teaching and research (economics, law, education). For 25 years she worked as a civil servant in the Ministry of Education, Youth and Sports in the German Land of Baden-Württemberg. She has also represented the Federal Republic of Germany in numerous international bodies and committees. Since the 1980s, she has contributed to various Council of Europe (CoE) inter-governmental co-operation programmes. Reinhild Otte is a CoE Expert in Education for Democracy and Human Rights; she was awarded the "Pro Merito Medal" of the CoE.

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Human Rights in the Education System During the System Transformation in Poland

1. Human Rights Education in Poland During the Transformation of the Political System

Political changes initiated by Round Table negotiations in Poland faced Polish education system with challenges, which neither its personnel nor its co-workers nor the society as a whole were prepared for. Transition from the school which strengthened the authoritarian regime and the statist system, and was subordinate to communist ideology, into a school that strived for being democratic and for observing human rights, a *liberal* school that, by principle, introduced pluralism of values, must have encountered obstacles on each stage. First of all, subjects "civil education" and "knowledge about society" needed a change as they were highly burdened with indoctrination. Moreover, today's world has faced societies, including Polish one, with a need to enter into the globalization processes. The need to develop tolerance for others' individuality, peaceful coexistence, awareness of environmental problems, and to head towards a knowledge-based society, and, last but not least, to introduce *lifelong education* – these are just a few of challenges Polish education system is facing.

From 1989, when Poland went on a path of rapid changes in all areas of social and economic life, which consisted in adjustment to principles of a democratic state ruled by law, human rights became one of more important and popular subjects. Accession to the Council of Europe resulted in Poland's obligations to conduct systematic and reliable education about human rights. Also the accession to the European Union made Poland obliged to undertake the effort of safeguarding the observance of human rights, which entailed the need of educating wide social circles in this subject. Because of the borders getting opened – not only between

the states, but also between people – such an education must be directed towards integration and focused not only on knowledge of foreign languages, communication, cooperation and technological skills – it must include also human rights education accessible to people in each age.

2. Poland's Performance of Obligations in the Field of Human Rights Education After 1989

After 1989, tasks of the state in the field of human rights education have been carried out superficially and jerkily and only when some facts that stimulated interest in this subject took place. Despite international obligations, Poland still does not fulfil the basic requirements on providing accessible and reliable information on human rights. Participation in various international meetings concerning the scope and the ways of human rights education without providing society with information on important developments during these meetings (e.g. recommendations worked out during such meetings are not translated into Polish) demonstrate serious negligence in the area of human rights education in Poland. So far, no coherent action plan in this field has been worked out. Although the ministries work out their plans of human rights education (each one in its own field), there are no coordinated and thought-out actions resulting in joint activities for civil society and human rights in Poland. Polish education system, in its present stage, still contravenes many international and domestic recommendations that specify the goals of education in the field of human rights. Absence of human rights in new curriculum for elementary schools, introduced in 2008, and superficial information provided to children in *gymnasium* (a middle school or junior high school for pupils aged 13 to 16) cannot be compensated by education in high schools as it includes only part of schoolchildren (another part chooses e.g. learning within Voluntary Labour Corps, where they have no chance of learning about this subject). Thus, one of the most important components of a democratic state ruled by law – knowledge and awareness of human rights – was in fact placed on the margin of the education system.

2.1. Preparation of Teachers

Another serious problem is teachers' lack of preparation for human rights education. In order to be able to teach about human rights, it is not enough to be a teacher of history or civics, or an educationalist. While it is unimaginable that mathematics could be taught by somebody who did not graduate in it, it happens in case of human rights – they can be lectured on by everybody; moreover – due to little literature available – it can be based on sources like Wikipedia. In Poland, adequate training of teachers to conduct lessons on human rights is a serious

problem: first, civics is not listed among fields of university studies, which means that this subject is taught by persons who graduated in other fields; according to a survey conducted in 37 *gymnasia* with 49 teachers of civics as the respondents, it appeared that most of them graduated in history, with graduates of philology, social sciences, or political sciences present in the group as well; there were also graduates of biology, physical education, a theologian and a music teacher.[1] Such a random selection of teachers for conducting lessons that are supposed to prepare children and youth to active participation in public and social life clearly demonstrates the lack of understanding of importance of this subject. Second, many teachers of civics were not prepared in any way to teach about human rights; neither were teachers who passed this knowledge on when teaching other subjects. Outcomes of questionnaire survey among 203 teachers from *voivodeships* of Dolny Śląsk, Świętokrzyskie, Podkarpackie, and Mazowieckie demonstrate that 189 of them have taught about human rights;[2] however, only 50 of them have participated in classes (on human rights) held within their studies, or in additional training courses, the others acquiring their knowledge from various websites or randomly chosen papers they had managed to get. The classes were held usually during weekly class meetings, but also during lessons in other subjects like Polish or English language. Usually, the teachers kept to the curriculum, but many of them created their own schemes. The education forms included primarily the form of lectures, sometimes discussion was included, occasionally workshops. Out of 18 teachers of civics, only 5 attended an education course in human rights.

2.2. Human Rights Education of Public Education Officials

The problem of lack of education on human rights affected also other professions that include working directly with people. This issue was raised by all international organizations emphasize the training of officers and officials of the member states. One of reports prepared by the Agency for Fundamental Rights reads

[1] A. Sobańska, 'Założenia projektu badawczego «Monitorowanie reformy systemu oświaty» oraz metody badawcze' in E. Wosik (ed.), *Zmiany w systemie oświaty. Wyniki badań empirycznych*, Warszawa 2002, pp. 16-17.

[2] The data were collected during meetings with teachers' councils in various schools (*Gymnasium* in Jedlina Zdrój, 2nd *Liceum* in Końskie, Hugo Kołłątaj *Liceum* and Stanisław Konarski Complex of General Education Schools in Warsaw), during various meetings held by regional Teachers' Training Centres, and during meetings concerning human rights, held by universities (e.g. School of Law and Public Administration in Rzeszów holds an annual film festival on human rights for the general public; it is preceded by knowledge competition on human rights held in schools of Podkarpackie *voivodeship*. During the festival, the competition is summed up and the best students are handed the awards – in this case, those approached were teachers who came to the festival because of their students being awarded, or their interest in human rights and the festival itself).

"The right to human rights education and training requires the mobilization of all the sectors of the society, not only the State and the entirety of public authorities, specifically local authorities, but also the private sector",[3] and "It also sets out the State's specific duty for initial and continuing training of its agents, namely, judges, police officers, prison guards, and the entirety of its law enforcement agents as well as armed and uniformed services". Human rights awareness and feeling of responsibility for their work are among the components that enable individuals to exercise their human rights. Unfortunately, training of various professions in human rights is still insufficient and haphazard in Poland. A typical feature of most actions taken by public institutions in the field of human rights education is their infrequency and connection with some special occasions or anniversaries.

This issue has been raised, among others, during the conference 'Rights of the child in the face of challenges of everyday life'. In one of the papers presented at the conference we read: "Education of employees of social welfare institutions (but not only them) must be focused on preparing them thoroughly to understanding what human rights are and to their mandatory observance. The first step must be changes in curricula of various fields of studies so that they include comprehensive education in human rights".[4]

2.3. Education at the Level of University and Post-graduate Education

A similar problem appears in the area of human rights education for future government officials, civil servants, journalists etc. Despite the fact that human rights are included in many university curricula (unfortunately, the accuracy of their presentation is often poor), in many faculties and universities they are non-existent in practice; a review of curricula of selected fields of studies or continuing education shows that the subject of human rights was treated in various ways, sometimes they were mentioned in a very superficial manner which suggested ignorance or low esteem of the subject by persons who created the curricula. Despite Act of 27 July 2005 on Higher Schooling listing in its Article 13, among the fundamental tasks of universities, "educating students in feeling of responsibility for Polish state, for strengthening the principles of democracy and for observance of human rights",[5] the range of information provided during studies varies greatly

[3] UN's official draft of eclaration on Human Rights Education and Training (2005), as cited in 'European Union Agency for Fundamental Rights, Institutional needs assessment for Human Rights Education', Report by the Change Institute FRA1-CAR-2009-NP01, 2010, p. 17.

[4] M. Mączyński, 'Rights of the child in academic education', paper presented at a conference 'Rights of the child in the face of challenges of everyday life', held by the Commissioner for Children's Rights on 27 January 2010 in Katowice (in Polish).

[5] Dziennik Ustaw (English: *Journal of Laws*) of 2002, No. 164, item 1365, at (in Polish) <http://www.abc.com.pl/serwis/du/2005/1365.htm>, 21 December 2010.

and does not always enable students (be it 1st or 2nd degree studies) to acquire even the basic knowledge about human rights, let alone its application in practice. For example, students of administration are supposed to learn about "the notion and types of human/civil rights and freedoms – personal, political, economic, social, and cultural. Means of protection of rights and freedoms"; during 2nd degree studies "understanding the system principles which regulate relations between the state and the individual, in internal and comparative aspects" is required as well. Students are also expected to understand "protection of individual subjects in the system of legal protection in European Communities".[6]

The situation of students of *special education* is worse: apart from subject of "protection of rights of persons with mental disorders" during 2nd degree studies, they are not going to receive any knowledge about human rights as there is not a single word about human rights in their curriculum. Also in other fields of studies[7] information provided on human rights is fragmentary and superficial. The manner human rights are included in the schemes shows that education in human rights to those who are going to work in professions where human rights are crucial – teachers, lawyers, social workers etc. – is insufficient: first, its level varies greatly; second, it does not provide them with practical preparation for their professions.

Significant freedom universities enjoy in elaborating their curricula results in level of knowledge of human rights varying between students of the same

[6] Standards of education for studies of administration – 1st degree studies, in Regulation of Ministers of National Education and Sports of 18 April 2002 on definition of standards of teaching in particular fields of studies and levels of education (Attachment No. 1), see: Dziennik Ustaw (English: *Journal of Laws*) of 2002, No. 116, item 1004, at <http://www.abc.com.pl/serwis/du/2002/1004.htm>, 21 December 2010.

[7] Other analysed fields were journalism and social communication, political sciences, social work, and law. Students of 1st degree studies in journalism and social communication have a chance of learning something about human rights during classes on "principles of democratic state ruled by law, the idea of civil society and principles of the freedom of press", although human rights have not been mentioned as such. On 2nd degree studies, the result of teaching is supposed to be understanding "the idea of civil society", "principles of the freedom of speech" and notions of "freedom, truth, responsibility, honesty, respect for dignity", see: 'Attachment No. 10. Standards of teaching in the field "journalism and social communication"' in Dziennik Ustaw (Polish: Journal of Laws) of 2002, No. 116, item 1004. Students of political sciences have "guarantees of respecting individuals' rights and freedoms", and "civil society" listed among the subjects of respectively, 1st and 2nd degree studies; see: 'Attachment No. 49. Standards of teaching in the field "political sciences"' in ibid. In the field "social work", students of 1st degree studies have classes on "human rights – the history of the issue, today's international conventions; classification of human rights"; possibly the issue may be discussed during classes on "local non-governmental organisations", see: 'Attachment No. 54. Standards of teaching in the field "social work"' in ibid. Students of uniform master's degree studies of law have no separate subjects of human rights (it's fragmentarily discussed while they learn about constitutional law – as part of "the freedoms, rights and obligations of the individual" – and within the subject of history of law as "constitutional guarantees of civil rights", which may make the subject be narrowed), see: 'Attachment No. 55. Standards of teaching in the field "law"' in ibid.

subject at different universities; it regards both obligatory and optional classes. While universities enjoy autonomy in teaching, it has to be in line with international obligations Poland has taken on during the two decades of system transformation. However, carrying out these obligations is hampered by a number of problems of both formal and practical nature. First of all, it is clear that universities do not have enough lecturers specialized in human rights, which entails the absence of this subject in academic education or its superficial treatment. Despite Departments of Human Rights being established within many universities in Poland where work on comprehensive education in human rights was taken on, it is still not a common practice either in knowledge provided to students or practical activities preparing them to perform their professions or to perform public functions. One of few good examples are university legal clinics associated around Foundation for University Legal Clinics;[8] currently, there is 26 clinics, with one within Faculty of Law and Administration at the Jagiellonian University established in 1997 as the first one. Such a form of academic education is one of many best practices in education that really offer real preparation for future professionals.

Also worth mentioning is activity of ELSA Poland[9] for promotion of and education in human rights among Polish law students; one of their latest actions was agreement on continuous cooperation with the Commissioner for Civil Rights – Prof. Irena Lipowicz, and on propagating by ELSA Poland knowledge on the institution of the Commissioner and on human/civil rights.[10]

[8] The first legal clinics were established in Krakow (1997) and Warsaw (1998). Active contacts with The European Law Students' Association (ELSA) were of important influence on development of legal clinics; in May 1998 in Szczecin, ELSA held a conference 'Reform of the system of legal education. Development of idea of university legal clinics' that became a beginning of 'a serious discussion on development of clinic education in Poland', at <http://www.fupp.org.pl/index.php?id=historia>, 11 December 2010.

[9] The European Law Students' Association (ELSA), seated in Brussels, is the largest non-political, non-profit-making organisation in the world that associates law students and recent graduates in 42 European countries. Its goal is building cooperation and understanding of law students by learning about other political systems and legal cultures. Activities undertaken by its members are supposed to serve "a just world in which there is respect for human dignity and cultural diversity". In Poland, one of their most important fields of activity is raising awareness and knowledge and promoting respect for human rights among society. It is carried out by projects like "Lawyers' Film Academy", seminars, conferences, discussion panels, study visits, institutional study visits, contests, moot courts. In cooperation with institutions internships are held on local, national, and international level (e.g. in Bureau of Commissioner for Civil Rights). Its members gain experience also by working in NGOs operating in the field of human rights, e.g. Helsinki Foundation for Human Rights, Citizen Advice Bureaux, Forum of Persons Harmed by the State, Association of Families "Otwarty Umysł" (English: Open Mind) in Rzeszów, and in West-Pomeranian Foundation for Help for the Family "Tęcza serc" (English: The Rainbow of Hearts) in Szczecin. In 2007 ELSA Poland's Human Rights Programme was granted a title of Partner of Polish National Committee of UNICEF, and in 2009 Amnesty International became a partner in the programme; at <http://www.elsa.org.pl/oelsa/19>, 11 July 2011.

[10] The meeting was held in Office of the Commissioner for Civil Rights on 21 June 2011, at <http://www.rpo.gov.pl/>, 11 July 2011.

However, universities are not only about education of students – they are primarily supposed to be places where scientific thought of human rights should be developed. In a report in 1995, Prof. Ewa Łętowska wrote that "purely scientific publications that contain original solutions of scientific problems from the field of human sights are a rarity"[11] and "undoubtedly, the *status quo* is influenced by the fact that academics (from universities and from Polish Academy of Sciences) are highly involved in promotional and educational activities carried out outside the education establishments; it is self-interest, social obligation, and finances that are decisive here".[12]

A hope for change of *status quo* is reform that is taking place in higher education after twenty years of transformation. Maybe this time human rights will take place in the education system they deserve.

2.4. Handbooks

Another issue that needs solution is the knowledge delivered to schoolchildren and students. Most of the handbooks are over-theorised; some are also unreliable as they contain errors and outdated information (e.g. the European Commission of Human Rights, which was abolished in 1998, is sometimes still listed among the existing bodies). Another problem that still persists is an ideological approach to human rights. Despite the fact that human rights themselves are not questioned by any political party, there is reservation or even reluctance among some decision-makers to introduce handbooks and papers covering e.g. protection of the rights of sexual minorities (like in case of Council's of Europe handbook *Compass*, which was criticised by Mr Roman Giertych – then-minister of national education. First and foremost, there are very few studies containing suggestions of activities which stimulate to activity and to taking actions; those being published are merit of NGOs, and not of systematic work of public administration.

2.5. Non-formal and Informal Education

An important role in human rights in Poland is played by non-formal and informal education which, instead of being a supplement of public education, has dominated the education market in this field. In accordance with the Council of Europe Charter on Education for democratic Citizenship and Human Rights

[11] E. Łętowska, 'Survey on Human Rights Education within the Framework of the UN Decade for Human Rights Education (1995-2005) in Poland', Warsaw 2005, p. 14. Type report Helsinki Foundation for Human Rights. The Raport prepared for UN Hight Commissioner for Human Rights.

[12] Ibid.

Education, "Non-formal education" means any planned programme of education designed to improve a range of skills and competences, outside the formal educational setting" and "informal education" means the lifelong process whereby every individual acquires attitudes, values, skills and knowledge from the educational influences and resources in his or her own environment and from daily experience (family, peer group, neighbours, encounters, library, mass media, work, play, etc.).[13]

The role of NGOs in human rights education was accurately described by Ewa Łętowska:

> Human rights education in Poland is dominated by NGOs' activity and designed with foreign sponsors in mind. It has several disadvantageous results: such activities are dispersed both in space and in time. Moreover, these activities are rather ad hoc than systematic ones, and they are not accompanied by consistent follow-up activities. It would not pose a problem if educational activities of NGOs and foreign sponsors only supplemented the education organized in a systematic manner by state institutions. Unfortunately, the state administration seems to feel excused from taking any actions in this field (also strategic ones which undoubtedly falls within their duties). As a consequence, we have a picture of actions taken ad hoc and randomly, and overlapping both as to their scope and level.[14]

Activities of NGOs working in human rights education are dispersed and, to a large extent, focused on specific tasks, be them set by foreign sponsors or defined in grant competitions organized by ministries.

3. Good Practices in Human Rights Education

Good examples of human activity in each field are worth following and education is no different. Officers, civil servants, journalists, NGO activists, and teachers – they all look for inspiration for teaching and for good work in line with the principles of democratic state ruled by law, as well as for activity for human rights. The examples presented here are just a selection of a few from many, often unknown to the public opinion, Polish educational activities, regarding both theory and practice, and were created in particular situations.

The first one, 'Competition of Knowledge on Human Rights. Democracy – Human Rights – Rule of Law', was an example of making the education spheres take up the subject of human rights and stimulate schoolchildren to broaden

[13] 'Council of Europe Charter on Education for democratic Citizenship and Human Rights Education', Recommendation CM/Rec(2010)7 adopted by the Committee of Ministers of the Council of Europe on 11 May 2010 and explanatory memorandum, Council of Europe Publishing, Strasbourg 2010, p. 8.

[14] E. Łętowska, 'Survey on Human Rights…', pp. 49-50.

their knowledge in this field. Schools are supposed to develop individual interests and abilities. One of the forms of activity in this field comprises various contests of knowledge. They enjoy popularity among students, especially those that give a chance to be admitted to university studies. Usually, such contests are related with school subjects, this one is an exception. The Contest of Knowledge of Human Rights is a Polish invention, which aroused interest in Europe; it is intended for students of high schools. Its originator is Prof. Tadeusz Jasudowicz from Human Rights Department at the Faculty of Law and Administration of Nicolaus Copernicus University in Torun. Introduced by decision of the Minister of National Education of 2 Dec. 1993 it is still being organised, arousing interest at the international forum as an interesting idea in human rights education, which was proven by UNESCO granting the award during 3rd edition for the winner, his/her teacher and their school. Another piece of evidence was the interest of other countries, especially from Central and Eastern Europe, in chances of transplantation of Polish model of the Contest into their national education systems.[15]

The second example is National Competition for "Constitution of a School" held in 1994; it was an event where the Parliament, public officials, NGOs, and educators cooperated in order to make youth aware of role of constitution in a democratic state. The competition, intended for all high schools regardless of their profile and status, was supposed to promote the ideas of constitutionalism. According to its originators "constitution of a school, like constitutions of states, is to ensure the members of a community feel secure, to define their rights and duties, and to detail the rules of decision-making and solving internal disputes".[16] The jury, composed of representatives of various political bodies, state institutions and NGOs[17] assessed the competing works in terms of their compliance with the

[15] Also mentioned were observers from Russia (representing Moscow NGOs School of Human Rights) and from Slovakia (educational centre in Banska Bystrica), see: T. Jasudowicz, 'Przedmowa' in *Informator IV Olimpiady Wiedzy o Prawach Człowieka*, Toruń 1996, pp. 3-7 (in Polish).

[16] 'The rules of contest for constitution of a school', see: papers of Human Rights School of 1994 (in Polish).

[17] The jury consisted of: Bronisław Geremek (chairman of the Constitutional Commission in Sejm of 10th tenure), Alicja Grześkowiak (chairperson of the Constitutional Commission of Senate of 1st tenure), Walerian Piotrowski (chairman of National Assembly's Constitutional Commission of the 1st tenure), Aleksander Kwaśniewski (chairman of National Assembly's Constitutional Commission of the 2nd tenure), Tadeusz Mazowiecki (chairman of the Extraordinary Commission for so-called *Small Constitution*), Donald Tusk (chairman of the Extraordinary Commission for drafting the "Rights and Liberties Charter"), Ewa Łętowska (the Commissioner for Civil Rights between 1988 and 1992), Tadeusz Zieliński (the Commissioner for Civil Rights from 1992 to 1996), Andrzej Zoll (Chairman of the Constitutional Tribunal), Lech Falandysz (representative of the President in constitutional commissions), and, representing the organisers: Zbigniew Janas (vice-chairman of Stefan Batory Foundation), Lena Kolarska-Bobińska (director of Centre for Public Opinion Research CBOS) and Marek Nowicki (chairman of the Helsinki Foundation for Human Rights).

law and with procedures of work on constitutions in a democratic state. It is worth noticing that members of the jury would later take part in creating the Constitution of The Republic of Poland that was adopted on 2 April 1997.

At first, 183 schools applied to the contest; eventually, 51 works came to the competition's office before the deadline set on 11 November 1994. The best drafts and the most active participants received awards. The closing of the contest and handing the awards and diplomas took place in *Sejm*. Many of the participating schools continue the tradition of interest in the constitutionalism and civic activity.

The third example, *Human Rights School*, was a model education scheme for adults representing various professions. It was one of the most important programmes in the Helsinki Foundation for Human Rights in the field of education. It operated from 1991 to 2009; it was unique in the world's scale and also a great example of informal education that seriously influenced the knowledge and awareness of human rights among Polish society. Human Rights School was intended for persons who were potential violators of human rights – police officers, prison guards, border guards, judges, teachers, physicians, or worked for human rights in NGOs or in the media. An important group were also representatives of ethnic, national, religious sexual etc. minorities. An intention of the courses was not only delivering the best possible theoretical and practical knowledge but also, through recruitment to groups, ensuring their diversity (in terms of profession, regions of residence, beliefs, age, and gender), presenting the successes and obstacles in promoting and protecting human rights, teaching tolerance and accepting others' distinctness, and stimulating for joint actions for human rights. The School was graduated from by 940 persons. Among the graduates were many foreigners who lived in Poland or, after temporary stay, returned to their countries; these include individuals from Belarus, Russia, Ukraine, Spain, Lithuania, Slovakia, but also Congo, Jordan, and the United States. It is estimated that about 80 percent of the graduates use the knowledge gained at the School in their activities.

The fourth example is *Social Monitoring of Education*, which was a spontaneous reaction of part of society on the Government's decision to nominate Mr Roman Giertych as the Minister of National Education. The protest referred to education being left in the hands of a man who, as the initiators wrote

> uses the language of hatred and disregard in his public activities, who advocates violence and negates the values of tolerance. His experience in teaching consists in reactivating the All-Poland Youth – an organisation that is referring to fascist traditions. His ideas concerning the schooling system are absurd and dangerous. Repressive methods of teaching promoted by him, the retreat from democracy and dialogue will definitely not solve any of problems of Polish schooling; moreover, they also contravene the principles resulting from international agreements signed by Poland.[18]

[18] A. Dzierzgowska, 'Społeczny Monitoring Edukacji – opis działania' in *Edukacja – Trudne lata. Maj 2006 – wrzesień 2007. Społeczny Monitoring Edukacji. Raport*, Warszawa 2007, p. 5.

A result of this action was a print of all signatures under an open letter with demands to dismiss the Minister of Education brought to the Chancellery of the Prime Minister on 8 June 2006. The printout of the letter with 140,000 under it counted 3,600 pages and weighted about 18 kilograms.[19]

The latest example comes from the current year 2012. Inspired by the Commissioner for Children's Rights, *Sejm* announced year 2012 as the Year of Janusz Korczak. Together with universities, regional education boards, schools, and NGOs, the Commissioner held conferences in 16 voivodeships concerning the rights of the child and their protection in Poland and the role of Janusz Korczak in bringing these rights into existence. The participants were both adults – representing various governmental and local institutions, local governments, NGOs, universities, as well as schoolchildren and students. Altogether, the 16 conferences were attended by over 10,000 persons. At the same time over 500 grassroots-level events promoting Janusz Korczak's thought in actions for children were held.

The examples presented here include formal, non-formal, as well as informal education – education both theoretical and practical with participation of social partners. What is perhaps the most important is they were not copied from models from countries of Western Europe, being original ideas on how to bring human rights into everyday life in Poland. They all were a success, and some of them, like the Human Rights School, became models for other countries in human rights education.

4. Conclusions

The arguments cited earlier demonstrate that true reform of the education system in the field of human rights is still to come; so far, ideas of subsequent ministers of national education were implemented while each of these ideas was attached to the old "skeleton", serving the needs of the moment that resulted from current political tendencies or from international obligations.

In human rights education particular stress should be put on practical knowledge as it is not enough just to pass some theoretical knowledge that does not explain "the spirit of human rights"; it is necessary to stimulate people to take action in order to be able to exercise them and to react on each violation of human rights. Twenty years of system transformation in Poland demonstrated how much in this area was still to be done, and how little efficient has been education in this area so far. This includes both contents listed in the curricula and practical preparation of schoolchildren, students, and various professional circles on how to react in various situations when we encounter human rights issues, and, first and foremost, how to avoid violating the rights of others. Teachers unprepared to teach this knowledge and skills are still a problem. This is related with a miserable state

[19] A. Dzierzgowska, 'Chronologia zdarzeń' in *Edukacja – Trudne lata…*, p. 7.

of knowledge of human rights presented by many handbooks that are officially recognized. Last but not least, the attitude of part of society which claims that "there is too much rights and too little duties" or "the rights are connected with the duties" still demonstrates the ignorance of what human rights really are.

It's only solid education (based more on practice than on theory) based on the principle of "lifelong learning" can prepare individuals to the freedom of conscious choices, based on responsibility that should always accompany them in their actions. That's because its responsibility that determines the sense of human rights. Paraphrasing a thought by Jan Zamoyski – Lord Grand-Chancellor of the Crown in 16th century – "Such will be the Republics (i.e. Poland in the future – translator's note) as their youth's upbringing will be", it can be said today: "Such will be Polish democratic state ruled by law as its education on human rights will be".

Abstract

The systemic changes envisioned in the Round Table provisions, perceived as necessary prerequisites for the transition from the communist system to a democratic rule of law, required a new model of civic education, with human rights as its indispensable component. Yet already earlier, the banner slogans of the Polish opposition movement called for a restoration of normal relations between the individual and the state. However, the obligation to reform the old system of education, taken by the Polish authorities after the 1989 turnover, has not been implemented until now. So far, the striking features of the governments' efforts to improve the situation in the field of human rights education have been superficiality and mediocrity. Some systemic changes must be introduced immediately, while others, especially those aiming at raising the society's human rights awareness, should become part of the long-term educational strategy. Human rights ought to be included in university curricula to provide graduates with an in-depth knowledge in this area. Unfortunately, at present university students may acquire, at best, only a very fragmentary knowledge on human rights. In many universities, human rights are not taught at all. In state schools, in turn, the number of hours devoted to human rights education, although always insufficient, has been recently reduced. What is more, the qualifications of teachers who conduct classes on human rights in Polish schools leave much to be desired and the relevant handbooks are focused on the theory of human rights, leaving aside the practical side of the issue. It is characteristic now that the informal education on human rights is of better quality than that offered in public schools and universities. However, the former's possibilities are limited, mainly due to financial problems. Not always it is the best organisations that succeed in the race for grants and subsidies. In this context, it is worthwhile to point to valuable educational practices, such as 'The Contest in the Knowledge of Human Rights. Democracy – Human Rights – The Rule of Law' or The Human Rights School of the Helsinki Foundation for Human Rights in Warsaw. Due to widespread ignorance in the field of human rights, these initiatives are at present unpopular. They are also being incessantly criticised as a new religion. Nevertheless, human rights still remain the relevant answer to numerous questions regarding both the legal and moral dilemma of our times.

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The Texts, Expressions and Causes of the Arab Spring in Tunisia, Egypt, and Libya

The expressions and texts which appeared with the so-called Arab Spring reflect the real causes of the Arab Spring in the eyes of the people. The Arab language is full of expressions and deviations. The Miracle of the Prophet Mohammad (PUH) in the Holy Quran related to the Language and the rhetoric words of God in the Holy Quran. As Ahmed Ali wrote in his introduction when he translated the Quran into English Quranic Arabic is distinguished by sublimity and excellence of sound and eloquence, rhetoric and metaphor, assonance and alliteration, onomatopoeias of sound and rhythm.[1] The Society in Mecca was linguistically advanced. Therefore, language was the best mean to attract the non believers to be believers. We observed that the Arabs have been concerned with utilizing the appropriate choice of words in politics or their social life. In national or historical occasions, they used the expressions of the wars and their results. The result of the 1948 war with Israel, for instance, wasn't in the favour of the Arabs. They called it EL NAKBAH which means disaster. They called the results of the 1967 War – EL NAKSEH – which means to step down. The famous Arab linguist Al Fairouzabadi discussed these expressions in his great encyclopaedia dictionary.[2] There are many new political expressions which appeared after World War 1. The Arabs never used the word "revolution" before World War 1. They also didn't use the word "War" as they had special names for battle. In the dawn of Islam and before, the Arabs didn't use the word battle. Instead they used (YOUM) which means Day. For example, you find in the Holy Quran the expression: Yom Hunaien.[3] It refers to the fierce battle of the prophet Mohammad with the non believers in the dawn of Islam. Arabs

[1] A. Ali, *Al-Quran. A Contemporary Translation*, Karachi 1984.

[2] A. Fairouzabadi, Migd Eldeen Mohamad bin Yaqoub, *El Qamous El Moheet*, Beirut 1987, pp. 178, 746.

[3] The Holy Quran, Sura 9.

have traditionally fought in the day light to avoid killing the innocent. Until 1920 the Arab tribes never fought at night. War had traditions in the Arab culture. For example, they didn't kill sleeping persons,[4] and they didn't build castles or fortifications. The idea of building a ditch around (El Madinat) the Holy city of the Prophet Mohammad and the first capital in Islam is a good example. The city was exposed to the attacks of non believers in the dawn of Islam as The Muslims were in a very poor defensive position. An idea of having ditch around the city appeared and was executed immediately by three thousand soldiers (warriors). It was not an Arab idea as Salman El Farsi (Persian), one of the Prophet mates, suggested the idea of the ditch.[5] The Arabs didn't build ditches or castles because of their dignity. They bravely fought and died for a cause in open air rather than being protected by a wall like the old Chinese Great Wall or a castle like the castles of the Crusaders. Most of the historical castles in Jordan were built by Crusader armies or prisoners from the crusaders Army. This subject is rather lengthy, so we will concentrate on the expressions and their relations with the causes of the Arab Spring in North Africa. It is worth mentioning here that the causes of the so called Arab Spring are the same in the states of North Africa like Tunisia, Egypt and Libya and the Arab states in Asia like Yemen, Syria and the rest of the Arab states who witnessed the Arab Springs.

The Term: "The Arab Spring"

The term "The Arab Spring" has not been coined by the Arabs. It is imported as it was previously used by the Western Media in several occasions. For example, the crisis which took place in Czechoslovakia was known as the Spring of 1968 describing the Warsaw pact joint manoeuvres after the Dubcek government abandoned some reforms.[6] The term (The Revolution of the Nile) later appeared in the Egyptian Press. So this term is imported and may have been coined by the Western media referring to the shake off. In Libya the expression the 71th February Revolution is used.[7]

[4] The secret Instructions of John Bagot Glubb, the leader of the Jordanian Arab Legion to the British Officers in Jordan. Glubb served in Jordan and Iraq during the period 1921-1956. He was in the Army all the time and spent time in the desert among the Bedouins. Dr. Saad Abudayeh reviewed his papers in Saint Antony College, the Middle East Centre in Oxford, UK, and wrote his book *The Lord of Desert*. All these instructions are in *The Lord of Desert*, Amman 2006, pp. 143-153.

[5] H. Ibrahim Hassan, *History of Islam. Political, Religious, Cultural, and Social*, Beirut 1964.

[6] K.J. Holsti, *International Politics. A Framework for Analysis*, Prentice-Hall 1972, pp. 283-284.

[7] *Ad-Dustour* – Jordanian daily newspaper. We followed the news in this paper since the beginning of January 2011. See specifically the events from 18 January 2011 until 8 February 2011.

The Approach of the Study

This study concentrates on the Content Analysis approach. We followed the events through the most prominent daily newspaper in Jordan (Addstour). This newspaper was our source for looking up and analyzing the words or the political, economical and psychological terms which were used and reflected the causes of the so called Arab Spring in Tunisia, Libya, and Egypt. The independent variables relate to the combinations of the causes of the Arab Spring, like corruption, unemployment and other elements. Although we aren't convinced that (The Arab Spring) is the appropriate term or expression, we will use it because there are no other alternatives. A similar term in this regard is the "Middle East", which is not favoured by most Arab intellectuals. They consider it colonial and reminiscent of the colonial powers, England and France, who coined this expression after the WW1 to denote their ideas about the area. This area is in the East of England and France. Although the Arabs criticized the expression but they never invented an alternative and it is still used in Arabic literature. It is worth mentioning here that most of the writers about the Middle East are foreigners. (See the names of the Authors and books).[8]

The Phenomenon of the Name (El Boazeezi)

The New phenomenon and symbol of the change is the name "El Boazeezi". It is worth noting that a simple person was behind the so called Arab Spring and we may argue that he exported the revolution to the Arab World. It should be recalled that revolution is traditionally exported by states rather than individuals. In El Boazeezi's case a dead man exported the shake up to Egypt and the rest of the Arab World and the story started. He was the straw which broke the back of the camel.

The Roots of the Phenomenon of El Boazeezi

The phenomenon of El Boazeezi appeared for the first time in the recent history of the world in the beginning of 2011. Mohammad El Boazeezi (26 year old), who used to live in the small village of Seedi Abu Zaid, graduated from the University and did not find a job. He bought a small cargo of vegetables to sell. The Municipal officials broke his cargo. When he went to the Municipality headquar-

[8] The books about the Middle East are: Y. Armajani, *Middle East. Past and Present*, Prentice-Hall 1980, p. 1; T. Kavunadus, *The Middle East*, Bronxville 1968, p. 1; G. Lenczowski, *The Middle East in the World Affairs*, Ithaca–London 1979, p. 8; R. Harkavy, 'Strategic Access, Bases and Arms Transfers. The Major Powers Evolving Geopolitical Competition in the Middle East' in M. Leitenberg, G. Sheffer (eds.), *Great Power Intervention in the Middle East*, New York 1979, p. 17; J.K. Banerji, *The Middle East in World Politics*, Calcutta 1960, pp. 1-2.

ter of Seedi Abu Zaid to complain, a policewoman who works in the Municipality slapped him. He was humiliated. Since he was already fed up with the bad situation he lived in, he burnt himself over his cargo. That was the straw which broke the back of the camel. The grass was dry and the fire blew up. The environment was ready for reform. All the Middle class in Tunisia were dissatisfied with the situation. There were many things to complain about, including poverty and the corruption of the government which deprived the people of their wealth. The income of El Boazeezi, for instance, was $250 per month. People were frustrated for several reasons besides poverty; they had no right to practice their freedoms. For example, the freedom of religion was non-existent. Every citizen had to ask for permission before deciding in which mosque to pray. Women were not allowed to wear Islamic clothes. The Middle class were deprived of the most essential things for their spiritual life. El Boazeezi paved the way for the revolt when he burnt himself on 17th Dec 2010 and subsequently died after spending three weeks in the hospital. The pressure groups in Tunisia started to express their discontent immediately. They were very thoughtful and expressed their point of view politely and peacefully. The government, however, was tough and used sharpshooters who killed civilians. After his death the way was paved for the shakeup which promptly started in Tunisia. There were other elements in the society which contributed to the shake off, and they will be discussed later.

The Phenomenon of Imitating Among Individuals; New Ways of Expressing Their Views and Frustrations

There was a very great reaction towards the events in Tunisia as the Arab World in North Africa and Asia was pleased. In Jordan, the people demonstrated to congratulate the Tunisian people. They gathered in front the Tunisian Embassy. In the press the articles were welcoming the developments in Tunisia. They were happy with the change in Tunisia. In Cairo the same thing happened.

This is of secondary importance compared to the following phenomenon:

We may observe that the behaviour of El Boazeezi, which led to the shake up, was exported to other Arab States and became a phenomenon among individuals who started to imitate and burn themselves like El Boazeezi. This extended to the Arab states and there were small cases of the influence which reached Europe. It started with individuals. All these individuals who protested and burnt themselves shouted while they tried to burn themselves that they were mistreated by their government. So facing injustice or humiliation is the common factor between El Boazeezi and others who did the same thing and used the same method to express their dissatisfactions and frustrations. All the others who burnt themselves shared with (El Boazeezi) the following things:

1. Being humiliated by the corrupted regimes.
2. Being unemployed and frustrated by the government.

The Reaction Abroad. Imitating the Burning

This way of protesting extended to the Arab World from Tunisia as individuals started to burn themselves:

In Cairo a man burnt himself in front of the Parliament on Monday 17th Jan 2011 protesting against poverty and the bad conditions in the country. The man was shouting: "AMN EL DAWLA AMN ALDAWLA HAQI THIE JWA ELDAWLA" امن الدولة امن الدولة حقي ضاع اوجع الدولة. This means: "OH OH, THE SECURITY OF THE STATE; MY RIGHTS ARE VIOLATED INSIDE THE STATE". The man came from another city to Cairo. He faced a problem with the local administration that refused to give him what he ought to have for his restaurant. There was another case of a young man in his twenties who lived in Alexandria. His father accused him of being insane and he later died.[9] It stretched to other places as follows:

1. In Algeria

There were eight persons who did the same thing later. They were in several cities. Not one of them died. The reason of these accidents was frustration with the government procedures. In Algeria a man had an argument with a policeman after the policeman tried to give him a ticket. He stabbed him.

2. In Mauritania

A rich business man burnt himself protesting the treatment by the government against his family or tribe. On 23rd Jan 2011 the press announced that he had died. The government statements accused him of corruption.

3. In Morocco and the Western desert

There were three men who burnt themselves in Morocco and the Western desert on 22nd Jan 2012.

4. In the South of Saudi Arabia

A man burnt himself for unknown reasons in the South of Saudi Arabia on 22nd Jan 2011.

5. In Sudan

A 25 year old Sudanese worker originally from Darfur burnt himself in Um Darman in Sudan.

6. In Europe

This amazing phenomenon extended to Europe as two accidents occurred there. In Romania, two persons burnt themselves on 19th Jan 2011 according to Media FAX Agency. The first was a 31 year old who was suffering from poverty and couldn't provide food for his children.

The second was a homeless man who was prevented from entering a shelter for the homeless people. None of them died. As of the 19th Jan, the number of people who attempted to kill themselves was as follows:

8 people in Algeria, including one woman. One died.

[9] *Ad-Dustour*, 18 January 2011.

6 people In Egypt. One died.[10]

It seems that those who killed themselves were affected by the results of the case of El Boazeezi. As he motivated the people in his country to revolt, the people outside did the same thing to express their frustration.

Diagnosis of the Meaning of the Word Corruption

The diagnosis of the word "corruption" according the people is that the government diagnosis of the word "corruption" is corrupted. So the point of view of the people is that corruption relates to governments rather than the people's behaviour. People blamed their governments who were accused of corruption, lack of nationalism and of burdening them. They accused rulers of following the policy (Make your dog hungry, it will follow you). But now they say (Make your dog hungry it will eat you); the people eat you. We want to attract the attention to the role of the Media and internet tools, which accelerated the movement of the news from one place to another.

The combination of the word "corruption" and other words which caused the shake up: There are combinations of several factors which lead to this situation. The most important factors were unemployment, poverty, and corruption. There is one factor in our point of view which helped increase the frustration of the people; the collapse of the image of the governments and rulers and the legitimacy of the Arab rulers, especially those who were accused of a lack of nationalism. Their legitimacy was shaken as the Constitutional party had lost its legitimacy in Tunisia and the people in Tunisia still demanded to have new rulers and no one from the ex party.

The people disliked their leaders for many reasons like corruption and lack of nationalism. There was also a lack of religious behaviour among some leaders like the Tunisian leader. The President of Tunisia wasn't liked by the people not because he was corrupt but because he was accused of having secret relations with Israel before the Peace process started in Madrid 1991. During the first years of the presidency of the President of Tunisia in 1988, the popular Palestinian leader Abu Jihad was killed in Tunisia by Israeli forces that attacked his residence. Accusations reached a high level in June 2011 suggesting that the Tunisian President was an Israeli agent.

The importance of the environment cannot be understated. The environment in Tunisia was supportive as the government was looked upon by the people as corrupted and very provocative to Islam. It was accused of building barriers between them and their religion. After the collapse of the regime, the press published on the 22nd of January that the people were finally able to pray on Friday with freedom as they weren't afraid any more from the provocative procedures of the

[10] Ibid. and 8 March 2012.

ex regime. The women were finally able to wear the scarf without any harassment by the Police. The environment of corruption and provocations of Islam by the ex leaders with miserable economic conditions created the right environment for a shake up. So the environment for shake up was ready for the start of the pressure groups in Tunisia against the so called delicate dictatorship. Everyone expected that this regime was powerful and that it was a fate that you cannot get rid of it.

The corruption of the leaders in the eyes of the people in Tunisia and Egypt was a common factor. This corruption was further exposed by the media after the collapse of President Mubarak. Mubarak, who represented the old regime, reflected all kinds of corruption from the top along with his sons Jamal and Alaa. He was accused with his sons of taking bribes. (The soft word "commission" is used here).[11] The Egyptian president was also accused of being bribed by Israel. This indicates that Mubarak was a very irresponsible and corrupted person. In Cairo, a psychologist said that Mubarak is a narcissist and that this was the result of him ruling for a long time. Mubarak had ruled for 30 years while Bin Ali the President of Tunisia had ruled for 24 years. Both of them enjoyed good relations with the Western states and Israel. This gave them confidence that they were immune and they ignored the needs of the people and rather became businessmen or politicians surrounded by businessmen. This was accompanied by a weak corrupted administration at all levels. This is applicable on others leaders like the Libyan President who ruled for 43 years. (In Yemen, Ali Abdalla Salih ruled for 32 years). Both or all of them shared the same qualities of corruption and ignoring their people's rights. This long period of ruling contributed in killing the hope of the people in change or reform. The leaders in Egypt, Libya and Yemen prepared their sons to inherit them.[12]

A Class of Ruling Businessmen

There was a stratum or class of businessmen who ruled and was behind these miserable conditions. The leaders and their men created this class of Businessmen who had enormous wealth.[13]

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[11] M.H. Haykal, *Mubarak wa-zamanuh. Madha jará fi Misr wa-laha*, Cairo 2012, pp. 403--420. The title of this book may be translated: "The time of Mubarak the president of Egypt. What happened in Egypt and the surrounding area". The writer discusses the corruption. He says that the presidency informally receives around 800 millions EP from the Suez Canal revenues annually.

[12] Idem, *Ma baaed Mubarak wa-zamanuh*, Cairo 2012, pp. 83-94, 117-136. The title of this book is: *Egypt to Where*. The writer discusses the subject of inheritance of the president between Mubarak the President and his son.

[13] R. al-Minyawi, *Rajul min jahannam*, Allepo 2012, pp. 138-142. The title of the book in English is: *A man from Hell*. The writer discusses the corruption of the ex Libyan president. El Quwayeeri, Omar Hassan, *That El Rejal* ("Eye witnesses and events"), Benghazi 2012.

The priority in Egypt was similar to that in Tunisia in facing Corruption as it was a common factor. This corruption was further exposed after the collapse of the President Mubarak. The businessmen were ruling the country in the same manner they were running their businesses. Leaders had great confidence and they lost all motivation to reform as they are very confident that they are protected and immune.

Combination of Corruption and Humiliation

This important factor relates to the feeling of humiliation among all the Arabs and not only the youth. This frustration relates to the previous reasons and in specific the humiliation which the Arabs and Moslems felt after the campaign against Islam which followed the 11th September events. The reaction of the people was signified in informal reactions which started in Tunisia and Egypt and then the rest of the Arab states like Libya, Bahrain, and Yemen and to some extent in Jordan, Kuwait, UAE, and then later it appeared in Syria.

In the absence of the formal reactions from the strong Arab states like Egypt, new developments appeared in this vacuum as an informal reaction. Humiliation was accumulative and there were other reasons which participated in increasing the tension and frustrations like the economic difficulties which related to corrupted administration plus unemployment. The economy may in fact be the direct reason for all the events which took place in the Arab World in several occasions before the so called Arab Spring. For example, the shake ups in Jordan in 1989 and 1996 and in Egypt in 1977 and in Tunisia on several occasions were economic and didn't only relate to the political situation. So the shakeup happened in two states in North Africa earlier and before the Arab Spring. There are other indirect reasons for the accumulative humiliation which relate to the campaign against terrorism which correlated terrorism with Islam before and after invading Afghanistan. There were exaggerations in the media's campaign against Islam and against the so called weapons of mass destruction in Iraq. With the new media methods and internet the public opinion was combustible against the Western campaign against Islam and the occupation of Iraq and Afghanistan.

The Role of Homogeneous Feeling

These shake ups happened in Jordan before they happened in Tunisia or in the Arab world. They happened before the Arab Spring but they happened in one state

This book discusses the events, accidents and the situation during the time of the ex President of Libya. He called the revolution the Revoultion of 17 February. This book is more rational than the other book about the Libyan president by Ramzi al-Minyawi.

and were contained by the regime. The recent events happened in many states. They started with Tunisia and extended to Egypt, Libya, Yemen and then Syria. What is new is that they extended from state to state. It may be the satellite influence and new media methods which assisted in creating a homogeneous feeling in the Arab world indicating real globalism. These media methods in the last ten years helped create one homogeneous feeling or opinion.

The Real Evaluation of the Point of View of Pressure Groups Toward USA Policy

The USA didn't necessarily back corruption in Egypt or Tunisia. Syria has strong bilateral relations with the USSR and later Russia and is still accused of corruption, as there is a considerable amount of corruption in Syria similar to that in Egypt and Tunisia. Taiwan has good bilateral relations with the USA and is not corrupted. It has zero debt and the per Capita is 37,000$. The same is applicable to Japan and South Korea who have good bilateral relations with the USA.

In the Arab world, there is a combination of causes and reasons for corruption. Nonetheless, the Arab people dislike the USA for its support for Israel. Leaders who are allies to the USA are far less popular than others. After the Arab spring, the media in Egypt attacked those new leaders who had relations with the USA in the past. One clear example is the media attack on the current Egyptian president in the beginning of Jan 2013 because he said that he was working for NASA. He denied this, but the Egyptian Media showed the two videos in one of which he made these statements and in the second when he denied them.

In Libya, the current president Mustafa Abd El Jaleel wasn't inclined to deal with the USA or the west at the beginning although he was obliged to do so when he needed them to get rid of the old regime.

The scandal of Wiki leaks in the Arab world regarding the USA role shocked the American and some Arab rulers' image and made it worse than it was.

The Shakeup of the Pressure Groups in North Africa

By the beginning of 2011, for the first time in the recent Arab history, the pressure groups started the so called Arab Spring in Tunisia. The pressure groups in the Arab world moved to overthrow the regimes. The pressure groups usually made pressure on governments to change. However, this time they changed the rulers and the phenomenon extended from Tunisia to Egypt, then Yemen, Bahrain and Libya. So it started in the Arab world in Africa. The Arab world in Africa is 72% of the area of the Arab world and two third of the Arabs are in North Africa.

Pressure Groups in political Science are different from parties. They don't want to rule, they don't have a cadre and employees, and they don't receive foreign

support from the outside. The parties want to rule, have cadres and receive foreign support.

In Egypt and Tunisia these pressure Groups appeared quickly to express their frustrations against:

1. Humiliation,
2. Corruption,
3. Unemployment.

The Background and Methods of Participants

The Participants are ordinary people. They are pressure groups, not Parties.

The Methods of these pressure Groups were more peaceful than the governments'.

These people belonged to the middle class and started their protesting movement politely and they continued in this way despite being ordinary people. They are pressure groups not Parties. After the government used tough procedures by using thugs and sharpshooters who killed civilians, the Pressure Groups escalated their demands. This immoral behaviour was done by the Egyptian, Libyan and Tunisian governments. The people were not afraid any more. This corresponds with the Arab proverb which says that the drowned person is not afraid of getting wet.

The people who are protesting in Egypt are two thirds of the population of Egypt and 90% of them are unemployed according to the press. There was a call for one Million Demonstrators in Egypt on 29th Jan 2012.

The Army amounts to 468 000 members; it is the tenth largest army in the world. Furthermore, the number of the security forces is approximately 1,400,000. But here we observe the role of the unemployment factor which is clear and is one of the real factors in the uprising or the shake up. People may bear ever thing like corruption, lack of nationalism, and humiliation if they have jobs and monthly income. For example, we may observe that people in Iraq during the era of Saddam Hussein did not have democracy but they had security and jobs. Now the Iraqis are longing for the days of Saddam when they had security and effective services. So it is ultimately a matter of Priorities.

The Pressure Groups Use Names and Titles

In Egypt, pressure groups are as follows. The Youth in the El Tahreer circle (Square) are called The Coalition Youth of the Revolution (Shabab Etaaluf El Thawra). There is a confederation of the Youth of April movement and the Coalition of the Revolution Youth who made the uprising on 25th January. It is observable that this direction is similar to that of Tunisia where they choose the names of these pressure groups who changed the regimes. There is another Movement

whose name is The Popular Democratic Movement which states in its Communiqué that it doesn't want a New Dictator.

In Egypt and Libya the leaders prepared their sons to replace them.

In Libya the Transitional National Council was founded in Benghazi by the revolutionaries. This is the Political power of opponents in Libya. France was the first to recognize this council on Sunday the sixth of March 2011.

In Libya, both sides of the leaders and the pressure Groups used violence. There was an international intervention in Libya, a Political intervention by UN and the Arab League and a military intervention by NATO.

The Role of the Absence of the Formal Reaction

In general: In the absence of the formal reactions from the Arab leaders, the informal reaction appeared from the Arab People. This reaction was strong and continuous. It was a reaction of the pressure groups by demanding reform at the beginning but later they demanded more as they demanded the removal of the leaders. When the accident of El Boazeezi succeeded in igniting the shakeup in Tunisia, the young generation was affected by the results of the events. After they had lost hope for a bright future and with the combination of all the reasons which were mentioned earlier they started their shake up.

This happened in Tunisia, Egypt and Libya. Everything in Egypt was similar to Tunisia. The Middle class were frustrated. There was a lot of corruption. It is the pressure Groups which started the shakeup politely and peacefully in Tunisia and Egypt demanding the change. The pressure groups usually concentrate on putting pressure on governments and don't think of receiving the power and their goals are different from the goals of parties which look for receiving the power.

Day after day, the people became more frustrated and the hatred increased toward the rulers. No one wanted to confess that there was a very great scale of hatred. We have noted that it is an accumulative combination of causes, some of them are direct and strong but others may be indirect. For example, some years ago the Arabs suffered and still do from the humiliation of the American occupation of Iraq. Although the people don't openly talk about their opinions, they express them in their private meetings. It had been predicted that these events could have happened before if there was a backing for the people to start protesting. Even though there was no encouragement from the outside, they had started to demonstrate. Demonstrations came to the streets in these states whose governments were allies to USA, like Tunisia or Egypt. They reached Yemen, and Algeria. There have been continuous demonstrations. What was new is that people insisted on their demands. People were following up and this was a new Phenomenon.

The Developments in Egypt indicated that the pressure groups were effective. In their methods, these pressure groups behaved politely and in a very high stand-

ard of responsibility. The Governments in most of these states were not. There were thugs who appeared and killed in Egypt, Tunisia and Libya.

In Egypt and Tunisia, people hate the symbols of the old regimes of Mubarak and Zain El Abdeen.

In Libya the situation deteriorated after the demonstrations demanded the removal of the President, and after the tough procedures by him.

In Libya people moved against the President. The results of the events encouraged the young generations that there was hope to put pressure on their leaders. All the leaders in Tunisia, Egypt and Libya had Military background and came from the Army or the security forces. In the past, the Army used to lead the change. In the fifties the change in the Arab world was by officers backed by Western powers as in Egypt in 1952. Later the ruling officers in Egypt backed the revolution in Iraq on 14 July 1958, Yemen in 1961, Iraq in 1963, and Libya in 1969. Now the shakeup is against the leaders, some of whom have military backgrounds. The shakeup is by civilian pressure. It is escalating in every few minutes in the Arab World. Still the file is open as long as the combination of causes is there.

Abstract

The expressions and texts which appeared with the so called Arab Spring reflect the real causes of the Arab Spring in the eyes of the people. The Arab language is full of expressions and deviations. By the beginning of 2011, for the first time in the recent Arab history, the pressure groups started the so called Arab Spring in Tunisia. The pressure groups in the Arab world moved to overthrow the regimes. The pressure groups usually made pressure on governments to change. However, this time they changed the rulers and the phenomenon extended from Tunisia to Egypt, then Yemen, Bahrain and Libya. So it started in the Arab world in Africa. The Arab world in Africa is 72% of the area of the Arab world and two third of the Arabs are in North Africa.

We may observe that the behaviour of El Boazeezi, which led to the shake up, was exported to other Arab States and became a phenomenon among individuals who started to imitate and burn themselves like El Boazeezi. This extended to the Arab states and there were small cases of the influence which reached Europe. It started with individuals. All these individuals who protested and burnt themselves shouted while they tried to burn themselves that they were mistreated by their government. So facing injustice or humiliation is the common factor between El Boazeezi and others who did the same thing and used the same method to express their dissatisfactions and frustrations. All the others who burnt themselves shared with (El Boazeezi) the following things:

1. Being humiliated by the corrupted regimes.
2. Being unemployed and frustrated by the government.

Pressure Groups in political Science are different from parties. They don't want to rule, they don't have a cadre and employees, and they don't receive foreign support from the outside.

The combination of the word "corruption" and other words which caused the shake up: There are combinations of several factors which lead to this situation. The most impor-

tant factors were unemployment, poverty, and corruption. There is one factor in our point of view which helped increase the frustration of the people; the collapse of the image of the governments and rulers and the legitimacy of the Arab rulers, especially those who were accused of a lack of nationalism. Their legitimacy was shaken as the Constitutional party had lost its legitimacy in Tunisia and the people in Tunisia still demanded to have new rulers and no one from the ex party. The priority in Egypt was similar to that in Tunisia in facing Corruption as it was a common factor. This corruption was further exposed after the collapse of the President Mubarak. The businessmen were ruling the country in the same manner they were running their businesses. Leaders had great confidence and they lost all motivation to reform as they are very confident that they are protected and immune.

This study discusses the combinations of causes which were behind the so called the Arab Springs and it focuses on the new expressions and phenomena which accompanied the so called the Arab Springs.

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Multiculturalism

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European Identity, Multiculturalism and the Problem of the Other

People living in every culture have always had an inclination to treat the other as non-human. The most important criterion of being one of us has always been language: only those people who have been able to speak our own language have deserved to be perceived as people as such. Thus the other has always been the real problem for all cultures. There have been several strategies to cope with the otherness. The most popular have been physical destruction, making a slave or a sacrifice, and eventually – physical and cultural isolation or pressure on assimilation to the cultural patterns of the majority. All these strategies are all well known also in Europe. A relatively new strategy is the strategy of dialogue and recognition. The best expression of it in political philosophy and in the social practice of some countries is ideology of multiculturalism. It is a collection of views of political nature, calling for support of numerous arguments in the fields of social history, cultural theory, political philosophy, ethnology and even literary studies. The common element of these arguments is that the value of the diversity of cultures should be acknowledged and the groups that belong to those cultures should be respected. According to this ideology, it is praiseworthy when the legislation and political practice of a given country expresses the conviction that every culture is worthy of respect and recognition, and all attempts whatsoever to introduce a cultural monopoly, under the pretext of some kind of universalistic vision of rights, ethics, politics or behaviour, are associated with efforts to discriminate against minorities that subscribe to different values than those dominant in a given political or cultural context. The ideology of multiculturalism proposes to eliminate the notion of the existence of one exceptional culture, from the point of view of which it might be possible to make an authoritative evaluation of other cultures. In this sense, multiculturalism demands an end to the sort of eurocentrism that is associated with colonialism, and tries to parochialise the West by showing that it only represents one particular cultural option, and that to raise western philosophical, ethical and political assumptions to the rank of universals is unjustified.

Canonical works in the formation of the ideology of multiculturalism are Edward Said's *Orientalism*[1] *and The Wretched of the Earth*[2] by Franz Fanon. Its philosophical exponents include Charles Taylor ("the politics of acknowledgment"),[3] W. Kymlicka ("the politics of difference"),[4] I.M. Young,[5] Bhiku Parekh,[6] and Seyla Benhabib,[7] among others. All of these writers demand the acknowledgment of the rights of groups connected by a common culture, which is most often understood as a religious, linguistic, behavioural and ethnic community. Such acknowledgment is supposed to serve to broaden the axiological and political horizon of liberalism, which is purported to respect only the rights of the individual. According to the partisans of multiculturalism, the right to the cultivation of cultural diversity cannot be exercised in isolation; it must concern whole communities. Thus, the individualistic (liberal) approach, which dominates in the West, ought to be supplemented by the rights of communities, as fully deserving subjects of political and social life.

Among the intellectual sources of the ideology of multiculturalism are e.g. communitarianism (the praise of community typical of this philosophical orientation is said to legitimize the right of groups to maintain their own culture), postmodernism (whose cult of difference and otherness appears alongside the desire of multiculturalists for the recognition of different cultures), feminism (in which women are often held to be a minority group that possesses its own culture, and demands recognition within the framework of the "politics of acknowledgement"), and Marxism (the ideology of multiculturalism is connected, in some of its versions, with opposition to capitalist organization of social and economic life, which is held to be responsible for the standardization of policy in western countries; furthermore, multiculturalism sometimes is taken as a continuation of the emancipatory processes having their origin in Marxist social criticism). The evolution of ethnological studies also had an effect on the development of multiculturalism, for these by degrees came to reveal the political bias of the western discourse on culture, and likewise gathered arguments holding that the parochial culture of the West was merely one possible version of different ways of seeing the world.

We can separately point to several particular social and political sources of multiculturalism, and among these may be mentioned the following: 1) the civil rights movement of the 1950s and 60s and also the counterculture movement.

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[1] E. Said, *Orientalism*, New York 1978.

[2] F. Fanon, *The Wretched of the Earth*, trans. by R. Philcox, New York 2004.

[3] C. Taylor, 'Multiculturalism and "the Politics of Recognition"' in idem, *Multiculturalism and "The Politics of Recognition". An Essay*, ed. A. Gutmann, Princeton 1992.

[4] W. Kymlicka, *Liberalism, Community and Culture*, Oxford–New York 1989.

[5] I.M. Young, *Justice and the Politics of Difference*, Princeton 1990.

[6] B.C. Parehk, *Rethinking Multiculturalism. Cultural Diversity and Political Theory*, Cambridge, Mass. 2000.

[7] S. Benhabib, '"Nous" et "les Autes". The Politics of Complex Cultural Dialogue in a Global Civilization' in Ch. Joppke, S. Lukes (eds.), *Multicultural Questions*, Oxford 1999.

Both led to a determined critique of western hegemony, which was understood as a policy of uniformity, imposing its particular point of view as something universal. These movements fostered doubts about the policies of western nations, policies which came to be viewed as discriminatory towards certain social classes, ethnic and sexual minorities, and women. 2) The phenomenon of anticolonialism and the so-called ethnic revival. On the wave of liberation and independence struggles of various groups and states against foreign (western) domination, there began to develop the conviction that the ascription of cultural inferiority to various nations and ethnic groups was a manipulative device intended to help the West maintain political dominance over the non-western world. In turn, the "ethnic revival" referred to the rejection by various minorities of the ideology of assimilation, which likewise came to be considered a tool employed by the dominant majority to secure its position over minorities. This movement can be associated with the shift from the view of society as a "melting pot" to the view of it as a "salad bowl" – that is, as a society in which the different elements, instead of blending together, co-exist, but retain their separate identity, texture and taste. 3) A third specific social cause of the appearance of the ideology of multiculturalism is without a doubt the demographic process which has been taking place in such nations as the United States, Canada, Australia and France. Immigrant peoples and ethnic minorities are becoming an ever greater proportion of the population, and their voices cannot be ignored. These groups are beginning to have an influence on the legislative processes of certain countries, and some, such as Canada and Australia, have adopted multiculturalism as an official (state) policy.

Social policies associated with the ideology of multiculturalism take various forms. Among the most frequently encountered are: the revision of the teaching curriculum to lessen the degree of eurocentrism and to inculcate appreciation for other cultures previously treated as being inferior; the introduction of bilingual education in schools; increasing the number of official languages in certain regions or throughout the whole countries; the introduction of elastic working-hours in connection with the observance of diverse religious holidays; tolerance on the question of personal attire; the ensuring of a certain number of places in legislative bodies for representatives of minority groups; providing sensitivity training in cultural diversity to public service employees; giving public financial support to organizations that foster various cultural heritages; establishing a network of university departments of ethnic or cultural studies; monitoring the media to remove disparaging references to particular cultures or religions; encouraging minority group members to hold high public offices; and supporting the advance of members of groups once socially or economically discriminated against by means of preferences in job promotion and admission to institutions of higher learning (so-called "affirmative action").[8]

[8] W. Kymlicka, *Finding our Way. Rethinking Ethnocultural Relations in Canada*, Toronto–New York 1998, p. 42.

The spread of the ideology of multiculturalism puts us face to face with a number of both ethical and political dilemmas. Let us start with the first category. In this area, we are confronted with the following situation: the ideology of multiculturalism posits the requirement of respect for all cultures; at the same time, however, from the point of view of the moral standards prevailing in western culture, this equality is difficult to accept, because it is hard to accept practices such as, for example, the subordination of women, arranged marriages between children, the complete submission of children (even after they are grown up) to parental authority, giving priority to the interests of a family or a clan over the common interests or individual rights. The dilemma that confronts us has the following form: either we are to acknowledge that all cultures are axiologically equal and guarantee them protection in full, at the cost, however, of losing a part of our own cultural identity, or we are to assert that cultures are not axiologically equal and that western culture is at least in some respects superior, in which case we lay ourselves open to the charge of cultural imperialism. And this charge is all the more painful in light of the fact that in the past cultural imperialists we undoubtedly were. For it would be difficult to describe as anything other than cultural imperialism the conviction, which persisted for centuries, of the absolute superiority of western culture over all other cultures in the world, a conviction which resulted in our imposing our own standards of behaviour, education and outlook on the representatives of non-western cultures. The foregoing dilemma can also be expressed in a somewhat different fashion: Should we respect other cultures and permit them to exist in an unchanged form, or should we rather struggle to have them respect western standards when it comes to such issues as human rights, individual rights, gender equality and the rights of children? Where are the boundaries of toleration for practices that violate our own standards, but which are yet integral elements of non-western cultures with which we want to live in peace and mutual respect?

Let us now move to consideration of the political dilemmas. Chief among these is one which can be identified as follows: Either, on the one hand, we are to acknowledge the western political culture – with its separation of church and state, its principles of liberal democracy and its conviction that the fundamental element in political relations is the individual, who may freely associate with others in order to articulate common values and interests – as being the immutable basis of the governmental structure (and within this structure will function groups which do not share these political principles, for example that of the separation of church and state; the function of such groups within such structure will be associated with feelings of inferiority and a certain alienation). Or, on the other hand, we must retreat from these cultural standards, and therefore from the principles of government that they underlie, at the cost of political chaos and perhaps inner conflict, the result of which might possibly be the descent of liberal-democratic state, which is certainly a precious achievement of the European political culture.

The dilemmas described above do not have any good solution. The hope that it might be possible to marry the best features of European culture with the best

features of non-European cultures seems to be illusory. In my opinion, the situation leaves us with no other option, but to accept the need for the greatest possible understanding and friendliness towards other cultures without crossing, however, a certain limit, beyond which there would be a direct threat to the axiological identity of European culture, most importantly to its political culture. Of course it is open to discussion what that identity consists in, just as much as where the boundary of it lies. Without going into details of these questions, let us here say only that the identity of the European culture seems best to be defined by a combination of qualities drawn from four basic sources: Greek philosophy, Roman law, Christianity, and the thought of the Enlightenment. And when it comes to political culture, the chief source is the tradition of liberalism. These are the sources, however, of a postulated, and not wholly realized, identity. It would seem to consist in such ideas and convictions as the following: human equality (including principally gender and racial equality), the right of children to a relative autonomy, the necessity of certain fundamental freedoms (freedom of conscience, freedom of worship, freedom of speech and freedom of association), the priority of the rights of the individual over the rights of groups, the need to maintain the separation of church and state and the treatment of religious faith as, above all, a private matter, religious toleration and tolerance of custom and behaviour (within boundaries established by law), respect for democratic principles and a democratic culture, the concept of the state as representing the common good, constitutional protection of the rights of minorities, respect for the rights of animals, and consideration for the natural environment.

In my opinion, our task is to adumbrate the western form of life in the most comprehensive possible way (maximally inclusive), while, however, still adhering to axiological and political principles typical of European culture in its best form. The best thing would be to have two things and the same time: politics of recognition and respect for all people, despite their cultural background, and the political reality of the liberal-democratic state. In the political and social practice of some states, these ideal situations seem to occur (e.g. Canada and Australia); in others it is still debatable (France, Great Britain, and Holland). Accordingly, an analysis of concrete legal-legislative and social measures might help us answer the question of what ought to be done, in order to ensure that cultural minorities feel at home in a liberal-democratic state. However this question should be answered, it must be realized that the effort to establish good mutual relations in a multicultural state is an effort that engages all parties in question. Certainly it cannot be done without mutual concessions, including both: a further evolution in western liberal-democratic culture in the direction of greater elasticity and the liberalization of certain minority cultures. Only in this way we can have a chance to preserve two things at the same time: the respect for ourselves and the respect for others, or maybe even more – the feeling that all differences are not so important in the face of our shared human fate.[9]

[9] See more on the subject in: A. Szahaj, *E pluribus unum? Dylematy wielokulturowości i politycznej poprawności*, Kraków 2004.

Abstract

The aim of the paper is to present the genesis of the multiculturalism as an ideology and as social practice. The author also strives to point at some possible problems which are connected with it, especially the ones linked to the problem of European identity confronted with foreign cultures. All the abovementioned issues are considered in the context of the old social problem of the possible ways of treating the Other as someone who must be either accepted or rejected. The author is prone to accept the ideology of multiculturalism in its moderate form, but he has serious doubts regarding this ideology in its radical form, in which the statement of equity of all cultures is connected with a postulate of changing European law in favor of foreign cultures in accordance with their religious elements.

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Philosophy-based HRE, and Some Consequences for Culturally Diverse Societies[1]

Introduction

Human rights are considered a part of international law in general, and are usually dealt with as solely legal norms. However, these norms and principles have moral aspects as well. They are not derived from states' or politicians' aspirations. They are derived from human dignity which is inherent to all human beings. So, human rights education (HRE) must take this aspect into account.

Bearing this aspect of human rights and HRE in mind, this paper aims at evaluating some consequences of this approach for culturally diverse societies. The main problems with culturally diverse societies in the context of human rights crystallise around group rights (or group-differentiated rights) and minority rights issues. In international human rights instruments, the term minority refers to national, ethnic, linguistic and religious minorities, and it is accepted that individuals belonging to such minorities have some differentiated rights – namely minority rights – by being a member of that minority group. Since there is no consensus on the concept of minority, scholars usually deal with the definition of it, and indicate problems stemming from its vagueness. However, there is another important and mostly neglected problem relating to this debate: the vagueness of the concept of *culture*. This vagueness causes some problems relating to cultural rights in general, and cultural rights of minorities and group rights issues in particular.

It is an indisputable fact that societies consist of individuals having different ethnic, linguistic, national, religious backgrounds; and almost all societies on earth are – more or less – culturally diverse in this sense. This diversity entails the exist-

[1] I would like to thank the audience for questions and valuable comments which made me think of the difference once again between multicultural and culturally diverse societies.

ence of different policies and mechanisms for minorities.[2] Nevertheless, there is also a necessity to re-evaluate the characteristics of cultural rights, group rights and minority rights, as the implications of those rights can be contradictory to human rights norms, which are indeed different from cultural norms.

In order to clarify these arguments it would be appropriate to start with the conceptions of culture, cultural rights, minority rights, group rights; and examine their different characteristics. Then, we shall continue with the problems relating to the existing international norms and approaches. Finally, we shall refer to philosophy-based HRE which is argued and defended by few scholars; and try to evaluate whether that approach contributes to this debate.

Culturally Diverse Societies and Human Rights Issues

Today, we have strong arguments – and even proof – in order to defend the fact that equality and non-discrimination principles are not enough for the protection of minorities and disadvantaged groups. However, this was not the case during the drafting process of the international human rights instruments.

From the beginning of the drafting process of the UDHR, there always has been a tension between different regions and their different approaches: between East and West; between the colonised world and colonies; between minorities, indigenous peoples, and majorities; between women and men –in brief, between hegemonic groups and subordinated ones.

While drafting the UDHR, those differences and disagreements were somehow overcome at a certain degree – at least, despite the objections of the American Anthropological Association (AAA) relating to the impossibility of the universality of values. The third statement of the AAA was as follows:

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[2] The term "minority" basically refers to group of people numerically lesser than the majority. However, a group of people that constitute a small amount of a society may be in a dominant position, and the group forming the majority might be the subordinated one in different ways. This is the case of some indigenous peoples of some States. Therefore, the term minority might be considered in the context of being in a disadvantaged position rather than in a numerical context. For this type of cases we can use the term "social minority". See: N.T. Casals, *Group Rights as Human Rights. A Liberal Approach to Multiculturalism*, Springer 2006, p. 65: «social minorities» generally refers to groups suffering from social disadvantages, mistreatment or discrimination mainly due to historically prejudices deeply rooted in the practices, beliefs and conventions of the mainstream society. Members of these minorities are, in some cases, easily identified by their externally visible characteristics such as gender, race or disability. In other instances, as with foreigners with foreigners, members of particular religions or gays, those features are not immediately perceptible. The Notion of social minority is not necessarily related to numerical factor. Although prejudices, negative stereotypes or hostility towards certain categories of people often result from their numerical inferiority vis-à-vis the majority, this is not always the case, as is most obvious in the discrimination of women".

> Standards and values are relative to the culture from which they derive so that any attempt to formulate postulates that grow out of the beliefs or moral codes of one culture must to that extent, detract from the applicability of any declaration of human rights to mankind as a whole.[3]

This extremely relativist approach was criticised[4] and has not become dominant. Horrible experiences of the Holocaust motivated the unification of common values. As one writer has pointed out "The Cold War, the women's lobby, and tradition of Latin American socialism were also major forces that shaped the writing of this pivotal document. But none of them match the Holocaust in importance".[5]

Therefore, instead of reflecting all those different approaches and their different demands, the drafters preferred as inclusive, abstract and general a formulation of the rights as possible. For example, Art. 3 of the UDHR declares that "Everyone has the right to life, liberty and security of person". It may seem quite clear at first; however, this article does not enable us to solve the problems relating to matters such as abortion, death penalty, euthanasia or human cloning. The article does not say anything about when life begins and ends. This is not because the drafters did not have a foresight. Rather, this is because they could not manage to have a consensus on those controversial issues; and left them to the signatory states' margin of appreciation.[6]

One of the most controversial issues was the one relating to minorities. Since there was no consensus among the drafters/delegates on that issue, they preferred not to mention the term minority or minority rights in the Declaration; but they assigned the Sub-Commission on the Prevention of Discrimination and Protection of Minorities of the Commission on Human Rights in 1948.[7]

In 1960s, at the stage of adopting a binding instrument, disagreements became more visible. Since the UDHR was a morality code, it was assumed to have a relatively weak impact on signatories. On the contrary, the two covenants were designed as legal instruments binding for the States parties. At that point, the conflicts between the West and the rest of the world (Eastern Block, third world

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[3] American Anthropological Association, 'Statement on Human Rights', *American Anthropologists*, Vol. 49, No. 4 (1947), p. 542.

[4] For various anthropological approaches to human rights see: M.C. Galli, 'Human Rights and Anthropological Perspectives on the Dynamics of Cultural Differences' in K. Feyter, G. Pavlakos (eds.), *The Tension Between Group Rights and Human Rights. A Multidisciplinary Approach*, Oxford 2008, pp. 71-87.

[5] J. Morsink, *The Universal Declaration of Human Rights. Origins, Drafting, and Intent*, Philadelphia 1999, p. 37.

[6] For the discussions during the drafting process of the article see: L.A. Rehof, 'Article 3' in A. Eide et al. (eds.), *The Universal Declaration of Human Rights. A Commentary*, Oslo 1992, pp. 73-85.

[7] And that Commission, more than forty years later of its mandate adopted the UN Declaration on the Rights of Minorities in 1992.

countries, colonies etc.), and even within Western states among different groups lead the drafters to adopt two different covenants.[8]

Today, the hierarchy and asymmetry between those covenants and substantive rights therein are widely discussed. The most well-known contradiction is the one between civil and political rights on the one hand, and economic, social and cultural rights on the other. Regardless of the relevance of the substantive rights to each other, they were set out in different texts. It has been criticised that cultural rights are neglected – even more neglected than economic and social rights. But what does "cultural rights" mean and what do cultural rights implicate?

Cultural rights are contained mainly in Article 27 of the UDHR and Article 15 of the ICESCR. The main idea of those articles is the right to participate/to take part in cultural life. However those provisions give us no definition of the concept of culture.

Stavenhagen formulates three main common usage of *culture* which seems appropriate for our discussion:[9]

1. Culture as capital: In this usage culture is identified as an "accumulated material heritage of humankind in its entirety". The right to culture means that every individual has a right to access this cultural capital. It also means the right to cultural development which requires a State to make investments in the cultural field.
2. Culture as creativity: In this usage culture is seen as a "process of artistic and scientific creation". Therefore, every individual has a right to create a cultural outcome. This is also closely linked with the freedom of though and expression of the creator.
3. Culture as a total way of life: This usage is common in the field of anthropology. It means the "sum total of the material and spiritual activities and products of a given social group which distinguishes it from other similar groups". In this sense culture is a system of values, symbols and practices that a specific group of people share and reproduce over time.

When we look at international human rights instruments we meet all those conceptions in various contexts. However, unlike the first two conceptions, the third one – culture as a total way of life – causes a tension between the implications of human rights and of local-cultural institutions and practices. Because, this conception of culture necessitates specific groups to have rights in order to promote and maintain their culture. Therefore, a group itself – like an indi-

[8] See: S. Morphet, 'Economic, Social and Cultural Rights. The Development of Governments' Views, 1941-88' in R. Beddard, D.M. Hill (eds.), *Economic, Social and Cultural Rights: Progress and Achievement*, London 1992, pp. 74-92.

[9] R. Stavenhagen, 'Cultural Rights. A Social Science Perspective' in A. Eide, C. Krause, A. Rosas (eds.), *Economic, Social and Cultural Rights. A Textbook*, Dordrecht 2001, pp. 87-91.

vidual – becomes a right-bearer; and it is assumed to have a right to "cultural identity".[10]

Beyond this, the minorities' or different groups' right to participate in cultural life includes the right "to preserve and to develop their culture. This brings us to the more basic question of the relationship between human rights and cultures in general and to inquiries into «cultural relativism»".[11]

Probably, as some feminist scholars rightly mention, the tension between universalist and relativist approaches becomes evident mostly in women's human rights.[12] Susan Okin, in her leading article asks a vital question: "What should be done when the claims of minority cultures or religions clash with the norm of gender equality that is at least formally endorsed by liberal states (however much they continue to violate it in their practices?)".[13]

Feminists and women's human rights activist were suspicious of the consequences of multicultural policies, cultural diversity and cultural relativism for many reasons. First of all, culture does not always have good connotations; asymmetric power relations constrain people in different ways in culture. Secondly, culture is not a monolithic thing and contains various beliefs. Passing over this complexity is also a discrepancy for a relativist approach.[14] That is why some scholars mention the necessity to think about internal minorities/minorities in minorities.

And some feminists, by escaping from both relativist and essentialist approaches, focus on the interaction between culture and the way how it constructs gender. By this way, they aim at displaying how "cultural norms function as a source of power and control within modern society".[15]

Today, we have various international provisions relating to cultural rights in general, and cultural rights of minorities in particular. However, there is an ongoing debate whether they are individual rights or group rights, and whether group rights are human rights.

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[10] Ibid., pp. 91-92. For example, Art. 5 of the Framework Conventions for the Protection of National Minorities is as follows: "The Parties undertake to promote the conditions necessary for persons belonging to national minorities to maintain and develop their culture, and to preserve the essential elements of their identity, namely their religion, language traditions and cultural heritage".

[11] A. Eide, 'Cultural Rights as Individual Rights' in A. Eide, C. Krause, A. Rosas (eds.), *Economic, Social…*, pp. 289-290.

[12] T. Higgins, 'Anti-Essentialism, Relativism and Human Rights', *Harvard Women's Law Journal*, Vol. 89 (1996), pp. 89-126 quoted in H. Steiner, P. Alston, R. Goodman (eds.), *International Human Rights in Context. Law, Politics, Morals. Texts and Materials*, Princeton 2008, p. 543.

[13] S.M. Okin, 'Is Multiculturalism Bad for Women?', *Boston Review*, October/November 1997, at <http://www.bostonreview.net/BR22.5/okin.html>, 2 November 2012.

[14] T. Higgins, 'Anti-Essentialism…', quoted in H. Steiner, P. Alston, R. Goodman (eds.), *International Human…*, p. 544.

[15] Ibid., p. 545.

Reconsidering the Underlying Problems

Here, I shall indicate three main arguments that seem problematic for the ongoing debate:

1. If we focus on cultural rights and their implications, we realise that existing human rights instruments have differing – and in some ways conflicting – approaches. Let us have a look at the main provisions related to cultural rights.

According to the Article 27(1) of the Universal Declaration "Everyone has the right to freely participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits".[16] Article 15 of the ICESCR regulates cultural rights in a similar way.[17]

By combining those two articles we derive four main components of cultural rights: i) the right of everyone to take part in cultural life, ii) the right of everyone to enjoy the benefits of scientific progress and its applications, iii) the right to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which the beneficiary is the author, iv) the freedom indispensible for scientific research and creative activity.[18]

Article 27 of the ICCPR regulates cultural rights of minorities,[19] and according to this article, minority rights have three components: (i) to enjoy their own culture; (ii) to profess and practice their own religion; (iii) to use their own language.

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[16] The Universal Declaration of Human Rights (UDHR), Art. 27: The right to culture.

(1) Everyone has the right to freely participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.

(2) Everyone has the right to protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

[17] The International Covenant on Economic, Social and Cultural Rights (ICESCR), Art. 15:

1. The States Parties to the present Covenant recognize the right of everyone:

(a) To take part in cultural life;

(b) To enjoy the benefits of scientific progress and its applications;

(c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.

3. The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.

4. The States Parties to the present Covenant recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields.

[18] A. Eide, 'Cultural…', p. 292.

[19] International Covenant on Civil and Political Rights (ICCPR), Art. 27: Minority rights. In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

Additionally, both the 1992 *UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities* and the 1995 *Council of Europe Framework Convention for the Protection of National Minorities* broaden this formulation by bringing new aspects: (i) to participate in cultural, religious, social, economic, and public life; (ii) to participate in decisions on the national and, where appropriate, regional level; (iii) to associate with other members of their group and with persons belonging to other minorities.

However, as mentioned before there may be a conflict between minorities' local institutions and practices, and international human rights standards.

The 1989 ILO Convention No. 169, Indigenous and Tribal Peoples Convention, contains an important statement which is as follows:

> These peoples shall have the right to retain their own customs and institutions, where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognised human rights. Procedures shall be established, whenever necessary, to resolve conflicts which may arise in the application of this principle.

Similarly UN Declaration Article 4(2) proclaims the rights of minorities to practice their culture, with an exception: "except where specific practices are in violation of national law and contrary to international standards".

Both the UN Convention and the Council of Europe Framework Convention strongly emphasize the protection and promotion of cultural differences. On the other hand, they contain similar provisions, too.[20] Those limitation clauses show that cultural norms may conflict with universal human rights norms; therefore they can be limited.

Prima facie, adopting such kind of provisions may seem a proper way in order to limit "cultural" demands of various groups. However, from a relativist point of view, there can be no universal norms, and so called universal norms – the existing ones in international instruments – only reflect certain groups' and cultures' interests.

We can leave this radical objection aside and justify the universal validity of some norms at a certain level. We can refer to transcendental interests and inter-

[20] Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, Art. 4(2): "States shall take measures to create favourable conditions to enable persons belonging to minorities to express their characteristics and to develop their culture, language, religion, traditions and customs, except where specific practices are in violation of national law and contrary to international standards". Article 20 of the Framework Convention for the Protection of National Minorities is a little bit different from other limitation clauses; it emphasizes the respect to the rights of others: "In the exercise of the rights and freedoms flowing from the principles enshrined in the present framework Convention, any person belonging to a national minority shall respect the national legislation and the rights of others, in particular those of persons belonging to the majority or to other national minorities".

culturally valid norms for example.[21] But still, we face a fundamental question: Do all cultural norms and practices deserve equal respect and protection as cultural human rights or group rights? If not, how can we scale them?

> Let us take the CEDAW into consideration, since the wording of it is a little bit different from other international instruments. Article 13 of the Convention relates to the right of women to culture. Article 5(a) of the Convention requires States to take all appropriate measures to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.

Here, culture is a thing that has to be challenged, and even modified.[22]

So, these differences among international instruments expose the doubtfulness about respecting cultural diversities at any cost. They also show that legal scholars and philosophers accepting the universal validity of human rights norms have to justify their arguments in a different way – at least different from the existing ones. Bringing some limitation clauses does not mean that universal validity is properly justified.

2. Another controversial issue is the conception of "human dignity". It is one of the key concepts of the human rights discourse, and it is possible to see many different conceptions of "dignity."

The *Preamble* to the UDHR recognise "the inherent dignity and of the equal and inalienable rights of all members of the human family". Then Article 1 declares that "all human beings are born free and equal in dignity and rights". Although the

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[21] See: O. Höffe, 'Kültürlerarası Tartışmada İnsan Hakları' [Human Rights in the Intercultural Debate] in İ. Kuçuradi, B. Peker (eds.), *Elli Yıllık Deneyimlerin Işığında Türkiye'de ve Dünyada İnsan Hakları*, Ankara 2004. According to him, the clearest proof of intercultural validity is the fact that every legal order takes crimes against body and life into consideration (p. 145).

[22] "The influence of the universalist/relativist divide on the politics of human rights is perhaps nowhere more evident than in debates over women's rights as human rights… Treating culture as monolithic fails to respect relevant intra-cultural differences just as the assumptions of the universality of human rights standards fails to respect cross-cultural differences. Cultural differences that may be relevant to assessing human rights claims are neither uniform nor static. Rather, they are constantly created, challenged and renegotiated by individuals living within inevitably overlapping cultural communities". T. Higgins, 'Anti-Essentialism…', quoted in H. Steiner, P. Alston, R. Goodman (eds.), *International Human…*, pp. 543-544. See also: R. Coomaraswamy, *Report on Cultural Practices in the Family that are Violent towards Women*, UN doc. E/CN.4/2002/83, para. 5: "Cultural markers and cultural identity that allow a group to stand united against the oppression and discrimination of a more powerful ethnic or political majority often entails restrictions on the rights of women. Many indigenous communities do not allow women civil rights or property rights and yet they themselves are often a threatened community, very vulnerable to the dictates of the more powerful groups in their respective societies. For this reason, the issue of cultural relativism requires a measure of sensitivity".

concept human dignity is not defined in the Declaration,[23] it is often referred to in an individual context.

On the other hand, Art. 1 of the *Declaration of Principles of International Cultural Co-operation* adopted in 1966 by UNESCO uses dignity in a different context:

a. Each culture has a dignity and value which must be respected and preserved;
b. Every people has the right and duty to develop its culture;
c. In their rich variety and diversity, and in the reciprocal influence they exert on one another, all cultures from part of the common heritage belonging to all mankind;
d. Here, we see the concept of the "dignity of cultures". A famous scholar focusing on group rights points out that:

> Universality need not be a "context free" legal or philosophical concept. It can actually recognise the necessary "margin of appreciation" and interpret human rights in a manner which does justice to cultural sensitivity and "dignity of cultures" – the actual agents of human dignity in many situations.[24]

But we know that in some cultures, dignity, honour, pride, and even fidelity are used interchangeably. If dignity is such an unsteady concept, then how can we use it as a legal norm, and as a basic principle for human rights?

This is another problematic conceptual issue underlying some of our existing problems relating to various cultural practices and their consequences for human rights.[25]

3. There is still a strong necessity to clarify the contents of the concepts of cultural rights, group rights/collective rights and minority rights, although they are widely used concepts in international law.

Some scholars suggest that group rights are human rights. Some others say that those are individual's rights having collective aspects.[26] Some scholars do not distinguish between minority rights and group rights, and use the term "group rights of minorities". However, under the international law, minority rights are the rights of persons. When it comes to cultural rights, it seems a bit more complicated, since the right to culture is intimately related to minorities[27] and since it has

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[23] T. Lindholm, 'Article 1' in A. Eide et al. (eds.), *The Universal Declaration…*, pp. 47-51.

[24] D. Türk, 'Introduction. Group Rights and Human Rights' in K. Feyter, G. Pavlakos (eds.), *The Tension…*, p. 6. (Emphasize added).

[25] For a different conception of human dignity see: I. Kuçuradi, 'İnsan Onuru Kavramı ve İnsan Hakları' [The Concept of Human Dignity and Human Rights] in eadem, *İnsan Hakları-Kavramları ve Sorunları*, Ankara 2009, pp. 69-76.

[26] See for example: J. Donnelly, *Teoride ve Uygulamada Evrensel İnsan Hakları* ["Universal Human Rights in Theory and Practice"], Ankara 1995.

[27] Cultural rights are almost always examined with minority rights, and cultural rights of minorities. This is pointed out, for example in the Fribourg Declaration on Cultural Rights, Article 7: "*Observing* that cultural rights have been asserted primarily in the context of the rights of

both individual and collective aspects.[28] And this collective aspect causes a tension as Eide has pointed out:

> The individual cultural rights can, to some extent, coincide with collective cultural rights, but may also represent a challenge to them. It is one of the major problems in the contemporary world, due to the interaction between the process of globalization and the efforts to protect traditions and cultural identities for weak and vulnerable groups. However, dominant elites, within states or in subregions of states, also often seek to preserve their power based on cultural traditions, which are challenged by individuals who are negatively affected by them.[29]

Under international law, minorities are identified on the basis of national or ethnic, cultural, religious and linguistic identity.[30] From the UN approach, major concerns of minority rights are: survival and existence, protection and promotion of the identity of minorities, equality and non-discrimination, and effective and meaningful participation.[31] According to the existing human rights instruments, minority rights are the *rights of persons* belonging to a minority group. For example, according to the Framework Convention for the Protection of National Minorities "every person belonging to a national minority shall have the right to… manifest his or her religion or belief" or "to freedom to hold opinions and to receive an import information and ideas in the minority language, without interference by public authorities" or "to freedom of peaceful assembly".

Group rights (or group-differentiated rights) are intimately related to minority rights in this sense. In works of scholars like W. Kymlicka and C. Taylor, group rights are given a vital role for multicultural policies.[32] Two types of group-differentiated rights are mentioned: group rights held by individual members of minor-

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minorities and indigenous peoples and that it is essential to guarantee these rights in a universal manner, notably for the most destitute".

[28] See: S. Stavenhagen, 'Cultural…', p. 93: "When we speak of cultural rights we need to take into account the cultural values that individuals and groups share, which they often hold dear and which shape and define their collective identities. The right to culture implies the respect for the cultural values of groups and individuals by others who may not share these values; it means the right to be different. How else are we to interpret the fundamental freedoms of thought, of expression, of opinion, of belief that are enshrined in the Universal Declaration of Human Rights".

[29] E. Eide, 'Cultural…', pp. 300-301.

[30] *Minority Rights. International Standards and Guidance for Implementation*, UN Doc. HR/PUB/10/3, 2010, p. 2, at <http://www.ohchr.org/Documents/Publications/MinorityRights_en.pdf>, 4 November 2012.

[31] Ibid., p. 7.

[32] See for example: C. Taylor, 'Tanınma Politikası' in A. Gutmann (ed.), Çokkültürcülük. *Tanınma Politikası* [Multiculturalism. Examining the Politics of Recognition], İstanbul 2010; W. Kymlicka, 'Kanada'da Grup Ayrımlaşmalı Üç Yurttaşlık Biçimi' in S. Benhabib (ed.), *Demokrasi ve Farklılık. Siyasal Düzenin Sınırlarının Tartışmaya Açılması* [Democracy and Difference. Contesting the Boundaries of the Political], İstanbul 1999, pp. 220-243.

ity groups, and group rights held by group qua group. The latter one is considered "a properly called group rights, as in the case of indigenous groups and minority nations, who claim the right to self-determination".[33] Jacob Levy, for example, classifies the main demands of group rights as follows: 1) Exemptions from norms prohibiting or restricting certain actions that form part of the cultural practices of minority groups; 2) Assistance rights that "seek help in overcoming the obstacles to engage in common practices"; 3) Self-government; 4) External rules which refer to the claims of rights that are intended to restrict the freedom of non-members and are seen as necessary for the sake of cultural presentation; 5) Recognition of cultural communities; 6) Internal rules; 7) Representation and participation in decision making processes; 8) Symbolic demands.[34]

When it comes to the international rules and standards, according to the Human Rights Committee the only recognised group right is the right to self-determination. Group-differentiated rights held by individuals, however, are not considered group rights. They are considered minority rights.

Besides those conceptual challenges and complications, internal minorities/minorities in minorities constitute another controversial issue. It can be suggested that a person does not have to identify herself/himself as a member of a certain cultural minority. However, rejecting a particular "cultural identity" can be really difficult sometimes, especially in some closed groups, like religious communities. In order to prevent this kind of constraints Kymlicka suggests distinguishing two types of collective rights that a group might demand: "external protections" which are rights necessary for the protection of minority groups and relates with the fairness, and "internal restrictions" which consist of minority groups' claims against its members. He concludes that the second group rights were unacceptable to protect. By saying this, he refers to patriarchal and theocratic cultural images.[35] This differentiation seems appropriate and important. However, S. Okin points out to the fact that "in many cultures, strict control of women is enforced in the private sphere by the authority of either actual or symbolic fathers, often acting through, or with the complicity of, the older women of culture".

> She claims that although Kymlicka rejects discriminative practices, his arguments for multiculturalism fail to register what he acknowledges elsewhere: that the subordination of women is often informal and private, and that no culture in the world today, minority or majority, could pass his "no sex discrimination" test if it were applied in the private sphere.[36]

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[33] S. Song, 'Multiculturalism' in E.N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy*, Winter 2010 Edition, at <http://plato.stanford.edu/archives/win2010/entries/multiculturalism/>, 30 September 2012.

[34] See: N.T. Casals, 'Group…', pp. 76-77.

[35] W. Kymlicka, 'Eşitlik…', pp. 229-230.

[36] S.M. Okin, 'Is Multiculturalism…'

Philosophy-based HRE, and Some Consequences for Culturally Diverse Societies

All those abovementioned aspects display that we need really strong justification for universal validity of human rights norms. This does not necessarily mean that those norms are applied identically in any case. Rather, this means that implications of human rights for different groups may vary. And varying characteristics of those different groups must take into account.

Few scholars argue that human rights education must be philosophy-based.[37] For example, Kirchschlager suggests that human rights are moral, legal and political rights at the same time; and it is the moral dimension that gives them their universality:

> human rights in their legal dimension depend in their justification on the moral dimension of human rights, because their legal justification is limited to the boundaries of a national legal system which can be compensated by the moral dimension of human rights. Vice versa, human rights in their legal dimension cannot justify human rights in their moral dimension, due to the limited validity of the first. Human rights in their moral dimension have to find their justification in the moral dimension.[38]

This leads us to the point that human rights require a moral justification.

Secondly, he argues that philosophy-based HRE "with a focus on the moral justification of human rights" is also necessary for challenging relativist objections against universality of human rights.[39]

Philosophy can contribute to our problems by clarifying the concepts that we have been struggling with since the beginning of our discussion. But, we also know that different philosophers have different approaches and arguments on the same issue. Here we come to the second point: what kind of philosophical approach?

According to Kuçuradi who claims that HRE must be based on philosophy and ethics, – and who formulates human rights conceptions by using some arguments of philosophical anthropologists like M. Scheler, N. Hartmann and T. Mengüşoğlu among others – one of the main aims of this kind of education is to display the kinds of norms which differ epistemologically, and to justify the universal validity of human rights norms by their distinguishing characteristics:

> Human rights express norms deduced from premises of a special epistemic quality – from the knowledge of the value of certain human potentialities… This specifity of them constitutes their "universality", that they bring demands for the treatment of every human being – independently from his or her "race, colour, sex, language, religion etc."

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[37] For this approach see: P. Kirchschlager, 'Prospects for Human Rights Education' in I. Kuçuradi (ed.), *Human Rights 60 Years after the Universal Declaration / Evrensel Bildirgenin 60. Yılında İnsan Hakları*, İstanbul 2011, pp. 159-193; I. Kuçuradi, 'İnsan…'

[38] P. Kirchschlager, 'Prospects…', pp. 161-162.

[39] Ibid., p. 167.

> On the other hand, cultural norms changes; they are deduced in a given social conditions by induction. They aim at protecting the interests or benefits of individuals in the given conditions of the groups to which they belong; if deduced with sagacity, they are useful so long as the conditions from which they were deduced have not changed. The former i.e. human rights, aim at protecting what we call human dignity, which all human beings share.
>
> What multiculturalism promotes is respect, not to all human beings, but to all such cultural norms, an important part of which consists of religious norms. We have to look at norms independently from whichever culture or religion they stemm from –including our own–, to scrutinize them cool headedly and evaluate them philosophically before we try to spread or enforce them.[40]

Apparently, all norms and practices are not the same kind: they are derived from different sources and they have different functions: Cultural norms are "deduced in different given historical conditions from experience by induction". Human rights norms, on the other hand, are "deduced by the comparison of different given (human or historical) conditions in the light of the knowledge of the specificities of the human being – or of what is called human dignity."[41]

Cultural norms possess practical function if they are deduced with sagacity. But once the conditions that they are deduced change, they loose their ground and they become dysfunctional, sometime even harmful.

There are many – and increasing – international human rights instruments. And there are various kinds of protection mechanisms attributed to them. However, those instruments are not always complete each other. Contrary, sometimes they compete with each other.

Today, we experience that protection and promotion of cultural norms – without taking their different characteristics and implications into consideration – may cause really harmful consequences, especially for women's human rights.

As Susan Okin points out in her abovementioned article "whether the minority group speaks a different language that requires protection, and whether the group suffers from prejudices such as racial discrimination"[42] have to be taken into account. Because, the right to speak a mother tongue – and the right to speak a minority language – the right to learn her/his mother-tongue, the right to make a publication in a minority language etc. – or the right not to be discriminated on any ground, are indisputable human rights which must be respected, protected and fulfilled by a State. However, there are some other cultural norms, mostly

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[40] İ. Kuçuradi, 'Universal Human Rights and Their Different Implications for Multiethnic and Multireligious Societies' in Y.S. Tezel, W. Schönbohm (eds.), *World, Islam and Democracy*, Ankara 1999, pp. 41-52.

[41] For further details see: I. Kuçuradi, 'Human Rights as Ethical Principles and as Premises for the Deduction of Law' in eadem (ed.), *Human Rights…*, p. 65.

[42] S.M. Okin, 'Is Multiculturalism…'

religious norms – not human rights norms – that must be re-analysed in every single case, and must be limited if needed.

Therefore, we have to see the different characteristics of norms, instead of placing them in the same fundamental rights catalogues. And, we have to find the implications of human rights norms in every single case; not impose them just because they are demands of certain minorities or groups.

Abstract

Human rights are considered a part of international law in general, and are usually dealt with as solely legal norms. However, these norms and principles have moral aspects as well. They are not derived from states' or politicians' aspirations. They are derived from human dignity which is inherent to all human beings. So, human rights education (HRE) must take this aspect into account.

Bearing this aspect of human rights and HRE in mind, this paper aims at evaluating some consequences of this approach for culturally diverse societies. The main problems with culturally diverse societies in the context of human rights crystallise around group rights (or group-differentiated rights) and minority rights issues. In international human rights instruments, the term minority refers to national, ethnic, linguistic and religious minorities, and it is accepted that individuals belonging to such minorities have some differentiated rights – namely minority rights – by being a member of that minority group. Since there is no consensus on the concept of minority, scholars usually deal with the definition of it, and indicate problems stemming from its vagueness. However, there is another important and mostly neglected problem relating to this debate: the vagueness of the concept of *culture*. This vagueness causes some problems relating to cultural rights in general, and cultural rights of minorities and group rights issues in particular.

In order to clarify those different right categories, their distinguishing characteristics and their different implications, we need clearly justified human rights norms. And we can find this justification in philosophy.

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Australian Multiculturalism

The Roots of its Success

1. Introduction

Human rights are the basic norms that make a multicultural society possible. They are the secular standards that guide human interactions advancing dignity, mutual respect and equality.

The Auschwitz-Birkenau Nazi concentration camp visited by the participants of the 3rd International Conference on Human Rights Education represents both a total denial of human rights and human diversity and a comprehensive failure of the multicultural ideal. People were murdered there because of their race, religion, politics, ethnic and national origins, sexual orientation, social status and other characteristics that are now typical of modern diversity.

The Auschwitz experience has underpinned the post World War II (WWII) resolve to build an international human rights system. The Auschwitz Museum has also an on-going educational value for all interested in the advancement of civil society.

This paper is about the success or otherwise of Australian multiculturalism.

2. Multiculturalism

2.1. Multiculturalism – Does it Work?

Europe's and Australia's assessments of success of multiculturalism differ dramatically.

Criticism of multiculturalism appears to be in fashion lately with some European leaders. In fact, in the recent past the heads of the three biggest European economies – Germany, France and the United Kingdom – have all come out against multiculturalism.[1]

[1] Mail Online, 'Nicolas Sarkozy joins David Cameron and Angela Merkel view that multiculturalism has failed', 11 February 2011, at <http://www.dailymail.co.uk/news/article-1355961/

In October 2010 German Chancellor, Angela Merkel, started the ball rolling by making references to the slow integration of Turkish guest workers and declaring that multiculturalism in Germany had "failed utterly".[2] A few months later, the British Prime Minister David Cameron, using a speech to a security conference in Munich, drew a connection between Islamic extremism and British multiculturalism. The former French President Nicholas Sarkozy, however, delivered the harshest criticism, in February 2011. During a televised debate, he declared multiculturalism to be a failure and asserted that it is socially divisive and undermines the secular nature of French society and called for a renewed focus on France's "identity".

To be fair, I need to acknowledge that these leaders' assessments do not reflect the reality for all those in Europe who daily practice multiculturalism on the community level. Take, for example, European football, which is a good example of multiculturalism and racial integration in practice.[3]

Australians see the workings of multiculturalism in a rather different light from Europeans. To Australians, the European approach to multiculturalism all seems a matter of semantics or perhaps a victory of politics over policy. They view the European leaders' attacks as being long on rhetoric and short on substance. They see their attacks as focussed more on the name "multiculturalism" as a descriptor of demographic change rather than as a policy of empowerment of different ethnic and cultural groupings. Australian critics of the European leaders' statements would simply suggest that it is difficult to fail at something you never actually tried.

Although Australian multiculturalism has undergone some significant changes since it was adopted as government policy in 1970s, it is generally regarded as a successful undertaking clearly contributing to the cohesion of Australian society.

Nicolas-Sarkozy-joins-David-Cameron-Angela-Merkel-view-multiculturalism-failed.html>, 17 January 2013.

[2] Speaking to a group of Christian Democratic Youth and targeting Germany's guest worker population, Merkel said: "at the beginning of the 60s our country called the foreign workers to come to Germany and now they live in our country. We kidded ourselves a while, we said: «They won't stay, sometime they will be gone», but this isn't reality"; "And of course, the approach [to build] a multicultural [society] and to live side-by-side and to enjoy each other… has failed, utterly failed".

[3] For example the UK football club Arsenal has only 6 UK players out of its 32-player strong premier league list and their coach is French. They have players from all over Europe, South America, Africa and Asia. Arsenal, as well as the governing body of football in Europe the Union of European Football Associations (UEFA) and Football Against Racism in Europe (FARE) have teamed up to run anti-racism campaigns to eradicate racism and to educate football fans that there is a zero tolerance policy on racial harassment and abuse. Examples of successful education campaigns include "Show Racism the Red Card" events involving high profile professional footballers as anti-racist role models and the Arsenal's initiative called KROSSS (Kick Racism Out Of School, Sport and Society).

Australian governments, both Labor and the Conservative, have supported it. Recently, for example, Prime Minister Julia Gillard said: "Multiculturalism is the word that we use to capture our love of the things that bind us together and our respect for the diversity that enriches us"[4] and her Minister for Immigration and Citizenship Chris Bowen asserted in a speech entitled 'The Genius of Australian Multiculturalism' that "multiculturalism has, without a doubt, strengthened Australian society".

Australian Leader of the Opposition, Tony Abbott, confessed that although in the past he worried about multiculturalism, now he embraces it because of his belief "in the gravitational pull of the Australian way of life".[5] His shadow Minister Scott Morrison agrees and does not "see the experience of Europe on immigration as prophecy for our own future in Australia". He links Australia's success to its selective migration intake.[6]

So, why do we have such stark differences in the judgement of impact of multiculturalism between our countries?

2.2. The Meaning of the Word "Multiculturalism"

Let us start with the question: What is multiculturalism?

There is no agreed definition of "multiculturalism". Looking at how the word "multiculturalism" is used I must conclude that multiculturalism means different things to different people.[7] Below I distinguish three different meanings that are most commonly given to the word "multiculturalism".

Firstly, to some, multiculturalism is simply a demographic descriptor of a diverse population. This is the most common use of the word – we often declare that country *x* or *y* is a multicultural society. For example, the populations of Germany, France, Peru, India, Malaysia and China are clearly diverse as they include multi-

[4] J. Gillard, 'These Values We Share. Australian Multicultural Council Launch', *Australian Multicultural Council*, 22 August 2011, at <http://www.amc.gov.au/speeches/pm-20110822.htm>, 8 January 2013.

[5] T. Abbott, 'Vote of Thanks at the Inaugural Australian Multicultural Council Lecture, Parliament House', 20 September 2012, at <http://www.tonyabbott.com.au/LatestNews/Speeches/tabid/88/articleType/ArticleView/articleId/8894/Vote-of-Thanks-at-the-Inaugural-Australian-Multicultural-Council-Lecture-Parliament-House.aspx>, 17 January 2013.

[6] S. Morrison, 'Our Nation. A Liberal Perspective on Immigration and Social Cohesion in Modern Australia. Speech to the Federation of Ethnic Communities Council of Australia', 18 November 2011, at <http://www.scottmorrison.com.au/info/speech.aspx?id=312>, 18 January 2013.

[7] Personally, I must confess that I do not like this word very much. It is because of its ending with *-ism*. Remember the words: fascism, communism, atheism and other words describing ideological commitments and emotions. To me multiculturalism is about working, practical solutions to manage a diverse society and not about ideology or feelings. But I could not come up with a better word to describe what we practice in culturally diverse Australia.

ple national identities, cultures and religions living next to each other within their borders with their diversity reflected in the streets, at schools, in crime statistics, at football stadiums, etc.

These countries may have also some legal, policy and program responses to such diversity, which may include: anti-discrimination measures, special welfare and language training services for minorities and/or anti-terrorism measures or, like in the case of China, a range of measures directed against non-Han minorities, and in particular against the Tibetan and Uyghur people.

The earlier quoted statements by European leaders suggest that European multiculturalism simply fits into this category – recognition of ethno-cultural diversity plus some measures to deal with it. Furthermore, the German, French, British, Dutch and some other European leaders appear to have one thing in common; when they say multicultural they actually mean Islamic culture. There is no talk of a need to integrate German immigrants into British culture and vice versa, it is all about the integration of Muslims into Western, secular societies.

Secondly, multiculturalism can be used as a normative ideal to be aspired to or ideological concept about how a diverse society should be organised to be just. Multiculturalism is defined as a cohesive society cantered around a defined cultural ideal rather than as a collection of ghettoised individual cultural elements. It assumes that culture is enriched by diversity rather than polluted by it and that the diverse cultural elements exist within a cultural envelope that creates its own common ground.[8] Fairness, equality, non-discrimination and justice are viewed as all-important foundation stones of multiculturalism. In fact, nobody would use the word multiculturalism for the description of a diverse society organised along the concepts of slavery or apartheid.

According to Koleth in Australia: "Multiculturalism has served a variety of goals over the years, including, the pursuit of social justice, the recognition of identities and appreciation of diversity, the integration of migrants, nation building, and attempts to achieve and maintain social cohesion".[9] The Keating government was particularly focused on linking multiculturalism to the Australian value of "fair go".

Thirdly, multiculturalism is understood as a social compact that involves power and wealth sharing between different ethno-cultural groups. Such a compact is usually based on equality of status and opportunity of different ethno-cultural grouping. It usually consists of a complex set of agreed national values and goals, normative and structural systems as well as policy, budgetary and program re-

[8] Europe during the period of Renaissance, when diverse cultures met and different ideas about architecture, commerce and citizenship flourished could be described as an example of such an ideal, although it is rarely associated in our minds with the concept of multiculturalism. It was the time when the multi-national, Jagiellonian Poland experienced its Golden Age.

[9] E. Koleth, *Multiculturalism. A Review of Australian Policy Statements and Recent Debates in Australia and Overseas*, [Canberra] 2010, pp. 3-41.

sponses put in place to manage diversity. Multiculturalism in this sense of the word exists in countries like Canada, New Zealand and Australia.

Canada is usually recognised as the birthplace of multiculturalism in the last understanding of the word. Since the nineteenth century, Canada experienced mass immigration and by the 1980s almost 40% of the population were of neither British nor French origins. Today Canada has one of the highest per capita immigration rates in the world ensuring that approximately 41% of Canadians are first or second-generation immigrants,[10] meaning one out of every five Canadians currently living in Canada was not born in the country.

Canada initially adopted a bilingual/bicultural approach to accommodate a large French minority in Quebec, but this did not adequately accommodate other significant minority populations in its western provinces from places like the Ukraine, Poland and Germany as well as its own indigenous population.

A 1963 Royal Commission Report attempted to preserve Canada's status as a bilingual and bicultural society but it was neither popular nor correct. The Report was attacked by both English and French speaking nationalists, but most vociferously by the so-called "Third Force" Canada's other minority populations, who advocated for multiculturalism.[11] Faced with the very real possibility of their nation being torn apart the formula was changed from "bilingualism and biculturalism" to "bilingualism and multiculturalism".[12]

Let us now focus on the Australian experience with building multiculturalism that is somewhat different from that of Canada or New Zealand.

3. Australian Multiculturalism

3.1. Background

Before offering a commentary on the development and key features of Australian multiculturalism let us briefly examine Australia's historical background and her contemporary characteristics as both directly relate to it.

Firstly, Australia is a very young country, especially when one draws comparisons with the old world. In fact, the history of modern Australia began on the day Captain James Cook arrived at Botany Bay on the *HMS Endeavour* in 1770 and formally took possession of the east coast of New Holland (as it was then called) for Britain.

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[10] Citizenship and Immigration Canada, 'Facts and figures 2008 – Immigration overview. Permanent and temporary residents – Permanent residents by gender and category, 1984 to 2008', at <http://www.cic.gc.ca/english/resources/statistics/facts2008/permanent/01.asp>, 17 January 2013.

[11] M. Marger, *Race and Ethnic Relations. American and Global Perspectives*, Belmont 2008.

[12] R. Knopff, T. Flanagan, *Human Rights and Social Technology. The New War on Discrimination*, Canada 1989, p. 131.

To put the timing into the perspective, it was the time when Europe was about to be shaken by the French Revolution and Napoleonic wars and the Polish Great Sejm started its deliberations to deliver the 3rd of May Constitution; when the United States of America were consolidating after their War of Independence and Chinese troops occupied Thang Long, the capital of Vietnam.

Politically it was only in 1901 that Australia became a united entity (dominion) with full independence from Britain in international affairs and defence to arrive much later. The process of nation building is not yet finished in Australia.

Secondly, Australia has always had a culturally diverse population and this diversity has to be managed by the government of the day as the history of white settlement of Australia shows that it was not always peaceful or prejudice free.

Australia began as a white settlement in a land inhibited by Indigenous people. The clash at the frontier between the Indigenous population and white settlers was cruel, hateful and has left long lasting consequences. Aboriginal resistance against the settlers was widespread, and prolonged fighting between 1788 and the 1920s led to the deaths of at least 20,000 Indigenous people and between 2,000 and 2,500 Europeans.[13] In the area that was later to become Sydney smallpox decimated the local Eora people and debate rages still as to whether it was deliberately introduced to them or not.

Other conflicts developed along ethnic and religious lines. The settlers imported into Australia the conflict between the Protestant English and Catholic Irish. These old prejudices and hatreds did not subside but flourished in Australia until the early post WWII years when they finally started to wane.

A conflict also developed between white and Chinese miners in the Gold Fields of Victoria and elsewhere during the 1850s. According to John Knott:

> There were allegations that the Chinese were immoral, that their methods of mining were wasteful, that they were unwilling to prospect for new fields, that they spread disease, that they would marry white women and that their weight of numbers would eventually swamp the British character of the colony.[14]

What was particularity resented was that the Chinese were very industrious, hardworking and were able to earn income from claims abandoned by white settlers. In other words, the Chinese were accused of amongst other things unfair labour competition because they worked too hard. Their work practices were clearly seen by white miners as undermining what they understood to be the "fair go" principles and no equal two way interaction was established between the Chinese and European miners.

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[13] J. Grey, *A Military History of Australia*, Port Melbourne 2008, pp. 28-40.

[14] J. Knott, 'Arrival and Settlement 1851-1880' in J. Jupp (ed.), *The Australian People. An Encyclopedia of the Nation, its People and their Origin*, Cambridge–New York 2001, p. 37.

> World War I (WWI) and WWII saw the government establishing the internment camps in remote locations for thousands of men, women and children classed as 'enemy aliens'. According to the National Archives of Australia: During World War I, for security reasons the Australian Government pursued a comprehensive internment policy against enemy aliens living in Australia. Initially only those born in countries at war with Australia were classed as enemy aliens, but later this was expanded to include people of enemy nations who were naturalised British subjects, Australian-born descendants of migrants born in enemy nations and others who were thought to pose a threat to Australia's security.[15]

Australia interned almost 7,000 people during WWI, of whom about 4,500 were enemy aliens and British nationals of German ancestry already resident in Australia. During WWII the Japanese, Germans and Italians were also interned based on their ethnicity, even if they were British nationals.

All these past conflicts required extensive government intervention, including legislative, policy and program responses such as the "White Australia" policy and dictation test or the establishment of bureaucracies to manage Aboriginal issues or to run internment camps.

Thirdly, since its early days Australia was built as an egalitarian society, with limited class divisions and a culture of "fair go" and social justice. Most Australians had believed that they have a right to act, preferably against the authorities, in case of individual injustice. In fact it is the egalitarian streak in Australia's national character, and not the past racism and xenophobia, that provided effective groundwork for the establishment of contemporary multiculturalism.

Captain Arthur Phillip, given command of the first fleet of convict settlers, was remarkably successful at delivering them alive and relatively well to the shores of Australia. Looking back, a large part of Capitan Phillip's success was his insistence that proper food be provided to the convicts and that they be regularly allowed out of the holds and up on deck.[16]

When Phillip became the first governor of Australia, one of his earliest decisions was to distribute the food equally amongst the convicts and freemen. He realised almost immediately that food was going to be an issue in the new colony and that any system that distributed it unfairly would result in civil unrest. This was not a decision that his men and officers agreed with, particularly when he had anybody who stole from the stores, convict or freeman, flogged.

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[15] National Archives of Australia, 'Wartime internment camps in Australia', 2012, at <http://www.naa.gov.au/collection/snapshots/internment-camps/index.aspx>, 17 January 2013.

[16] In a voyage of 252 days Captain Arthur Philip guided 11 ships carrying nearly 1,500 people over 24,000 kilometres without the loss of a single ship and with a death rate of only 3% (45 people). "Given the rigours of the voyage, the navigational problems, the poor condition and seafaring inexperience of the convicts, the primitive medical knowledge, the lack of precautions against scurvy, the crammed and foul conditions of the ships, poor planning and inadequate equipment, this was a remarkable achievement". Wikipedia, *First Fleet*, (2012), at <http://www.wikipedia.or.ke/index.php/First_Fleet>, 18 January 2013.

He also very quickly set up an emancipation system whereby convicts could earn their freedom and take land grants in the new colony. By 1790 there was a growing population of emancipated convicts and ex-military men establishing private enterprises.

Considering Phillip's focus on equal access to food for all, his focus on the emancipation of convicts and his paying little attention to class barriers, it is not without some cause that we can describe Governor Arthur Phillip as the founder of the "fair go" ethos in Australia.

A succession of Governors, some better than others, continued to build a society based on Phillip's foundations. Governor Lachlan Macquarie, for example, much to the chagrin of the free settlers, appointed emancipated convicts to high government office including Francis Greenway as the colonial architect and Dr William Redfern as the colonial surgeon. He even appointed one former convict, Andrew Thompson as a magistrate. In the old world, this disregard for class barriers would simply not have been possible.

This notion of a "fair go" and equality of all men continued post federation. In 1907, Justice Higgins used Australia's innovative conciliation and arbitration industrial relations system to bring down the landmark Harvester decision and established a concept of the living, or basic, wage. As a result, an employer was obliged to pay his employees a "fair and reasonable wage" that guaranteed them a standard of living that was reasonable for "a human being in a civilised community", whether or not the employer had the capacity to pay.[17] Another of the industrial court's early acts was to set the standard working week at 48 hours. What all this meant was that employers had to incorporate the cost of a decent standard of living into their operating expenses.

The concept of a "fair go" was grounded in this interventionist approach into employment relations and in the resulting flat class structure of the Australian society. In particular, the Australian governments had been seen as the custodians of the "fair go" principle and the key function of any government (especially Labor) has been to remove disadvantages, deliver housing, schools and hospitals and tax tall poppies out of existence, as electors will take care of politicians who become too full of themselves. In fact, despite their focus on egalitarianism, Australians display enormous trust in the government and tend to respect and follow the rules.

[17] Although this decision lead the world in setting up progressive labour standards and was made long before the Bolshevik Revolution or establishment of the International Labour Organisation, it is important to note, that the Harvester decision did not guarantee the same conditions of employment to women and Aboriginal Australians. In other words, Harvester decision could be also described as both racist and sexist with neither women nor Aboriginal Australians enjoying the benefits of the basic wage. In fact, the early Australian concept of the "fair go" was a bit like Athenian concept of democracy in around 500 BC which formally applied to all Athenian citizens, but excluded Athenian women, most likely Athenians with disabilities, "barbarians" – which often meant other Greeks who spoke in a different dialect or with a different accent and slaves.

The extension of the "fair go" ethos (both as participation in an equal, two way interaction and as an access to government administered "goodies") since the colonial days to include new categories of people must be seen as an extension of Australian democracy and economic inclusion; in particular Australian multiculturalism extended liberty, equality and economic wealth to waves of migrants joining the Australian society and offered them a sense of belonging, unparalleled opportunities and integration into democratic institutions.

Fourthly, Australia is a migrant country and to put it boldly there would be no contemporary Australia without mass migration. Every person who lives in Australia, with the exception of Aboriginal and Torres Strait Islander Australians, is either a migrant or a descendent of a migrant. Having said this, it must be acknowledged that since the very early days Australians have developed a strong national identity, separate from their British nationality and based on the "Australian way of life".

Furthermore, Immigration to Australia has always been tightly controlled by the government(s) of the day.[18] Initially Great Britain sent predominantly British and Irish convicts together with accompanying officials and military personnel. As early as 1790, Governor Arthur Phillip wrote to England imploring the British authorities to send skilled migrants to assist with economic development.

The first free settlers arrived in 1793, but numerically significant free migration started in 1820s. The British government in 1831 established the first scheme of assisted emigration to New South Wales and Tasmania.[19] Then a range of different assisted migration schemes and selection procedures were developed over time by the different colonies to bring in the most desirable migrants, needed for economic development. In 1836 the colony of South Australia was established for free settlers from Great Britain, with notable German language settlement. Skilled tradesmen and wealthy individuals were often the target of the early migration schemes.

Governments temporarily lost control over immigration between 1851 and 1860 after the discovery of gold. During this time, the level of overseas immigration to colonial Australia was unrestricted and reached its peak as the population of Australia grew from 437,655 to 1,151,947 and the population of Victoria from 77,000 to 540,000. Although the vast majority of newcomers emigrated from the British Isles, there were some Chinese, Americans, Canadians, Germans, French, Scandinavians, Italians and the Poles arriving in this period. The Chinese constituted the largest non-British group numbering about 34,000 people in 1858 and accounting for about 20% of the mining population in Victoria. According to Phil-

[18] S. Ozdowski, 'The Law, Immigration and Human Rights. Changing the Australian Immigration Control System', *International Migration Review*, Vol. 19 (1985), pp. 517-534.

[19] D. Oxley, E. Richards, 'The Convict Period' in J. Jupp (ed.), *The Australian People…*, pp. 16-34.

lip Lynch, the Fraser government Immigration Minister, Chinese "did not intend permanent settlement" and "lived on the gold field as closed communities".[20]

The conflict between the Chinese and white miners resulted in the Victorian government legislating in 1855 to restrict the entry of the Chinese into the colony, and then other colonies followed suit, resulting in a significant drop in the Chinese population.

From 1856 the Australian colonies, except Western Australia, became self-governing and took over the management of migration issues, including controls over the levels of immigration, selection of migrants and management of various forms of assistance. This enabled the colonies to adjust immigration intake to changing economic circumstances and labour conditions. Particular attention was paid by the legislators to political pressures to ensure that labour competition between settled colonialist and newcomers was minimalised.[21]

During the latter half of the nineteenth century, several colonies continued giving passage assistance to skilled immigrants mainly from Great Britain but also from Europe and the British government paid for the passage of convicts, paupers, the military and civil servants. From 1880 the Australian colonies adopted the White Australia Policy, the policy of excluding all non-European people from immigrating into Australia that was later unified under national legislation.

The first acts of the Federal Parliament established very strong controls over immigration to Australia. The first act was *The Immigration Restriction Act 1901*, which established the "White Australia Policy" and the famous dictation test to be taken by potential immigrants in any European language, at the discretion of immigration officials.

In 1903 the federal Parliament established *The Naturalisation Act,* which describes Australians as British subjects rather than Australian citizenship. It also established that Asians and other non-Europeans were to be denied the right to apply for naturalisation and that resident non-European males would not be allowed to bring Asian wives into Australia.

Everything changed when WWII came to Australia and when Australia was nearly invaded by the Japanese who flattened Darwin and attacked Sydney. WWII made it obvious that Australia's population was too small to defend the continent. In 1945, the Minister for Immigration, Arthur Calwell wrote: "If the experience of the Pacific War has taught us one thing, it surely is that seven million Australians cannot hold three million square miles of this earth's surface indefinitely".[22] The old cry "populate or perish" won new currency with all major parties and mass migration started. Between 1945 and 2011 some 7.2 million immigrants arrived

[20] P. Lynch, 'The Evolution of a Policy', *Multicultural Australia*, (1971), p. 2.

[21] A. Martin, 'Immigration Policy before Federation' in J. Jupp (ed.), *The Australian People…*, pp. 39-43.

[22] A. Calwell, 'White Paper on Immigration', *Hansard House of Representatives*, 2 August 1945, pp. 4911-4915.

and Australia's population increased from about seven million in 1945 to almost twenty three million today.

Looking back, even before the end of WWII policy makers recognised that Australia would need a significant number of immigrants in order to both defend her and to grow her economy. They also understood that a post war Britain would be in no position to supply the large number of immigrants required and as a result an Inter-Departmental Committee (IDC) on Post-War Migration was formed in 1942. By December 1944, the part of the minutes of the committee labelled "secret" at the time recommended:

> A vigorous policy of white alien immigration, complete with an effort to make the individual alien feel he is regarded an asset;
> Assistance to immigrants to meet part of passage costs that maybe necessary to induce good flow;
> A central body of unofficial groups interested in migration to be formed in each State to assist with reception, placement and after-care of migrants, alien and British alike;
> It should be made clear that Commonwealth immigration policy is based on social, economic and cultural grounds and not on any assumption of racial superiority.[23]

This shows both a need and desire to seek out "New Australians" (as they would become known) from alternative European sources such as Italy and Greece and indeed Poland.

Furthermore, it shows that it was government policy to make those New Australians welcome. Arthur Calwell played a visionary role in this policy and process, first as the founding chair of the Inter-Departmental Committee (IDC) on Post-War Migration and then as Australia's first Immigration Minister.

The post-war migration started with a preference for "ten pound" British immigrants; however, when the number of British migrants fell short of what was required Arthur Calwell opened Australia to the hundreds of thousands of people displaced by the War from Central Europe and then Southern Europe. The Menzies Government (1949-1966) continued the immigration program that the Chifley Labor government had started and signed the Refugee Convention in 1954.[24] By late 1960s, European migration had slowed and it was no longer sufficient to support the Australian appetite for population growth.

Mass migration required changes to immigration and related laws. The division between the British and non-British Australians and the "White Australia" policy were not only out of date with modern Australia and her needs for more migrants, but also offensive to a growing proportion of Australians and to Australia's neighbours. A change was imminent. As many new arrivals were not British subjects, Australian citizenship was created by the *Nationality and Citizenship Act*

[23] J. Zubrzycki, 'Arthur Calwell and the origin of post-war immigration', *Multicultural Australia*, (1994).

[24] S. Morrison, 'Our Nation…'

1948. It was also a time to dismantle the "White Australia" policy and introduce a program of global non-discriminatory immigration intake.

But it took some 25 years to completely dismantle the "White Australia" laws and associated practices.[25] The process was started in 1949 by the Menzies Government allowing some 800 non-European refugees to remain in Australia and allowing Japanese war brides to enter Australia. In May 1958, the Menzies Government replaced the arbitrarily applied dictation test with an entry permit system, that reflected economic and skills criteria. In 1960 the term "White Australia" was removed from the Liberal Party's Federal Policy Platform[26] and the Labor Party followed five years later. The final vestiges were removed in 1973 by the Whitlam Labor government and the migration from non-European countries started after the Fraser government came into office in 1975.

The abolition of the White Australia Policy and the resulting globalisation of immigration and refugee[27] intake led to a significant increase in immigration from Asian and other non-European countries. The breakthrough came in August 1977 when, with the European migration being unable to deliver the numbers Australia needed, the Fraser government started significant intake from South-East Asia.

Now Australia has a non-discriminatory global immigration intake based on skills. For example, of total immigration intake of 127,460 between July 2010 and June 2011, 15.5% migrants came from China and 8.3% migrants arrived from India. In addition, Australia has a generous refugee intake program of some 20,000 people per year.

Fifthly, not only immigration policies changed over time, but also the outlook of Australian people and Australia's place in the world has rapidly changed over the last two hundred years. It was a journey from being an insecure, ethno-centric, parochial outpost, glorifying and depending upon Mother England to becoming a modern, self-conscious, cosmopolitan and independent mid-range political and economic power in Pacific Asia. It was a journey from a society based on racial prejudice and intolerance to a contemporary multicultural Australia embracing diversity. During that time the Australian egalitarianism and the principle of "fair go" were extended from being applied to British males only to being applied to all residents, including women, non-British minorities, people with disabilities and most recently to gays and lesbians.

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[25] Department of Immigration and Citizenship, 'Fact Sheet 8. Abolition of the "White Australia Policy", (2009), at <http://www.immi.gov.au/media/fact-sheets/08abolition.htm>, 8 November 2012.

[26] S. Morrison, 'Our Nation…'

[27] The most common non-Christian religions in 2011 were Buddhism (accounting for 2.5% of the population), Islam (2.2%) and Hinduism (1.3%). Of these, Hinduism had experienced the fastest growth since 2001, increasing by 189% to 275,500, followed by Islam (increased by 69% to 476,300) and Buddhism (increased by 48% to 529,000 people). For more see: J. Jupp, *The Encyclopedia of Religion in Australia*, Port Melbourne 2009.

The examination of Australia's legal history indicates that the early Australian laws and political institutions reflected these prejudices and fears.

The Federation movement of the 1890s was firmly driven by our anti-Asian prejudice and fear of foreign invasion. One of the motives for creating a federated Australia was the need for a common immigration policy to stop the immigration of cheap labour mainly from China and of indentured workers from New Caledonia to work in the Queensland sugar industry.

That Australian constitution was created without a US-style Bill of Rights was not an oversight on the part of the drafters, but a conscious reflection of the policies and feelings of the day. Australia being a predominantly white British nation on the periphery of Asia with a fear of being demographically overwhelmed by its heavily populated Asian neighbours did not want to legislate for the equality of people of different races.

The mandate of the League of Nations, established in 1920, was compromised by Australia's (and other nations) refusal to include a commitment to non-discrimination based on race.

WWII challenged the old alliance with Britain when Australia had to repatriate. Despite Churchill's protest, two Australian divisions were moved from Egypt to the Asia Pacific war theatre. A new alliance was formed with the USA when the US military entered the war in the Pacific and then strengthened when the USA decided to continue their significant military and economic presence in the region. The post-war years saw Australia embrace its independence and grow as a modern nation in its region.

Today's Australia is clearly a multicultural society in the descriptive sense of this word. According to the Australian Bureau of Statistics 2011 Australian Census over a quarter (26% or 5.3 million) of Australia's population were born overseas and a further one fifth (20% or 4.1 million) had at least one overseas-born parent.

Although historically the majority of migration had come from Europe, the post WWII globalised intake of migrants resulted in modern Australia being one of the most culturally and linguistically diverse societies in the world. When we look at cultural heritage, over 300 ancestries were separately identified in the 2011 Census. The most commonly reported were English (36%) and Australian (35%). A further six of the leading ten ancestries reflected the European heritage in Australia with the two remaining ancestries being Chinese (4%) and Indian (2%). Today Australians speak more than 200 languages – this includes some 40 Aboriginal languages. Apart from English the most commonly used are Chinese (largely Mandarin and Cantonese), Italian, Greek, Arabic and Vietnamese languages. There is also enormous religious diversity with some 61% reporting affiliation to Christianity in the 2011 Census and 7.2% reporting an affiliation to non-Christian religions, and 22% reporting "No Religion".

To manage this diversity and to respond to the growth in wealth and political influence of non-British settlers, since the early seventies, successive governments commenced the development of multicultural policies. These policies moved to

extend the coverage of Australian liberties and egalitarianism ethos further to include all with their cultural, linguistic and religious differences within some democratic structures.

In conclusion, contemporary Australia's consciousness, laws and demographic makeup differ significantly from the Australia of early European settlement and its colonial times and from Australia during the period between the 1901 Federation and the end of WWII. Very few nations in the world have experienced such a significant change in such a short period of time.

3.2. From Assimilation to Multiculturalism

Initially, assimilation of non-British migrants and continuation of a mono-cultural "Australian way of life" was the followed ideal. The expectation of the post-WWII Australian immigration policy was that the non-British European migrants would in (short) time melt seamlessly into Australian society and adopt as fast as possible the Australian lifestyle, become local patriots and abandon their past national allegiances and cultural "baggage".

"New Australians" had to speak English, not live in cultural ghettos and wherever possible marry into the Australian-born community. In fact, the first Immigration Minister Calwell was also a vigorous defender of the White Australia policy although it must be said that his views reflected the views of the Australian public at the time. It was generally believed that it might take a generation but a conscious policy of assimilation would see a cohesive mono-culture "without self-perpetuating enclaves and undigested minorities".[28]

However, upon their arrival non-British migrants did not dissolve easily into the Anglo-Celtic melting pot, but established their own lively communities with churches, sports, youth and cultural clubs, associations, language schools, welfare and financial institutions. They established these to maintain their culture and to help themselves in the process of settlement. "New Australians" also developed their organisational leaderships and started to participate in political processes. It is important, however to note, that the ethnic communities established their institutions in the broader context of Australian society. Their aim was to participate on equal terms and not to build ethnic ghettos or to separate from the community at large. The good integration of the second generation into broader Australian community is the best indicator of the success of such approach.

The changes leading away from the policy of assimilation towards multiculturalism, political and civic openness and participation were gaining momentum in the late sixties. To begin with, the policy of assimilation did not have the moral high ground in a globalising world and both the migrants and many British Australians rejected it as inhumane. The ideals of racial equality were gaining acceptance as geographic and social integration of migrants progressed.

[28] P. Lynch, 'The Evolution…'

A loose alliance formed between ethnically based and Aboriginal grass-root groups and community organisations and there was a concerted push to legitimise their cultures both by recognising their value and by ensuring that individuals had the right to continue practising their culture within an Australian context. A culinary revolution and a high rate of intermarriage also played a role in this process.

Furthermore, because of the mass European migration the demographic composition of Australian society had been irrevocably changed and Australia became a multicultural society in the demographic sense of the word. With the increase in numbers and growing wealth of New Australians, political influence of ethnic minorities grew and the so-called ethnic vote started to make a difference in particular to the marginal electorates. Finally, there was a clear leadership provided by both Labor and Coalition politicians in support of multiculturalism and against any form of discrimination.

By the early seventies it was also becoming more and more obvious that entrenched cultures carried to Australia by immigrants were not going to go away and that the nation would be better served by accepting diversity rather than trying to eradicate it. This was especially true, when considering the growing political influence and wealth of continental migrants in the Australian society. The ethnic vote was well organised making it difficult, especially in some urban areas, to win a parliamentary election without appealing to minority voters. The threat of the emergence of "self-perpetuating enclaves and undigested minorities", was no longer realistic as many migrants were not staying in places of their original settlement but became geographically mobile, using their newly created wealth to settle in the suburbs they aspired to.

3.3. Early Multiculturalism – Whitlam's Labor Government (1972-1975)

On 5 December 1972 Australia elected Whitlam's Labor government, the first Labor government in more than two decades, and it set out to change Australia through a wide-ranging reform program. Whitlam's Minister for Immigration, Al Grassby had discovered the term "multi-cultural" on a trip to Canada in 1973 and in the spirit of reform brought it back to Australia.

Although Grassby never proposed a precise definition of multiculturalism, his speeches suggested that for him multiculturalism was a range of different ideas, concepts and policies associated with migrant settlement, welfare and socio-cultural policy.[29] His description of "the family of the nation" came close to being the first official definition of multiculturalism:

[29] A. Grassby, 'A Multi-Cultural Society for the Future', *Multicultural Australia*, 11 August 1973.

> In a family the overall attachment to the common good need not impose sameness on the outlook or activity of each member, nor need these members deny their individuality and distinctiveness in order to seek a superficial and unnatural conformity. The important thing is that all are committed to the good of all.[30]

The Whitlam government's practical approach to cultural and religious diversity was to remove the discriminatory provision of the immigration legislation, empower the migrants with anti-discrimination legislation and promote both of these things as good for Australia. *The Racial Discrimination Act* was enacted in 1975 to implement Australia's obligations under the newly ratified UN Convention on the Elimination of All Forms of Racial Discrimination and an office of Commissioner for Community Relations was established.

3.4. Ethno-specific services – Multiculturalism under Fraser (1975-1983)

When Malcolm Fraser's conservative coalition government came to power in late 1975 it adopted the Labor foundations and significantly extended Australian multiculturalism both as a concept and as a practical policy and program response to diversity. Fraser's adoption of the Labor multicultural framework established a degree of bipartisan support for multiculturalism that has lasted until now.

Fraser firmly believed that Australia's culture is greatly enriched by the maintenance of diversity and linked his political success with the advancement of multicultural policies. Under Fraser, multiculturalism also emerged as a concept that articulated a normative ideal of a society based on the principles of social cohesion, equality of opportunity and cultural identity. The Fraser government also believed that it is the government's responsibility to respond to the settlement needs of migrants, and here I wish to acknowledge the pioneering role of Professor Jerzy Zubrzycki and his Australian Population and Immigration Council in defining the normative concept of Australian multiculturalism. A tribute needs also to be paid to the Fraser government for the establishment of a first consultative and advisory body the "Australian Ethnic Affairs Council".

In August 1977, responding to the decreasing European migration and intake of refugees from South-East Asia, the Fraser government established the Review of Post-Arrival Programs and Services to Migrants to be undertaken by a Melbourne barrister Frank Galbally.

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[30] However, Mark Lopez (*The origins of multiculturalism in Australian politics 1945-1975*, Carlton South 2000, p. 245) argued that multiculturalism under Labor had a precarious status as a ministerial policy because Grassby had not attempted to change the Labor party's immigration policy, and the policy direction outlined in his speech was not officially confirmed by the Whitlam Government.

The Galbally Review provided a watershed in the development of Australia's multiculturalism. The resulting 1978 Report[31] identified a need to provide ethnospecific services and programs for all migrants to ensure equal opportunity of access to government funded programs and services with a view to helping migrants to be self-reliant.

It has also spelled out in "Guiding principles" what needed to be done to continue developing Australia as "a cohesive, united and multicultural nation". The report identified the right of all Australians to maintain their culture without fear of prejudice and identified the need to provide special services and programs to all migrants to ensure equality of access and provision and proposed the establishment of the Australian Institute of Multicultural Affairs (AIMA) due to the consideration that "there is very little information available on multicultural developments in Australia and overseas".

In 1979 AIMA was established by legislation as an independent statutory authority. The objectives of the AIMA included the development of an awareness of cultural diversity, the promotion of tolerance, understanding, justice and equity in the Australian community. These objectives were to be achieved through providing advice to the Government, undertaking community education and research, promoting coordination between government and community agencies and encouraging the conservation of cultural materials.

Amongst the many programs set up by the Fraser government the Special Broadcasting Service (SBS), a government sponsored radio and television service the principle function of which is "to provide multilingual and multicultural radio and television services that inform, educate and entertain all Australians and, in doing so, reflect Australia's multicultural society" (SBS charter) has been an outstanding success.

In 1981, the Fraser government created the first federal Human Rights Commission to implement domestically the provisions of the International Covenant on Civil and Political Rights (ICCPR) and other anti-discrimination measures. Particular importance was attached to the ICCPR Article 27, which states: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their religion, or to use their own language". Discrimination on the grounds of nationality was removed from the Federal and State legislation. Subsequently the State and Territory governments developed their own multicultural policy frameworks and programs and removed discriminatory provisions from the State legislation. As a result the new settlers were given more access to social welfare services and Australia's immigration policies become implemented in non-discriminatory fashion.

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[31] F. Galbally, *Migrant Services and Programs. Report of the Review of Post-arrival Programs and Services for Migrants, May 1978*, Canberra 1978, p. 5.

3.5. Defining Australian Multiculturalism under Hawke/Keating (1983-1996)

When the Labor party returned to government under the leadership of Bob Hawke in 1983 the bipartisanship approach to the policy of multiculturalism continued.

The Hawke government started reshaping multiculturalism in response to a range of electoral undertakings. Firstly, he ordered the review of AIMA which was perceived to be too close to Liberals and the former Prime Minister Fraser. The Committee of Review reported to the Minister for Immigration and Ethnic Affairs November 1983.[32] The Institute was closed in 1986 and in its place a new Bureau of Immigration, Multicultural and Population Research was established.

Then, in December 1986 a Committee of Review of Migrant and Multicultural Programs and Services (ROMAMPAS) was created under the chairmanship of Dr James Jupp to advise on the Federal Government's role in assisting overseas born residents to achieve their equitable participation in Australian society. The Committee made a report in August 1986 expanding a range of principles underlying the concept of multiculturalism, such as the principles of equitable access by all to government resources, of rights to political participation, rights to practice own culture, language and religion and recommended the establishment of the Office of Multicultural Affairs (OMA) in the Department of Prime Minister and Cabinet.[33]

The establishment of OMA, as a central coordinating agency for multicultural policy and programs created a "golden era" in Australian multiculturalism and ensured that the years of Hawke/Keating governments were characterised by the expansion of the multicultural narrative and linking it to the mainstream. The focus on service delivery through ethno specific services was replaced by principles of "access and equity (A&E)" applying to delivery through mainstream agencies.

Throughout the Australian Bicentenary in 1988 and afterwards, constant efforts were made to link multiculturalism to Australian values and the Australian way of life. According to Gwenda Twan strong efforts were made to "place multiculturalism within a national narrative where cultural diversity and tolerance were part of Australian national identity".[34]

The Federal Government sponsored development by James Jupp of a publication to celebrate the bicentenary called the Encyclopaedia of Australian People,

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[32] Committee of Review of the Australian Institute of Multicultural Affairs (AMIA), *Report to the Minister for Immigration and Ethnic Affairs, November 1983*, Canberra 1983.

[33] Committee of Review of Migrant and Multicultural Programs and Services (ROMAMPAS), *Don't Settle for Less. Report of the Committee for Stage 1 of the Review of Migrant and Multicultural Programs and Services, August 1986*, Canberra 1986, p. 526.

[34] E. Koleth, *Multiculturalism…*, pp. 3-41.

which documents the dramatic history of Australian Settlement and describes the rich ethnic and cultural inheritance of the nation through the contributions of its people.[35]

Perhaps the biggest achievement of Hawke government was the creation in 1989 "National Agenda for a Multicultural Australia. Sharing Our Future". The Agenda document further defined multiculturalism by expressing its limits. It said that effective multiculturalism requires an overriding and unifying commitment to Australia, an acceptance of the rule of the law of freedom of speech and religion, English as the national language and the equality of the sexes. It also stated that the right to express your own culture carried the responsibly to give others the same right to express theirs. In addition to the social justice and cultural identity aspects a third tier of economic efficiency was also added.[36]

Hawke's era was also characterised by the enhancement of consultations with ethnic communities and by the establishment of strong links between ethnic leadership and the Commonwealth and State Labor governments. The teaching of non-English languages was enhanced[37] and interpreting and translating services created.

> When Paul Keating replaced Bob Hawke as Prime Minister at the end of 1991 he continued acting in the same vein. Paul Keating described Multiculturalism as "a policy which guarantees rights and imposes responsibilities.

The essential balance, I think, in the multicultural equation: the promotion of individual and collective cultural rights and expression on the one hand, and on the other the promotion of common national interests and values. And success depends on demonstrating that each side of the equation serves the other.[38]
But perhaps Paul Keating put it most eloquently when he said multiculturalism imposes responsibilities. He said:

> These are that the first loyalty of all Australians must be to Australia, that they must accept the basic principles of Australian society. These include the Constitution and the rule of law, parliamentary democracy, freedom of speech and religion, English as a national language, equality of the sexes and tolerance.

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[35] J. Jupp, *The Australian People. An Encyclopedia of the Nation, its People and their Origins*, Sydney 1988.

[36] B. Cope, M. Kalantzis, *Productive Diversity. A New, Australian Model for Work and Management*, Annandale 1997.

[37] J. Lo Bianco, 'National Policy on Languages', *Multicultural Australia*, (1987), pp. 1-10, 14-15, 18, 189-203.

[38] P. Keating, 'Global Cultural Diversity Conference', *Multicultural Australia*, 16 July 2002, at <http://www.multiculturalaustralia.edu.au/library/media/Audio/id/526.Global-Cultural-Diversity-Conference>, 8 January 2013.

The cross-portfolio evaluation of the 1986 Access and Equity Strategy[39] under the Keating government ensured that the Australian Public Service had to incorporate A&E objectives into corporate planning, data collection, evaluation, audit and staff training and to adopt procedures able to deal with language and culture barriers in service provision. The report also strongly stressed the need for consultation with and participation in policy development by client groups. A part of the outcome was that almost all "ethno-specific" welfare and other services were replaced by mainstream services. Towards the end of Keating's Prime Ministership there was, however, a growing disquiet about what it meant for Australia to be a multicultural society or indeed whether being a multicultural society was desirable. The first warning came in the process of developing the National Agenda when the OMA had commissioned a massive AGB: McNair survey of 'Issues in Multicultural Australia'. The results of the (unpublished) survey indicated that there was a significant disquiet in Australia about the government's multicultural policies and that a significant proportion held negative attitudes towards multiculturalism. By the late 1980s the number of migrants arriving from Asian and Middle-Eastern countries had increased significantly and caused initial settlement problems. In this context the government created ad-hoc 1988 Committee to Advise on Australia's Immigration Policies, chaired by Dr Stephen FitzGerald, warned of a "clear and present need immigration reform" and found that the philosophy of multiculturalism was not widely understood and the "ensuing uninformed debate" was "damaging the cause it seeks to serve".[40] Many Australians were particularly and incorrectly concerned that multicultural policies were driving the immigration policies of the day and resented that linkage.

The happy days of bipartisan support for Australia's immigration policy and multiculturalism appeared to be over.

3.6. Backlash against Australian Multiculturalism under John Howard (1996-2007)[41]

In 1996 the Coalition leader John Howard was swept into power with a significant majority. He had for many years been a vocal critic of multiculturalism. Soon after the election, John Howard dropped the multicultural portfolio by closing down the Office of Multicultural Affairs and transferring the responsibility

[39] Commonwealth of Australia, *Access and Equity Evaluation 1992. Inquiry into the responsiveness of Australian Government services to Australia's culturally & linguistically diverse population*, Canberra 1992.

[40] S. FitzGerald, 'Immigration. A Commitment to Australia Report', *Multicultural Australia*, (1988), pp. 119-127.

[41] John Howard had been a critic of multiculturalism while a member of the opposition and advocated instead the idea of a "shared national identity", grounded in concepts of "mateship" and a "fair go". Despite initial criticism, when in government Howard left the policy of multiculturalism intact and introduced expanded dual-citizenship rights.

for multicultural issues to the Department of Immigration and Multicultural Affairs. He also closed the BIMPR, restricted access to the Adult Migrant Education Program for new migrants and reduced the funding and consultation of ethnic organisations.

At the same time, a dis-endorsed Liberal candidate and a Queensland fish and chips shop owner named Pauline Hansen was elected and started to voice her strong criticism of multiculturalism, foreign aid and the then Aboriginal and Torres Strait Islander Commission. Her criticism won her significant popular support and political following. In her maiden speech to the parliament Hansen said "I and most Australians want our immigration policy radically reviewed and that of multiculturalism abolished. I believe we are in danger of being swamped by Asians".

Initially Howard was reluctant to criticize Hansen, claiming free speech as her right. However after she formed the One Australia Party, which split the conservative and blue-collar vote and her tirades began to affect our relationships with our neighbours, Howard had to act. In December of 1996, just 2 months after Hansen's maiden speech Howard said:

> that there is no place in the Australia that we love for any semblance of racial or ethnic intolerance. There is no place within our community for those who would traffic, for whatever purpose and whatever goal, in the business of trying to cause division based on a person's religion, a person's place of birth, the colour of the person's skin, the person's values, ethnic make-up or beliefs.[42]

Then, under the pressure from the National Multicultural Advisory Council[43] calling upon the Howard Government to do more to defend multiculturalism, in December 1999 the government launched a new policy statement called *A New Agenda for Multicultural Australia.* Multiculturalism, although with a slightly redefined form and focus, returned to public life.

The defeat of the One Australia Party and return of public trust in the government's handling of immigration and multicultural policies has allowed a significant increase in immigrant intake since 2000, and in overall funding for multicultural, citizenship and settlement programs. A new Council for Multicultural Australia (CMA), supported by the Department of Immigration and Multicultural Affairs was created to promote community harmony, through the Living in Harmony grants and promotion of Harmony Day.

The government also took measures to advance the value of Australian citizenship. Now those applying for citizenship need to undertake an Australian history and culture test in English and pledge: "loyalty to Australia and its people […] whose democratic beliefs I share […] whose rights and liberties I respect […] and

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[42] J. Howard, 'John Howard on Multiculturalism', *Multicultural Australia*, 3 December 1996.

[43] National Multicultural Advisory Council (NMAC), *Australian Multiculturalism for a New Century. Towards Inclusiveness*, Canberra 1999.

whose laws I will uphold and obey". This policy shift was reflected in the name change from the Department of Immigration and Multicultural Affairs to Department of Immigration and Citizenship January 2007.

The terrorist attack on the World Trade Center in New York on 11 September 2001 also gave Australian Multiculturalism a new lease of life. In 2003 the government issued a new policy statement 'Multicultural Australia. United in Diversity. Updating the 1999 New Agenda for Multicultural Australia. Strategic Directions for 2003-2006', that shifted the focus of multiculturalism to unity and social cohesion. It also meant the return to old practices of community consultation and of opening government access to the community leaders. To deal with the threat of homegrown Islamist terrorism the government created in 2005 a Muslim Community Reference Group with focus on Australian Muslims to become more integrated with the rest of the community.

3.7. Multiculturalism Reasserting itself under Rudd/Gillard Governments (2007-)

The Labor government returned in 2007 with Kevin Rudd as Prime Minister. Upon the election, the Labor did not return to the past Labor policies of active support for multiculturalism but displayed distrust of the concept. The electoral platform promise to re-establish OMA in PM&C was not implemented after the 2007 election. In the 2010 election, for the first time since Whitlam, a Labor government did not put forward a multicultural policy proposal.

However, after the 2010 election the Australian Minister for Immigration and Citizenship Chris Bowen dropped a bombshell when he announced the restoration of the portfolio and full-on multiculturalism, including anti-racism strategies and other mechanisms that will require taxpayer dollars. In an address entitled *The Genius of Multiculturalism*[44] to the Sydney Institute, given just after the British PM Cameron's Munich speech, Bowen quoted Grassby, Keating and even Fraser as examples of how multiculturalism, if done properly can be the cure for racial tensions rather than the cause of them. He expressed the view that, "If Australia is to be free and equal, then it will be multicultural. But, if it is to be multicultural, Australia must remain free and equal."

The Australian Multicultural Council was officially launched by the Prime Minister on 22 August 2011 at the Parliament House in Canberra and the most current version of Australia's Multicultural Policy could be found at in 'The People of Australia – Australia's Multicultural Policy.'[45]

[44] C. Bowen, 'The genius of Australian multiculturalism', *Minister for Immigration and Citizenship*, 17 February 2011.

[45] Australian Multicultural Advisory Committee, 'The People of Australia. Australia's Multicultural Policy', *Department of Immigration and Citizenship*, 16 February 2011, at <http://

Prime Minister Julia Gillard has strongly condemned the rioters who took part in a violent protest over an anti-Islamist video as "extremist." "What we saw in Sydney on the weekend wasn't multiculturalism but extremism", she said last night in a speech to the Australian Multicultural Council.[46]

Ms Gillard said last night multiculturalism was not just the ability to maintain diverse backgrounds and cultures but that

> It is the meeting place of rights and responsibilities where the right to maintain one's customs, language and religion is balanced by an equal responsibility to learn English, find work, respect our culture and heritage, and accept women as full equals. […] Where there is non-negotiable respect for our foundational values of democracy and the rule of law, and any differences we hold are expressed peacefully. […] Where old hatreds are left behind, and we find shared identity on the common ground of mateship and the Aussie spirit of a fair go.

"True multiculturalism" had a very different face [to the riots], the Prime Minister continued. It was the face of

> a new migrant studying hard in an English language class, working two jobs to put their kids through school or lining up to vote for the very first time. […] True multiculturalism includes, not divides, it adds more than it takes. In the end, multiculturalism amounts to a civic virtue since it provides us with a way to share the public space, a common ground of inclusion and belonging for all who are willing to 'toil with hearts and hands […] And because it always summons us toward a better future, multiculturalism is an expression of progressive patriotism in which all Australians, old and new, can find meaning.

4. Conclusion

The history of multiculturalism in Australia is a journey. It has been a journey from British oriented nationalism and the "Australian way of life", through reluctant acceptance of the need to "populate or perish" of the post-war years through the end of the "White Australia Policy" to the inclusion of diversity into its liberal democracy and the significant growth of Asian migration. By now Australia has an official multicultural policy and a range of programs to implement it. Although there were some important differences between multicultural policies of Whitlam, Fraser, Hawke/Keating, Howard and Rudd/Gillard governments, the policy of multiculturalism was built cumulatively by these governments often in the context of

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www.immi.gov.au/media/publications/multicultural/pdf_doc/people-of-australia-multicultural-policy-booklet.pdf>, 17 January 2013.

[46] R. Peake, 'Gillard defends nation's diversity', *Sydney Morning Herald*, 20 September 2012, at <http://www.smh.com.au/national/gillard-defends-nations-diversity-20120919-267d7.html>, 18 January 2013.

political contest for electoral advantage. By now both the political parties and the majority of the Australian public accept the key elements of multicultural policy. The policy, however, is subject to adjustments to reflect the public opinion of the day.

The aim of contemporary multiculturalism in Australia is for all to participate on equal terms, to access opportunities and focus on nation building without need for ethnic ghettos or separateness from the community at large. Over the years, Multiculturalism in Australia maintained 2 key values: tolerance of racial, cultural and religious differences, underpinned by the acceptance of Australian values such as equality of the sexes and the rule of law.

Migrants also participate fully in the Australian economy and deliver the so-called "productive diversity" dividend[47] because of their links to the globalised economy.

Under multiculturalism, migrants are expected to join the broader Australian society and its political and cultural institutions at their own pace. This policy aims at integration with "human face" and dignity. It allows for preservation and transfer to the next generation of minority cultural and linguistic heritage that is not in conflict with the Australian core values. It is, however, expected that newcomers upon arrival in Australia will give up their foreign loyalties and in particular involvement with the country of origin's conflicts and ethnic or religious hatreds.

In other words, contemporary Australian multiculturalism must be seen as a compact or a two way street between the Australian society and newcomers that requires both give and take.

Recently the Australian Prime Minister Julia Gillard, introducing the Australian Multicultural Council Lecture at Parliament House, stated:

> Multiculturalism is not only just the ability to maintain our diverse backgrounds and cultures. It is the meeting place of rights and responsibilities. Where the right to maintain one's customs, language and religion is balanced by an equal responsibility to learn English, find work, respect our culture and heritage, and accept women as full equals."

Leader of the Opposition Tony Abbott agreed saying the "Newcomers to this country are not expected to surrender their heritage but they are expected to surrender their hatreds".

These aims are well reflected in public policy statements and implementation measures. In fact, each government since the 1970s produced its own government manifestos like the Prime Minister Hawke's 'National Policy for a Multicultural Australia', Prime Minister's Howard's 'New National Policy for a Multicultural Australia' and practical measures like the establishment of Special Broadcasting Service by the Fraser government.

The public policy is also reflected in a range of many legislative and educational measures, the most prominent being measures to combat race discrimination

[47] B. Cope, M. Kalantzis, *Productive Diversity…*

and prejudice. Starting with Federal *Racial Discrimination Act 1975* and appointment of Al Grassby as the first federal Commissioner for Community Relations, Australia developed an effective tolerance infrastructure able to welcome and empower the newcomers, including those with racial, cultural or religious minority backgrounds. These measures empowered migrant communities and the acceptance of the benefits of diversity and have survived attacks from the right and from the left.

In addition, especially those arriving as refugees were given a generous range of free government benefits, such as healthcare, unemployment and income support payments, English language education, etc.[48]

It is also important to note that each government has also established of a range of consultative bodies and liaison mechanism with ethnic community leaders. These play an especially important role in the handling of social conflicts associated with the nature of diversity. Community leaders are expected to assist the government in particular with the management of impact on foreign loyalties and religious hatreds.

In conclusion, multiculturalism, as a public policy, works well in Australia as it supports integration and keeps the society open to newcomers. What is also important is that it is supported both by the established communities and by recent arrivals.[49] For example, a recent Mind & Mood[50] report on New Australians, based on extensive interviews with Chinese, Indian, Vietnamese and Somali migrants indicated that they see Australia as peaceful and fair nation and are more optimistic about their future in the "lucky country" than the local-born middle class.[51]

The occasional difficulties shown more recently by some radicalised elements of the Muslim community in adapting their ways to secular Australia, are in my view temporary and do not reflect the views held by the vast majority of Muslim Australians or their leadership.[52] To link such events with multiculturalism

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[48] Unfortunately, refugees, and especially those arriving by boats, have a very low rates of labour force participation and extremely high rates of welfare dependence, even after many years of residence in Australia. For example, the employment rate of humanitarian migrants from Afghanistan and Iraq is only 9% and 12% respectively five years after settlement with 94% and 93% of households in receipt of welfare payments. The reliance on welfare payments by skilled migrants is low, especially because they are not entitled to unemployment and other welfare payments for the first two years of their residence. Also see: Australian Multicultural Advisory Committee, 'The People of Australia…'

[49] A. Markus, 'Attitudes to Australian Multiculturalism and Cultural Diversity' in M. Clyne, J. Jupp (eds.), *Multiculturalism and Integration. A Harmonious Relationship*, Acton 2011, pp. 89-100.

[50] G. Megalogenis, 'Happy to be here, say migrants', *The Australian*, 15 September 2012.

[51] Reported in *The Australian*, 15 September 2012.

[52] Although some concerns are being expressed from time to time about the radicalisation of some parts of the Muslim communities and in particular about the brain-washing of Muslim youth. For example Professor Clive Williams, a leading anti-terrorism expert has warned that

is plainly wrong and as Geoffrey Braham Levey[53] pointed out, the alternative is much worse: "Abolish Australian Multiculturalism and the strong cultural nationalist impulse in this country would go unchecked. Liberty and equality in Australia would be the first casualties".

The final question is: what relevance does the Australian multiculturalism have to the situation in Europe?

Firstly, as the success of Australian multiculturalism has its deep roots in the Australian history and is still a work in progress project, it may not be easily transferable to European conditions.

However, the grounding of Australian multiculturalism in values of equality and liberty makes it relevant internationally. These values are at the core of any democratic society, although some of them may have entrenched structures of privilege and/or racial or religious divisions. Work to extend liberty and equality in any diverse society means advancement of what Australia calls multiculturalism.

Only societies where citizens are free and equal in opportunities can have a common sense of belonging. Only such societies could remain cohesive and engaged in nation building projects.

The human rights education is a key mechanism assisting with the advancement of equality and liberty within the limits of modern liberal democracy. Therefore, we need our educational systems teaching human rights.

Abstract

Despite its racist past, high and diverse immigration and enormous cultural and religious diversity, contemporary Australia is a highly successful and well functioning multicultural society. The paper will analyse the reasons behind this success.

The paper starts with an examination of Australia's history from early settlement, with special focus on Australia's social justice ethos and egalitarianism, its initial reliance on mother England for migrants, economy, governance, culture, its self-imposed regional isolation and tight immigration controls.

The focus will then shift to the unique Australian culture that has emerged today, combining the elements of past and present. The paper will explore policies, institutions and laws that facilitated the development of modern Australia and its national character. Specific features of Australian multiculturalism are listed and discussed, including the open nature of Australian society, the significance of immigration controls and the evolution of the "fair go" concept.

Finally, the paper will examine the key and sometimes unique factors that have made the success of Australian multiculturalism possible. Some of these factors may not be present in other societies, thus making advancement of social harmony difficult. Particular

"Australian Muslim children are at risk of being groomed in extremist anti-Western ideology by radicalised parents, posing a new challenge to national security agencies".

[53] G. Levey, 'Defending multiculturalism is in all our interests', *The Drum Opinion*, 25 September 2012, at <http://www.abc.net.au/unleashed/4278128.html>, 17 January 2013.

attention will be paid to Australian policy and legislative settings, as well as to the Australian education system, all of which focus on inclusion and equity, celebrating the values that bring all Australians together.

Sev Ozdowski

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Dr. Ozdowski worked for the Australian government (1980-96) where he played a major role in the advancement of multicultural and human rights policies and institutions. He also headed the Office of Multicultural and International Affairs in South Australia (1996-2000). As the Human Rights Commissioner (2000-05) he conducted the ground-breaking *National Inquiry into Children in Immigration Detention 'A last resort?'* and the *National Inquiry into Mental Health Services 'Not for Service'*.

Dr. Ozdowski has an LLM and MA in Sociology degrees from Poland and a PhD from the University of New England. As a Harkness Fellow, Sev spent 1984-86 on research at Harvard, Georgetown and the University of California.

Sev's life-long commitment to multiculturalism and human rights was recognised among others by an Order of Australia Medal, Officers Cross of the Order of Merit of the Republic of Poland and an honorary doctorate from RMIT University in Melbourne.

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Including GLBTIQ Student Rights in 'Human' Rights Education

1. Introduction

Historically, human rights education has not strongly affirmed gay, lesbian, bisexual, transgender, intersex and otherwise queer (GLBTIQ) students. At the adoption of the *Universal Declaration of Human Rights* in December 1948, GLBTIQ rights were not seen by UN representatives, governments and educational institutions as inherent within 'human' rights. Many representatives repeatedly hindered moves to include protection on the basis of sexual orientation and gender identity within human rights conventions over the years.[1] However, discrimination against GLBTIQ students became a key area for global attention in human rights education recently, with policies promoting inclusive approaches to GLBTIQ students in human rights education and policies emerging in countries like Australia, America and England.

The movement became more organised at the "international level" in 2011, when the United Nations Educational, Scientific and Cultural Organisation (UNESCO) held the First International Consultation on Homophobic Bullying in Educational Institutions in Rio de Janeiro, Brazil (December 6-9th). The event was attended by government and non-government representatives and education research experts on the topic from all continents, who formed international advocacy networks towards future policy advocacy and created the *Rio Statement on Homophobic Bullying and Education for All*.[2] The statement, released on the tenth International Human Rights Day, stated the right to education must

[1] 'UN Human Rights Council. A Stunning Development Against Violence. Unprecedented Support for Statement on Sexual Orientation and Gender Identity', *Human Rights Watch*, 22 March 2011, at <http://www.hrw.org/news/2011/03/22/un-human-rights-council--stunning-development-against-violence>.

[2] UNESCO, *Rio Statement on Homophobic Bullying and Education for All*, Rio de Janiero 2011.

not be "curtailed by discrimination on the basis of sexual orientation or gender identity."

During the same period 200 UN Member States attended the New York convening 'Stop Bullying – Ending Violence and Discrimination Based on Sexual Orientation and Gender Identity'. The UN Secretary-General Ban Ki Moon contended:

> Bullying of this kind is not restricted to a few countries but goes on in schools […] in all parts of the world. This is a moral outrage, a grave violation to human rights and a public health crisis.[3]

This framing of human rights has subsequently been supported by the United Nations as a body, with the release of the United Nation's GLBTIQ-focussed *Born free and equal* policy.[4] This document outlines the UN's position in interpreting GLBTIQ rights as inherent in 'human rights' in a policy for the first time, and asserts the protection of all people against discrimination on the basis of sexual orientation, gender identity and intersex status in international human rights law. It pushes for decriminalisation of homosexuality, legislative recognition of discrimination protections and violence prevention measures in all nations.

The inclusion of GLBTIQ issues in anti-discrimination efforts in schools has been particularly aided by UNESCO's involvement, with such 2012 milestones as the 'First International Colloquium on Homophobic and Transphobic Bullying' in South Africa, China's first study of GLBTIQ students and a range of projects benefiting from UNESCO's funding and guidance. At the 21st UN Human Rights Council session (28th September 2012), countries such as South Africa and Finland accepted a variety of recommendations to combat GLBTIQ bullying and discrimination. However, there was still some resistance against protection of GLBTIQ rights, with India agreeing to study the possibility of decriminalising homosexuality but rejecting recommendations to combat violence and discrimination. Poland agreed to UN recommendations to make moves to guarantee the rights of the LGBT community around relationship recognition, discrimination and hate crimes; but concomitantly agreed to follow Holy See recommendations to "continue to protect the natural family and marriage, formed by a husband and a wife, as the basic cell of society".[5] Despite resistance and backlash, the movement towards recognising GLBTIQ rights in education appears stronger than ever before.

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[3] UN Secretary-General, Message to event on ending violence and discrimination based on sexual orientation and gender identity, Office of the High Commissioner for Human Rights, Geneva 2011.

[4] United Nations, *Born Free and Equal. Sexual Orientation and Gender Identity in International Human Rights Law*, New York–Geneva 2012.

[5] J. Fisher, 'Human Rights Council Session. Overview and Next Steps', *UN SOGI list Newsletter*, 2012.

2. A Conceptual Problem

The movement towards recognising GLBTIQ rights in education has the potential to impact how diverse sexualities and gender identities are understood generally. Until now there have been studies completed only on the mention (or lack of mention) of GLBTIQ students in education policies and human rights education provisions in quantitative frames.[6] But there has been little or no research exploring the specific constructions of GLBTIQ students in education policies and practices around the world, and how these relate to human rights. Such detailed conceptual description is needed in order to set the context for the approaches promoted in UNESCO's (re)construction of human rights education and to consider its value against other models. This paper aims to explore:

- the key constructions of GLBTIQ students in human rights education (including educational policies, practices, programs and messages) around the world, and in comparison,
- the particular construction of GLBTIQ students in UNESCO's new approach to human rights education.

3. Methodology

This paper drew on a Critical Discourse Analysis of over 100 education policies that dealt directly or indirectly with GLBTIQ students from around the world (selection was guided by what was available from all main continents). It also drew on key framings of GLBTIQ students in education textbooks, education research articles and other education program literature and materials containing constructions of GLBTIQ students. The texts were first read and then analysed for their representations of GLBTIQ students (in their images, grammar, vocabularies and practices). These representations were categorised according to whether they were conservative, liberal, critical or post-modern in nature based on a model of constructions of the sexual child as politicised representations developed in earlier work.[7] A framework for categorising constructions of GLBTIQ students in international human rights education was developed.

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[6] GLSEN, *State of the States. A Policy Analysis of Lesbian, Gay, Bisexual and Transgender (LGBT) Safer Schools Issues*, New York 2001; R. Russo, 'The extent of public education nondiscrimination policy protections for lesbian, gay, bisexual, and transgender students. A national study', *Urban Education,* Vol. 41, No. 2 (2006), pp. 115-150, http://dx.doi.org/10.1177/0042085905284957.

[7] T. Jones, 'Saving rhetorical children. Sexuality education discourses from conservative to post-modern', *Sex Education*, Vol. 11, No. 4 (2011), pp. 369-387, http://dx.doi.org/10.1080/14681811.2011.595229; idem, 'A sexuality education discourses framework. Conservative, liberal, critical and post-modern', *American Journal of Sexuality Education*, Vol. 6, No. 2 (2011), pp. 133-175, http://dx.doi.org/10.1080/15546128.2011.571935.

UNESCO's policy and new document releases were then read, analysed and categorised using this framework. The computer-assisted text (content) analysis application Leximancer was used to glean data from larger UNESCO documents to assist in this analysis. Leximancer uses a machine-learning technique for conceptual (thematic) analysis and relational (semantic) analysis, uncovering the main concepts in sources and their relationship to each other in a grounded fashion. Basic data about the documents' main concepts – rank ordered charts, word frequency, co-occurrence counts, co-relational maps and entity vocabularies – were created using the program on generic settings (to enhance reproducibility).

4. Framing Constructions of GLBTIQ Students in Education

This section of the paper offers a framework for considering common constructions of GLBTIQ students in education. It can be used to consider the representation of GLBTIQ students in education policies, curricula, programs or other areas of schooling (visual depictions). Four main orientations to GLBTIQ students were found *both* historically and in education sectors around the world today are detailed: conservative, liberal, critical and post-modern orientations. Within each orientation, there were several discourses on sexuality and gender identity in education and their relationship with human rights, and the views on GLBTIQ students that have formed within them (and some example countries/ state policies where they were found) are detailed below.

4.1. Conservative – The Degenerate Threat: Invisible, Impossible, Iniquity

A conservative orientation to sexuality in human rights education policy and programs privileges **"institutional freedom of religious expression"** and thus **"focuses on the transmission of dominant sexualities/ values in frames that exclude/ dehumanise GLBTIQs."** This can be achieved through one or several discursive sexuality education methods. Some methods avoid direct sexual discussion: Non/-approaches in which sexuality content is withheld (as the rightful domain of parents or religious leadership) or even actively censored as unspeakable, Storks and Fairies approaches which substitute sexual information with mythologies ("the stork/ fairies brought you"), and Birds and Bees approaches which indirectly hint at human reproduction through nature-based metaphors (around flora and fauna reproductive processes). Other methods promote the repression of all but the most conservative sexual expressions: Physical Hygiene approaches managing puberty according to social norms, Sexual Morality approaches promoting religious sexual restrictions and Abstinence Education approaches promoting abstaining from pre-marital sex. Finally, some methods use sciences to limit sexual

norms: Biological Science approaches understanding sex as the human species' biological reproductive process, and Christian/ Ex-gay Redemption approaches understanding heterosexuality as the religious and psychological "ideal".

There are several constructions of GLBTIQ students within the conservative orientation. However, the overriding logic surrounding GLBTIQs in this perspective is that they simply don't exist, as they are not "conceivable" within most of the key sexuality frameworks in use.[8] For example, Storks and Fairies, Non-Approach and Birds and Bees Discourses all prevent direct discussion of human sexuality in school settings, and thereby avoid GLBTIQ topics entirely. Such approaches have been prevalent in countries like Uganda and Nigeria where there have been many taboos around direct discussion of sexual themes,[9] and in Russia where there is active punitive censorship of homosexual themes in educational or social contexts in places like St Petersburg – to the point where Russian exchange students have been warned against study in the UK as they may encounter gay host families.[10] The insistence on avoiding sexual contact outside heterosexual marriage in Abstinence Education Discourse means that GLBTIQ sexual acts and identities simply aren't considered, for example in some middle and southern America states still impacted by the 1981 Chastity Act mandating the approach.[11] Further, Birds and Bees and Biological Science Discourses mainly explore sexualities in strictly (heterosexual) reproductive terms.[12]

Where metaphoric examples of same-sex encounters can be deduced in texts manifesting Birds and Bees, these are often negated as reproductive failures that have a corruptive impact on the species in question, as in the logic of early naturalists who considered homosexuality in nature as abnormal and Biological Science advocates who cast homosexuality as influenced by corrupted sex drives.[13] Thus, the figure of the "adult homosexual as corruptive influence" arises as a contaminant to (essentially heterosexual) GLBTIQ students. This is similar to the construction of GLBTIQs as "unhygienic degenerates" in Physical Hygiene, where homosexuality and gender difference constitute direct contamination threats (physically or

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[8] K.H. Robinson, 'Making the invisible visible. Gay and lesbian issues in early childhood education', *Contemporary Issues in Early Childhood,* Vol. 3, No. 3 (2002), pp. 415-434, http://dx.doi.org/10.2304/ciec.2002.3.3.8.

[9] L. Darabi et al., *Protecting the Next Generation in Uganda. New Evidence on Adolescent Sexual and Reproductive Health Needs*, New York 2008.

[10] 'Russia issues «gay family» warning to parents of UK summer school kids', *Gaystarnews*, 18 July 2012, at <http://www.gaystarnews.com/article/russia-issues-gay-family-warning-parents-uk-summer-school-kids180712>, 18 July 2012.

[11] J.P. Moran, *Teaching Sex. The Shaping of Adolescence in the 20th Century*, Cambridge, Mass. 2000.

[12] J.P. Elia, 'Sexuality education' in J.T. Sears (ed.), *Youth, Education, Sexualities. An International Encyclopedia*, Westport 2005, pp. 785-789.

[13] B. Bagemihl, *Biological Exuberance. Animal Homosexuality and Natural Diversity*, New York 2000.

socially) to youth.[14] In this discourse, there is an added perception of GLBTIQs as deviant, psychologically inverted through a misidentification with sex-based identity, and as coming from bad environments or biological issues. The Physical Hygiene view of homosexuality as (possibly contagious) physical degeneracy is reflected in some sex education teachings in Ethiopia and has also been a product of Ethiopian laws against sodomy.[15]

Both Sexual Morality and Ex-Gay Redemption frame the contamination of GLBTIQ students as having a moral or spiritual aspect. Sexual Morality can cast these students as sinners or sodomites, or as engaging in evil practices, depending on the religion shaping the discourse. Kenyan education, influenced by conservative versions of dominant faiths including Christianity and Islam, takes this approach.[16] A combination of Sexual Morality and other conservative discourses were strengthened in Polish schools during Roman Giertych's term as Minister of National Education (2005-07); when the Ministry called for bans on "homosexual propaganda" in Polish schools, supported only conservative constructions of homosexuality as deviance in Polish school manuals and dismissed of the Director for the National In-Service Teacher Training Centre for publishing a manual with a paragraph on counteracting discrimination on the basis of sexual orientation.[17] The Ministry was known for its policy of (re)distribution of EU subsidies that was contrary to the European Commission's priorities pertaining to counteracting racism, xenophobia and homophobia,[18] and even university-level health education programs in Poland can still feature homophobic constructions of GLBTIQ identities as disordered and deviant.[19] The Catholic Church is considered central to the formation and propagation of anti-gay attitudes in Polish society inside and beyond educational institutions, especially in rural areas, and encourages homosexuals to remain abstinent.[20]

While Ex-Gay Redemption approaches may seem to promote inclusive attitudes to GLBTIQ students through actively welcoming them into Christianity and

[14] D.L. Carlson, 'Identity conflict and change' in J.T. Sears (ed.), *Sexuality and the Curriculum. The Politics and Practices of Sexuality Education*, New York 1992, pp. 34-58.

[15] G. Tadele, *Bleak Prospects. Young Men, Sexuality and HIV/AIDS in an Ethiopian Town*, Leiden 2006.

[16] H.M. Kodero et al., 'Perception of students on homosexuality in secondary schools in Kenya', *International Journal of Current Research*, Vol. 3, No. 7 (2011), pp. 279-284.

[17] '«We do not want such deviations in schools» says The Ministry of Education', *More Poland. Press Review*, 15 March 2007.

[18] R. Biedroń, M. Abramovicz, 'The Polish educational system and the promotion of homophobia' in M. Abramovicz (ed.), *Situation of Bisexual and Homosexual Persons in Poland. 2005 and 2006 Report*, Warsaw 2007, pp. 51-56.

[19] 'Homosexuality akin to rape and prostitution, Polish nursing teaching books claim', *The Telegraph*, 19 November 2012, at <http://www.telegraph.co.uk/news/worldnews/europe/poland/9319151/Homosexuality-akin-to-rape-and-prostitution-Polish-nursing-teaching-books-claim.html>, 19 November 2012.

[20] 'US gov't says Catholic Church is central in promoting homophobia in Poland', *Child Rights International Network*, 12 September 2011.

re-appropriation of gay pride iconography such as rainbows and pink triangles[21] (see Figure 1), this discourse posits that GLBTIQ students should ultimately practice heterosexuality and gender normative lifestyles, and thus does not provide an "affirming" subject position but one in which their sexual or gender expressions must be denied. The conversion of GLBTIQ students to heterosexuality has been supported in some Born-Again Christian schooling in the US encouraged by ministries like PFOX and Inqueery,[22] in recent education policy changes in Dominica[23] and in recent education movements in Uganda encouraged by anti-gay sexuality education activists like Stephen Langa.[24] It has been widely dismissed as harmful by psychology experts,[25] who argue conversion to heterosexuality does not work and involves cruel "treatments" ranging from chemical castrations to training in gendered behaviours. Overall, the conservative orientation makes GLBTIQ student subjectivity invisible, impossible, or the basis for inequitable (and even cruel) treatment such as exclusion or interventions. These identity constructions are either de-humanising in and of themselves, or suggest the need for de-humanising treatments. They are useless (or harmful) for GLBTIQ students in terms of human rights protection.

Figure 1: Image from PFOX Website (http://pfox.org/bookstore.html)

[21] The pink triangle was originally used as a means of humiliating homosexual men taken captive in Nazi prison camps. Its use as a gay pride icon by Gay Liberationists since the 1970s subverted this attempt at humiliation.

[22] 'The Battle Over Gay Teens', *Time Magazine*, 2 October 2005, pp. 42-55.

[23] 'Dominica to enforce anti-gay education', *Gay Star News*, 26 September 2012, at <http://www.gaystarnews.com/article/dominica-enforce-anti-gay-education200912>, 26 September 2012.

[24] 'The role of US evangelists in Uganda's «kill the gays» bill', *The Age*, 12 January 2012, at <http://www.theage.com.au/opinion/politics/the-role-of-us-evangelists-in-ugandas-kill-the-gays-bill-20100111-m2lf.html#ixzz2C9vbdv3y>, 14 November 2012.

[25] American Psychological Association Task Force on Appropriate Therapeutic Responses to Sexual Orientation, *Report of the Task Force on Appropriate Therapeutic Responses to Sexual Orientation*, Washington 2009.

4.2. Liberal – The Homosexual Alternative: Controversial, Rare, at Risk

A liberal orientation to sexuality in human rights education policy and programs focuses on **"teaching sexuality skills and knowledge for personal choice/development/individualist rights that can tolerate GLBTIQ freedoms without foregrounding them"**, achieved in one or more ways. Most methods privilege direct sexual discussion of individual's rights to choice: Sexual Liberationist approaches cover sexual rights and responsibilities, Sexual Readiness approaches cover decision-making processes and concerns related to becoming sexually active, Sexual Risk approaches cover prevention of perceived sexual dangers and Comprehensive approaches cover a wide range of sexual topics increasingly expanded upon by age level. Other methods address social issues/responsibilities related to sexuality: Effective Relationships approaches foster negotiation and relating skills, Controversial Issues approaches foster the development of students' individual perspectives on sexuality-themed debates, and Liberal Feminist approaches foster understanding of women's choices.

Constructions of GLBTIQ students potentially emerge within liberal discourses. These approaches can incorporate terms such as homosexual, gay, lesbian, bisexual, intersex and transgender into their particular vocabularies. Some Sexual Liberationist perspectives normalise homosexuality using research or the Kinsey Scale of sexual orientation, and like Comprehensive Sex Education may provide limited education opportunities around GLBTIQ sexual acts, identities and issues.[26] In such cases, as in some Liberal Feminist teachings, homosexuals or gender diverse students may be represented as tolerated rarities that "occur" within society at specific rates or engage in specific lifestyles. In South Africa, a policy[27] encourages educating young people about rights and responsibilities enshrined in the countries' constitution, including protection against discrimination on the basis of sexual orientation. The document is concerned with individual sexual rights and responsibilities (rather than a broad social movement), typifying the Liberationist approach.

In addition, due to the view of the students as "decision-makers" with a right to individual sexual expressions in liberal discourses, there can be a sense that homosexual or diverse gender expressions are private individual "choices" that schools must respect rather than inhibit. This is particularly so in Controversial Issues Discourse, where schools and particularly teachers are not to impose their beliefs on students and must respect their privacy regarding disclosures.[28] Similarly, there

[26] D.L. Carlson, 'Identity conflict…'

[27] South African Government Department of Education, *Building a culture of responsibility and humanity in our schools. A guide for teachers*, Johannesburg 2005.

[28] D. Dewhurst, 'The teaching of controversial issues', *Journal of Philosophy of Education*, Vol. 26, No. 2 (1992), pp. 153-163, http://dx.doi.org/10.1111/j.1467-9752.1992.tb00277.x.

is room in Effective Relationships Discourse for discussion around the possibility that students may enter same sex relationships, particularly in countries where same-sex marriage is legal – this is the case in relationships education in the Netherlands.[29] However, GLBTIQ identities and choices are not especially affirmed, but seen as tolerable 'alternative options/ feelings' students less commonly experience. Education Minister Ronald Thwaites restricted Jamaica's Relationships Education approach to promoting heterosexuality only, with "a tolerance and compassion for those who adopt a different lifestyle".[30]

Even less affirming are the constructions of GLBTIQ students as being "at high risk" of disease transmission, sexual mistakes or social controversies in some manifestations of Comprehensive Sex Education, Sexual Risk, Controversial Issues and Sexual Readiness Discourses, common in the sex education of countries like Australia.[31] Gay male and transgender male-to-female identities can particularly be associated with HIV/ AIDS risk in textbooks, with such students portrayed as "yet to be infected".[32] The Liberal Feminist view can conceive trans individuals as tragic victims of patriarchal role norms.[33] Thus, while the democratic underpinnings typical of the liberal orientation tolerate GLBTIQ students' individual rights to privacy and freedom of sexual and gender expression, and may conceive them within varying sexual demographics related to sex acts or risk rankings, sweeping or cohesive social change in support of GLBTIQ students is not usually the main aim of these human rights education approaches.

4.3. Critical – The Marginalised Minority: Possible, Political, Protected

A critical orientation to sexuality in human rights education policy and programs focuses on **"facilitating education-based action based on alternative sexuality principles and marginalised groups, in which GLBTIQ rights are either central or peripheral"**. Redressing marginalised sexualities can be achieved in one or more ways. Some methods focus on redressing specific marginalised sexual identities: Radical Feminist approaches cover feminine sexuality and anti-rape

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[29] R.M. Ferguson, I. Vanwesenbeeck, T. Knijn, 'A matter of facts… and more. An exploratory analysis of the content of sexuality education in The Netherlands', *Sex Education*, Vol. 8, No. 1 (2008), pp. 93-106, http://dx.doi.org/10.1080/14681810701811878.

[30] L. Douglas, 'Thwaites says no to gay lifestyle in school', *Jamaica Observer*, 1 October 2012, at <http://www.jamaicaobserver.com/news/Thwaites-says-no-to-gay-lifestyle-in-school_12622849#ixzz2ByqqAcgx>, 1 October 2012.

[31] T. Jones, L. Hillier, 'Sexuality Education School Policy for Australian GLBTIQ students', *Sex Education*, Vol. 12, No. 4 (2012), pp. 437-454, http://dx.doi.org/10.1080/14681811.2012.677211.

[32] C. Patton, *Fatal Advice. How Safe-Sex Education Went Wrong*, Durham 1996, p. 62.

[33] L. Tuttle, *Encylopedia of Feminism*, London 1986, p. 326.

education, Gay Liberationist approaches combat homophobia directly and make gay rights issues visible, Post-colonial approaches support specific pre-colonial sexual expressions. Other methods take a broader approach potentially relevant to several sexual identities: Safe and Supportive Schools approaches argue for schools which provide safety and supportive environments for a range of students regardless of sexual differences, Inclusive approaches promote general inclusion of diversity, Socialist approaches promote greater acceptance of adolescent sexualities and "revolutionary" exploration of sexual pleasures, Anti-discrimination approaches combat discrimination or harassment on multiple grounds which can include sexual grounds ranging from homosexuality to pregnancy.

Gay Liberationist Discourse conceives GLBTIQ students as the core marginalised group in its model of liberation including same-sex attracted, gay, lesbian, bisexual, and sometimes transgender and intersex youth. This perspective acknowledges experiences of homophobia, transphobia and inequities; asserts particular models of sexual identification, desire and characteristics often based on an essential "born" identity; and can provide visibility in school materials. Organisations such as America's GLSEN, Australia's Safe Schools Coalition, China's aibai, Columbia's Diversa, Ireland's Belongto, Israel's Hoshim, The Netherland's COC, Poland's Lambda Warsaw and Campaign Against Homophobia, and UK's Stonewall are involved in education activism of this kind and supply the education ministries in their countries with guidance where possible. Radical Feminist Discourse can provide similar spaces for lesbian, female bisexual and transgender students, but also frame desire as political and assert subjection to sexism within patriarchal contexts (with trans identities seen as stemming from patriarchal roles). These spaces assert "differences" between GLBTIQ students who inhabit them and students generally.

GLBTIQ students may have similar centrality with manifestations of other critical discourses: as subject to structural, academic or social exclusion in Inclusive Education; as subject to discrimination in Anti-Discrimination; as subject to bullying and emotional rejection in Safe and Supportive Spaces. China's Gender Equity Education Act 2003 identified gay, transgender and pregnant students as "disadvantaged" and requiring special assistance in a manner typical of the Inclusion approach,[34] whilst Australia's state of Queensland has a broad Inclusion policy that is less specific about the ways in which sexuality needs can be met and is often overlooked in application to GLBTIQ students.[35] The Anti-discrimination approach is becoming more popular as law suits are increasingly pitched against education leadership internationally by GLBTIQ students. A key Australian example was Christopher Tsakalos' 1997 court proceedings against the

[34] C. Caceres et al., *Review of Legal Frameworks and the Situation of Human Rights Related to Sexual Diversity in Low and Middle-Income Countries*, Geneva 2008.

[35] T. Jones, L. Hillier, 'Sexuality Education…'; QLD Government, *Inclusive Education Statement*, Brisbane 2005.

NSW DET and Cranebrook High School, which held them accountable for his experience of verbal taunts, death threats and weekly bashings by large groups of students.[36] The action was settled with Tsakalos returning to school and implementing anti-homophobia training. Damages were sought for the breach of duty of care and Tsakalos' resulting suffering and loss of enjoyment of life. The NSW DET ultimately developed a single-page policy *Homophobia in Schools*[37] which typified the anti-discrimination approach; it cited (and came from) anti-discrimination legislation, was sent out to all school leaders (rather than communities) as it considered GLBTIQs in terms of official leadership duties, and framed GLBTIQ students as potential victims of discrimination and legal complainants whose concerns must be seen to be officially dealt with through the proper channels (discrimination officers). Similar legal cases against educational institutions have been seen in the USA, the Nepal Supreme Court and the Hong Kong Court of appeals.[38]

Safe and Supportive Schools constructions of GLBTIQ students as potential victims of bullying tend to stem from research data on bullying and negative health impacts. For example in Ireland, Belongto promoted national survey data on the victimization of GLBTIQ youth, leading to education ministry action to address homophobic bullying in schools and the insertion of young GLBT people as a National Suicide Prevention Strategy target group.[39] Similarly, Latin American and Caribbean Education and Health Ministers responded to research on bullying by promoting safe schools addressing the needs of people with diverse sexual orientations and identities.[40] In the UK, NGO Stonewall has encouraged the integration of action against homophobic bullying into existing policy on safe schools, using their ongoing research about the extent of such bullying to guide frameworks for school inspections.[41] Similar anti-bullying provisions informed by qualitative data can be found in Scotland, Brazil, Finland and Israel.[42] In Australia's state of Victoria, the Ministerial Advisory Committee responses to the public dissemination of local research on violence against same sex attracted youth in schools through health provisions for gender diversity[43] and anti-bullying policies mentioning sex-

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[36] C. Kendall, N. Sidebotham, 'Homophobic bullying in schools. Is there a duty of care?', *Australian & New Zealand Journal of Law & Education*, Vol. 9, No. 1 (2004), pp. 71-93.

[37] K. Boston, *Homophobia in Schools*, Sydney 1997.

[38] Hong Kong Court of Appeals, Leung T.C. William Roy v. Secretary of Justice, 2006; C. Hwang, 'Response to Peer Sexual Harassment of LGBT Youth in Schools. Advocacy, Legislation and Litigation', *Hastings Women's Legal Journal*, Vol. 12 (2001), pp. 131-142; Nepal Supreme Court, Babu Pant and others v Government of Nepal and others, 2007.

[39] Irish Government Health Service Executive, *Reach Out. Irish National Strategy for Action on Suicide Prevention 2005-2014*, Kildare 2005.

[40] Latin American and Caribbean Ministers of Health and Education, *Mexico City Ministerial Declaration Educating to Prevent*, Mexico City 2008.

[41] R. Hunt, J. Jensen, *The School Report. The Experiences of Young Gay People in Britain's Schools*, London 2009; OFSTED, *The framework for school inspection*, London 2012.

[42] UNESCO, *Review of Homophobic Bullying in Educational Institutions*, Paris 2012.

[43] VIC Government, *Gender Identity*, Melbourne 2009.

ual diversity.[44] In both the 2006 and 2010 policy sections dealing with homophobic bullying, an image inferred the depicted bullied student was apparently distressed from prior subjection to homophobic abuse in the downward vector of their postures and self-protective body language. One student was being pushed around (see Figure 2) and the other was huddling on the ground in a foetal-like position (see Figure 3). These images show how GLBTIQ students were portrayed as victims in the policies.

Figure 2: Image from *Safe Schools Are Effective Schools* (p. 14)

Figure 3: Image from *Building Respectful and Safe Schools* (p. 30)

[44] VIC Government, *Safe Schools are Effective Schools. A Resource for Developing Safe and Supportive School Environments,* Melbourne 2006; VIC Government, *Building Respectful and Safe Schools. A Resource for School Communities*, Melbourne 2010.

While legal protections, social supports and other campaigns may be asserted to prevent the victimisation focussed on in such approaches, Cloud's[45] critique of Gay Liberationist constructs emphasising victimhood (while minimising resilience and identification complexities) can thus also apply to Radical Feminist, Anti-Discrimination, Inclusive Education and Safe and Supportive Spaces. Monk[46] argues that casting GLBTIQ students as victims of homophobic bullying, tragic gays or abused children minimises their sexual nature (and the challenge it represents to education's "norms") and emphasises one-on-one incidents to be treated through disciplining particular bullies (rather than broader reforms). Conversely, Seckinelgin[47] argues that critical activism allows participation "in the politics of recognition". Youth are enabled to articulate an identity for use in public debate and to feel part of a united community. Bell and Binnie[48] posit that when "sexual dissidents make use of rights-based political strategies" they must conform to acceptable positions that are "privatised, de-radicalised, and confined". Thus despite the emancipatory goal of critical discourses, their constructions of GLBTIQ students are not automatically "affirming spaces" in and of themselves. Further, their usefulness in any education policy should not be presumed "a given", but understood in relation to their contextual functions and impacts.

4.4. Post-modern – The Sexually Diverse: Indefinite, Intersecting, Interesting

A post-modern orientation to sexuality in human rights education policy and programs focuses on **"theoretically exploring sex, gender and sexuality frameworks within human rights perspectives"**. Some methods focus on deconstructing specific sexual identities by showing how they rely on false binaries that actually overlap: Post-identity Feminist approaches pick apart "male" and "female" categories, Queer approaches pick apart "gay" and "straight" categories, Post-structuralist approaches pick apart categories generally. Other methods affirm a plurality of sexual identities and a culture of pluralism: Multi-cultural approaches promote the value of multiple culturally-determined perspectives on sexuality and sexual identity, and Diversity Education approaches celebrate the social contribution of diversity within sexualities and family types.

The constructions of GLBTIQ students within the post-modern orientation are complex and complicating. Some post-modern discourses can call the very

[45] 'The Battle Over Gay Teens', *Time Magazine*, 2 October 2005, pp. 42-55.

[46] D. Monk, 'Challenging homophobic bullying in schools. The politics of progress', *International Journal of Law in Context,* Vol. 7, No. 2 (2011), pp. 181-207, http://dx.doi.org/10.1017/S1744552311000061.

[47] H. Seckinelgin, 'Global activism and sexualities in the time of HIV/AIDS', *Contemporary Politics*, Vol. 15, No. 1 (2009), p. 116, http://dx.doi.org/10.1080/13569770802674246.

[48] D. Bell, J. Binnie, *The Sexual Citizen. Queer Politics and Beyond*, Cambridge 2000, p. 3.

notion of sexual identities and genders into crisis (particularly hegemonic "truths" about maleness, femaleness, masculinity, femininity and heterosexuality). Processes that can de-stabilise the bipolarised alignments of sex, gender and identity traditionally used to negate GLBTIQ students or render them invisible include the deconstruction and naming processes of Post-structuralist Discourse, analysis of sex-based identity constructions in Post-identity Feminism and identity queering of Queer theory. However, these processes also challenge the very bases of "same-sex attraction", "homosexuality", "bisexuality" and some "transgenderism" which can require stable notions of male and female sex in their internal logic. Queer can particularly be used to critique the use of "sexual orientation" and "gender identity" as installing a distinctive gender and sexuality matrix.[49] This can leave behind indefinite spaces for GLBTIQ students to step into. However, it can also offer opportunities for GLBTIQ students to rename and co-create new, interesting and useful subject positions for themselves or embrace more empowering and affirming constructions in the alternative discourses they are exposed to.[50] For example, they may come to versions of femaleness, "queer" or "genderqueer" that fit their particular bodies/sexualities/gender expressions (or fluidity), or other sexual concepts of their own making. Deconstructive approaches can also show how more and less stable or recognisable constructions of identity have varying levels of usefulness in different arenas.

Other post-modern discourses may instead provide a more varied terrain of GLBTIQ student constructions. Multicultural Education Discourse, for example, can offer the "cultural group" framing of GLBTIQs (as belonging to some kind of cultural community), and variable and intersecting constructions of GLBTIQs within different cultures that students may navigate (which may or may not be affirming). Diversity Education can offer both specific constructions for GLBTIQ students (like intersex or lesbian identity) and the general space for "diversity" of sexual subjectivity, both externally and internally, within which "everyone" is conceived. All of these spaces are affirmed as positively valued, as are the varieties of family structures, relationships and sexual and reproductive possibilities they relate to. There is also room for individual variations and inconsistencies. Examples of this can be seen in the main policy on GLBTIQ students in Australia's state of Victoria; *Supporting Sexual Diversity in Schools*.[51] GLBTIQ student subjects were constructed in the policy as both subjects and patients within the sexual diversity supporting process. As subjects they were part of the student body required to learn about, acknowledge and respect diversity, and explore their beliefs and critique their own perspectives and behaviour. As patients, they were part of

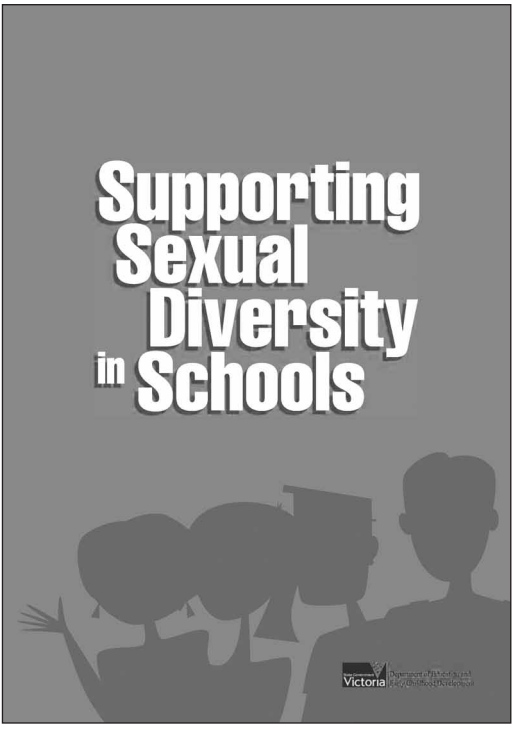
[49] M. Waites, 'Critique of «sexual orientation» and «gender identity» in human rights discourse. Global queer politics beyond the Yogyakarta Principles', *Contemporary Politics*, Vol. 15, No. 1 (2009), pp. 137-156, http://dx.doi.org/10.1080/13569770802709604.

[50] D.L. Carlson, 'Poststructuralism' in J.T. Sears (ed.), *Youth, Education…*, pp. 635-638.

[51] VIC Government, *Supporting Sexual Diversity in Schools*, Melbourne 2008.

the general, faceless but friendly and positively valued "sexual diversity" construction to be acknowledged respected, supported and celebrated within schools by all stakeholders (leadership, staff, parents and other students). They were at once part of "all students" for whom support is due, and a specific group whose entitlement to support must be proactively ensured by all stakeholders. The cover image of the policy showed a faceless group of unidentifiable students waving at the reader in a friendly manner (see Figure 4). This cover captured the affirming nature of this approach with its cheerful yellow imagery, yet also the slipperiness of this approach. Whilst it is clear the viewer (presumably a school staff member reading the policy) "knows" the students and supports them (they wave in greeting), it doesn't specifically identify the nature of their sexual diversity (whether they are gay, transgender or otherwise is unclear). The students are all together, at once connected and individual, the same and yet diverse.

Figure 4: Image from *Supporting Sexual Diversity* (cover)



These constructions do not portray GLBTIQs as victims in the same way the critical approaches so clearly do. They also don't simplify GLBTIQs into having one "identity type" or obvious, stereotypical traits. However, they can be problematic in their own way. As with some of the more deconstructive models and some socialist liberal models, the broader groupings within the post-modern orientation

of "diversity", or GLBTIQs as a "cultural group", may overlook physical and social differences that more specific identities assert for practical or political gains (such as intersex-specific activism, which may focus on medical concerns). As the vague policy cover image showed, it can also be unclear exactly "who" this approach is talking about, and which human rights they are being related to and why (fortunately the Victorian policy benefits from more detailed information drawing on critical approaches inside, with more specific guidelines than the image alone suggests). Thus, the positions available in these discourses lack some of the limitations and over-simplification of other models, yet can be less practical for educational advocacy efforts if they are not used in combination with more critical approaches.

5. UNESCO's (re)Construction of GLBTIQ Rights as Human Rights

UNESCO's approach to GLBTIQ issues in education has shifted over time, but can be increasingly seen to draw on Anti-discrimination, Safe and Supportive Schools and Inclusive Education discourses. This shift began most explicitly within the *International Technical Guidance on Sexuality Education* policy.[52] Aimed at education and health authorities and produced by UNESCO's "Section on HIV and AIDS", its two 50-page volumes featured a rationale and ideals for sexuality education, learning objectives and resources for students five to 18+ years old. The second volume of the document evidenced a combination of approaches to sexuality in schools. It defined sexuality education as:

> […] an age-appropriate, culturally relevant approach to teaching about sex and relationships by providing scientifically accurate, realistic, nonjudgmental information. Sexuality Education provides opportunities to explore one's own values and attitudes and to build decision-making, communication and risk reduction skills.[53]

This definition suggested a liberal, comprehensive approach focussed on developing skills and knowledge for decision-making. It portrayed the role of schools as equipping students with age-appropriate "knowledge and skills to make responsible choices" (p. 6), used data on the instrumentalist risk-reducing outcomes of sex education and repeatedly referred to AIDS epidemics (from the foreword onwards). While liberal approaches typical of Sexual Risk, Comprehensive, Anti-discrimination and Controversial Issues Discourses all appeared throughout the policy (for example on p. 3), GLBTIQ issues were contrastingly treated in a critical manner. "Sexual orientation" was cast as a risk factor for discrimination (p. 7); one of many elements in a non-discriminatory and inclusive sexuality education (p. 10-11); part of international antidiscrimination conventions (appendix 1); and

[52] UNESCO, *International technical guidance on sexuality education. An evidence-informed approach for schools, teachers and health educators*, Paris 2009.

[53] Ibid., Vol. 2, p. 2.

grounds for discrimination (along with gender) to feature in school level bullying policies (p. 11). Thus, the policy featured the negation of discrimination typical of Anti-Discrimination Discourse. The policy's inclusion of "Lesbian, gay, bisexual and transgender groups" as stakeholders (p. 9); concern for the lack of programs for "gay or lesbian or other young people engaging in same-sex sexual behaviour" (p. 14); and the claim that social attitudes and laws stifled "public discussion" of sexual diversity and disempowered sexual minorities (foreword, p. III) also typified Inclusive Education and Gay Liberationist Discourses.

UNESCO's *Rio Statement*[54] more strongly incorporated GLBTIQ students into human rights issues. This document quoted international conventions around education access including the Dakar Framework for Action on Education for All, and promoted school-based provision of "information relevant to the needs of all learners, including LGBTI people" and "learning environments truly accessible and productive for all"; features indicative of an Inclusive Education approach. The Safe and Supportive Schools approach can be seen in the document's requirement for governments and education providers across all school systems to ensure "safe school climates free of anti-LGBTI bias and violence". It is also seen in the document's discussion of bullying research:

> Studies repeatedly confirm links between homophobic bullying and bias – including lack of access to accurate information regarding health, sexuality and other aspects of the curriculum – and negative social, educational and health outcomes, including increased vulnerability to HIV, mental health consequences and suicide.[55]

Anti-discrimination Discourse was evident in the references made to institutional legislation and global governance precedents such as the adoption of the Universal Declaration of Human Rights in 1948, the Convention of the Rights of the Child, and the Millennium Development Goals. In addition, the Yogyakarta Principles specifically make clear that this right must not be curtailed by discrimination on the basis of sexual orientation or gender identity. The document also refers to mechanisms of periodic review and accountability, key concepts of Anti-discrimination Discourse.

UNESCO's *Education Sector Responses to Homophobic Bullying*[56] gave guidelines based on an earlier international research report on bullying,[57] and evidenced Safe and Supportive Spaces Discourse in its construction of GLBTIQ students as learners (220 times) whose right to education was disrupted or threatened through a lack of appropriate provisions around safety and violence prevention in educational institutions. But they were particularly linked to human rights through bullying as a concept (shown in the proximity of the concept of "gay" to "bullying",

[54] UNESCO, *Rio Statement…*

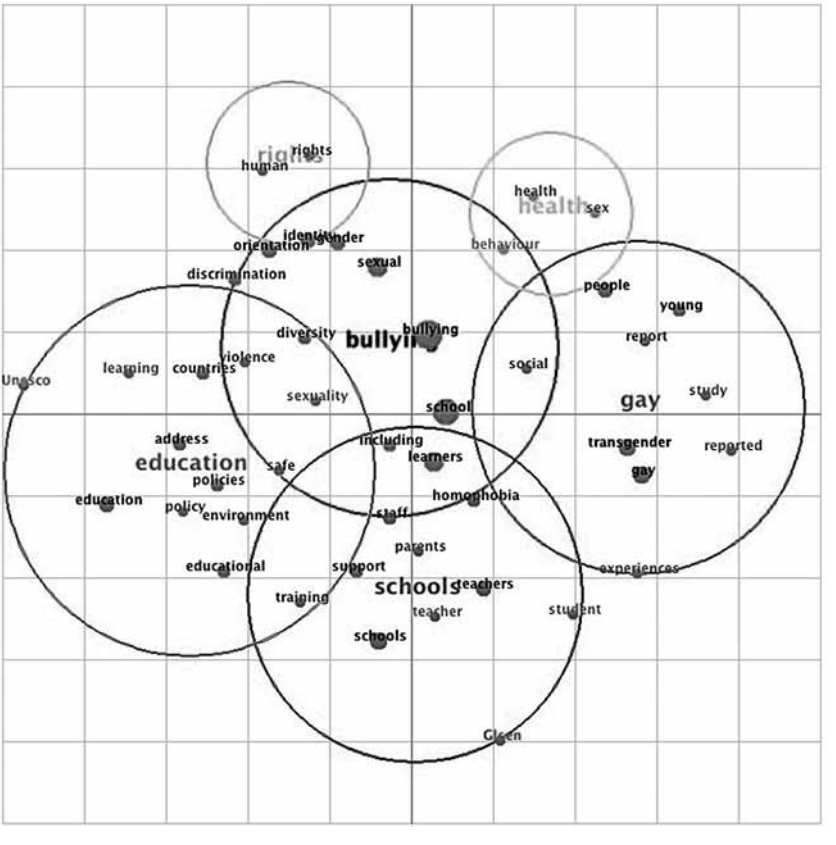
[55] Ibid.

[56] UNESCO, *Education Sector Responses to Homophobic Bullying*, Paris 2012.

[57] UNESCO, *Review of Homophobic Bullying in Educational Institutions*, Paris 2012.

and bullying to "rights" in the concept map Figure 5, and the 92% connectivity relative count of these concepts) and positioned as victims of social engagement within schools. Bullying was mentioned 454 times and was the largest concept of the document, support was mentioned 72 times, environment 44 times (although this was usually framed as school/schools, mentioned 556 times). Gay identity was repeatedly linked to bullying research (reports, studies) and wellbeing research. Gay Liberationist and Anti-discrimination Discourses combined in the document's discussion of homophobia (55 times) and related marginalisation, discrimination (46 times) and related legislation, and rights (45 times). The document evidenced Inclusive Education Discourse in its discussion of education access issues, and Diversity Education Discourse in its 47 mentions of diversity in relation to sexual themes. Overall, Leximancer found that the entity vocabulary for the term "gay" in the document included words like bullying, homophobic, support, rights and suicide. There is a very strong link between GLBTIQ student identity in this document and victimhood (both social and psychological in terms of wellbeing), support needs and human rights.

Figure 5: Leximancer concept map for UNESCO's Education Sector Responses, no. of points at 100%, theme size at 50%



6. Conclusion

Of the four main orientations to GLBTIQ rights/students found in education sectors around the world historically and today, none offered constructions of GLBTIQ students that were entirely without limitations. Yet it was clear that the conservative orientation offered the most conceptually problematic constructions wherein GLBTIQ students either didn't exist or were treated in a manner that could negatively impact their wellbeing (as deviants, degenerates or biological aberrations for example). This approach was dominant historically and in many parts of the world. The liberal orientation offered some constructions of GLBTIQ students that could promote tolerance, but also burdened aspects of GLBTIQ with the potential stigma of "risk" associations and "uncommonness" (which could easily be conflated with "abnormality" in an implicitly negative manner). Critical approaches often relied on "victimhood" tropes in their representation of GLBTIQ students, which were somewhat negative representations that conflated (for example) gay identity with being bullied, depression or suicidal tendencies. Post-modern approaches offered broader perspectives but could be too general and academic, and featured least in official approaches.

Yet the critical and post-modern orientations constructions of GLBTIQ students nevertheless offered the most useful constructions for "humanising" and sometimes even "normalising" GLBTIQ students in a manner that could allow them a greater place within human rights education in schools. The critical orientation was associated with the development of the most directly supportive education policies and provisions around GLBTIQ rights concerns in schools, particularly 'Anti-discrimination', 'Safe and Supportive Schools' and 'Inclusive Education' approaches in countries like Australia, the UK, Ireland, China and others. These approaches did frame GLBTIQ students as potential victims of discrimination at school, of bullying, and of systems overlooking their psychological needs. Yet the "use" of a victimhood status supported the inclusion of GLBTIQ students within human rights movements, legislation and policy. This was particularly so when coupled with the public dissemination of evidence of verbal and physical homophobic abuse in schools (whether through lawsuits, media coverage of specific incidents or research provided by NGOs). Research on the prevalence of self-harm and suicides associated with homophobic bullying and the impact of anti-homophobia education policies in reducing such problems has also supported the up--take of school policies which see GLBTIQ rights as a human rights issue.[58]

As the identity politics debate continues between post-modernists and critical theorists, it is clear the human rights movement around GLBTIQ rights in education has most strongly embraced an identity-based politics in recent years. This is particularly evident in UNESCO's contributions, which were largely critical in nature, but is also seen in many of the related country-specific policies now emerg-

[58] T. Jones, L. Hillier, 'Sexuality Education…'

ing. Invisibility or conservative representation in policy seemed to only enhance the difficulty of schooling conditions; yet critical education policies providing explicit protection against homophobia are associated in lowered rates of physical violence/ bullying, self-harm and suicide rates for GLBTIQ students.[59] Such policies were also associated increased likelihood that GLBTIQ students would rate their schools as a place they felt positively about.[60] While portraying young people as 'victims' is certainly not ideal for human rights education policy and programming in the long-term, it is nevertheless one key step in 'humanising' GLBTIQ students enough to break down social and political barriers to their inclusion in constructions of "human" rights provisions.

Abstract

Discrimination against gay, lesbian, bisexual, transgender, intersex and otherwise queer (GLBTIQ) students has recently become a key area for global attention in human rights education. The inclusion of GLBTIQ issues in anti-discrimination efforts in schools has been particularly aided by events held by the United Nations that specifically campaigned against homophobic bullying, speeches by the UN Secretary General framing homophobic bullying as "a public health crisis", and UNESCO's recent dissemination of new policy, programming and practice guidance to education sectors around the world. The movement towards protecting GLBTIQ students against bullying and discrimination, and the provision of structural and social supports in schools, has the potential to impact how diverse sexualities and gender identities are understood generally. This paper uses a Critical Discourse Analysis to provide an overview of constructions of GLBTIQ students in education policies and practices around the world, in order to set the context for the approaches promoted in UNESCO's (re)construction of human rights education today. Four main orientations to GLBTIQ students found *both* historically and in education sectors around the world today are detailed: conservative, liberal, critical and post-modern orientations. Within each orientation, a number of views on GLBTIQ students are described in relation to the broader discourses on sexuality within which they were formed. The paper argues that the public dissemination of evidence of verbal and physical homophobic abuse in schools, the prevalence of self-harm and suicides associated with homophobic bullying, and the impact of anti-homophobia education policies in reducing such problems have been key to the shift in understanding the position of GLBTIQ students in human rights education in places where anti-homophobia legislation and education policies exist. It gives examples from various countries of how this public dissemination – whether through courts of law, research reports, or media coverage – has been an important catalyst for change. The framing of GLBTIQ students as potential victims of discrimination at school (rather than as deviants, non-existent or biological aberrations for example) is thus argued as central to the promotion of 'Anti-discrimination', 'Safe and Supportive Schools' and 'Inclusive Education' approaches found in new human rights movements. While portraying young people as "victims" is certainly not ideal in the long-term, it is nevertheless

[59] Ibid.

[60] R. Hunt, J. Jensen, *The School Report*…

one key step in "humanising" GLBTIQ students enough to break down social and political barriers to their inclusion in constructions of 'human' rights educational provisions.

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Universal Values or Particular Agendas – Can We Still Speak Credibly of Human Rights?

Dicentes se esse sapientes, stulti facti sunt
(Rm, 1, 22)

1. Introduction

I greatly appreciate the invitation to speak here – all the more so, because my presence at this conference is somewhat difficult to explain. The programme of this conference announces me as a human rights lawyer, but this is not quite exact. I am not a human rights expert, and make no claim to be one. On the contrary, I am a declared non-expert, and proud of it. I hold no professorship on human rights, nor do I represent Amnesty International, Human Rights Watch, or a similar NGO, nor do I occupy any function in one of the UN treaty monitoring bodies, the European Court of Human Rights (ECtHR), or any similar institution. I am simply a lawyer like many others, and my professional activity has little or nothing to do with human rights. If I have written several critical papers on human rights, it is not because I believe that I believe to be an expert, but because I am perplexed by what I see human rights experts doing to human rights these days. Thus, I rather think of myself as of the little child in Andersen's tale who innocently asks: "Mummy, why is the Emperor naked?!".

Indeed, "human rights" seem to enjoy unquestioned authority, just as Emperors did in previous times, and some of their glory shines not only on the institutions that have been set up for their protection, but also on academic experts, NGOs, and – ultimately – on anyone who manages to give himself the aura of a "human rights activist". But with disturbing frequency, the affirmations of these institutions, experts, and activists, nowadays cause perplexity and astonishment, as they do not seem to have much in common with the moral intuition of average people.

Some weeks ago, for example, the European Parliament has nominated as one of the candidates for the Sakharov Peace Prize a Russian punk group that had acquired worldwide notoriety for performing group-sex actions in public places and for desecrating a Cathedral, claiming that these were "art performances" and a legitimate form of "political protest". No doubt, there may be many valid reasons to protest the Russian government – but since when are group sex and church desecration worthy of a prize that honours human rights defenders? If Andrey Sakharov were still alive, what would he say of this?

Another example is the decision of a Chamber of the ECtHR, adopted by unanimity, that the presence of crucifixes in school classes constituted a human rights violation, as non-Christian children might feel unwelcome.[1] The decision was later overturned, but in the meantime a similar, even more spectacular decision was adopted by a law court in Germany: it prohibited the religious practice of circumcision of boys, which was described as a violation the right to bodily integrity.[2] Who would have thought this: sixty years after Auschwitz a German judge outlaws a central marker of Jewish (and Muslim) religious identity. If that decision is not overturned,[3] or the law not changed,[4] then Jewish and Muslim communities in Germany will face the choice either to give up their religious practice or to emigrate.

Another example: in mid-November, I was at the European Parliament to watch the hearing of Dr Tonio Borg, who was going to be appointed as a new member of the European Commission. Everyone agreed that he performed well and had all the capacities that are required for the job. But from the moment his designation was made public there was an aggressive campaign by certain NGOs and Members of Parliament who questioned his commitment to "Fundamental Rights".[5] Why? Because of his views on issues such as abortion, same-sex marriage,

[1] European Court of Human Rights (ECtHR), Lautsi v. Italy, Application no. 30814/06. The Chamber decision issued on 3 November 2009 was later overturned by a Grand Chamber judgment of 18 March 2011.

[2] Landgericht Köln (LG Köln), 151 Ns 169/11, 7 May 2012.

[3] In the case at hand, the defendant, a Muslim doctor who had performed a circumcision on a boy aged 4 at the request of his parents and who had not committed any medical malpractice, was acquitted, as the court found that he had been in justifiable ignorance of the law. Given this acquittal, there was for formal reasons no possibility (and no reason) for him to appeal against the decision. But given the great media attention for this case, it is clear that any future defendants cannot expect to be acquitted on these grounds.

[4] On 12 December 2012, the Federal Diet has adopted a law to amend the Civil Code (Bürgerliches Gesetzbuch) in order to specifically allow for the circumcision of male infants.

[5] See: the joint statement published on 29 October 2012 by the International Planned Parenthood Federation (IPPF), the International Lesbian and Gay Association (ILGA-Europe), The Stop AIDS Campaign, Catholics for a Free Choice (CFFC), the European AIDS Treatment Group, and the European Parliament's LGBT Intergroup. Similar statements were published by the European Humanist Federation (EHF) and – rather surprisingly – by the Confederation of Family Organisations in the European Union (COFACE).

research on embryonic stem cells, etc. which marked him as a social conservative. What we see here is the deliberate radicalization of the political discourse: for certain pressure groups, if someone does not share their agenda, he is a "human rights offender". This way of displaying concern over fundamental rights could be described as a form of political hooliganism: its apparent purpose is to pre-empt a rational debate from taking place by denigrating the political adversary.

These are but a few of many such episodes. What they reveal is that, while human rights seem to stand at the summit of their glory, they are, at the very same time, in deep crisis. We all agree on human rights, but do we really? Or is the situation not better characterized by saying that human rights nowadays provide institutions and vocabulary that everyone can use for his own purposes?

We seem to be facing a new type of human rights abuse: the abuse of human rights language by certain pressure groups in politics and media. But it would be a great mistake to believe that the views and the agenda of those groups are generally accepted. If people still maintain their attitude of deference and do not dare to speak up, it is because, just like in Andersen's tale, they fear being reviled for being stupid, inept for their jobs, outdated, or worse. However, it becomes increasingly clear that, while we all seem to agree on the importance of human rights, the consensus on what those rights foresee, if it ever existed, is quickly eroding.

2. The West against the Rest?

Various UN agencies and treaty monitoring bodies, the ECtHR, and the Council of Europe (CoE), have been playing an important part in this. Instead of monitoring the application of rights standards that are uncontroversial, they are now trying to impose novel rights that are controversial. While they show no great efficiency in dealing with "ordinary" human rights violation cases,[6] they display a strange receptiveness for the frivolous "strategic litigation" or the "shadow reporting" of certain pressure groups.

The authority enjoyed by those institutions is due to the fact that they were entrusted with the mission to be the guardians of rules and principles on which there was a nearly worldwide consensus. But they do not seem to fulfil this task anymore; instead, they appear to have discovered a new mission for themselves, acting as the spearheads of a global movement that seeks to impose a new value system on the world.

That value system – how can I describe it? I am probably not wrong in saying that it represents the values of the cultural and political mainstream in North

[6] Such as the ethnic cleansings in Darfur, the religious discrimination of non-Muslims in nearly all Muslim countries, the persecution of Christians in China, North Korea, and other countries, the prevention of war crimes in Central Africa, etc.

America and Western Europe at the end of the 20th century. It embraces the achievements of the 1968 Cultural Revolution – in particular in all matters pertaining to sexual mores, social welfare, and individualism. The key concepts are "choice" and "equality": every individual is entitled to make its own choices, the morality or rationality of which must not be questioned by anyone. The State's role is not to question or to criticize, but to facilitate and to empower: hence the attachment to a generous welfare state providing for health, education, social security, housing, etc., all of which are new "human rights". However, it is noticeable that, while radical liberalism holds sway in the domain of sexual mores, there is in many other respects a certain distrust against individualism, and even an outright rejection of the idea that people should be allowed to make their own free decisions: how else can it be explained that human rights nowadays includes an ever increasing quantity of "anti-discrimination" laws that radically restricts the contractual freedom of citizens?

While those values may be the prevailing ones in contemporary Western societies, they can hardly be described as "universal". In non-Western societies they are upheld only by a thin elite, and even in Western societies there are some pockets of resistance. Besides this apparent lack of general acceptance, one has also reason to question the sustainability of the Western post-1968 code of values: the societies that have embraced them are now over-aged, over-indebted, and in a state of slow but steady decline as regards their political and economic influence. This is no wonder. The deconstruction of institutions like marriage and family and the adulation of individual self-fulfilment pre-suppose a strong welfare system that non-Western societies could never afford. It now turns out that Western societies cannot afford it either. What will remain are atomized and destitute societies, in which everyone has a lot of theoretical rights and entitlements, which unfortunately will not be of much practical use in reality. This is what the social engineers of our time call the "rights-based approach": to give new rights to people, and hope that the rest will follow. I am not sure it will.

Rather than agreement on universal values, what we are seeing is a cultural conflict in which the dividing line is between the West and the Rest, but even within the West it seems to be the project of a generation that was young in 1968, but which today is approaching the age of retirement. Their concept of human rights is certainly "modern" in the sense that it is neither universally shared nor of long standing – but is it not by now also somewhat outdated?

3. The Manipulation of Human Rights and the Decline of Human Rights Institutions

Be that as it may, the post-1968 generation is still in control of much of the institutional apparatus that originally was set up to protect human rights, but which, if those in charge so choose, can also be used to manipulate and overturn them.

Is there any need for me to provide detailed evidence for this observation? I think not. The facts should by now be notorious. ECtHR decisions like Goodwin vs. the UK,[7] Lautsi vs. Italy,[8] Tysiąc vs. Poland,[9] Schalk and Kopf vs. Austria,[10]

[7] ECtHR, Goodwin v. United Kingdom, Application no. 28957/95. The case, in which the Court found that transsexuals who had undergone a procedure of "gender reassignment" should have the right to marry, is remarkable for two reasons: firstly, because the Court embraces the theory of "gender" being a social construction rather than an objective biological given, and secondly, because it swiftly discards its own prior case law, saying that "social changes" mean that the European Human Rights Convention has changed its meaning.

[8] See: above note 2

[9] ECtHR, Tysiąc v. Poland, Application no. 5410/03. This judgment is the first one to contain a remarkable argument that was re-iterated in various subsequent decisions: while the Court explicitly recognizes that there is as such no "Right to Abortion" in the European Human Rights Convention, it argues that if and where a country makes the decision to legalize (or not to prohibit) abortion, it must ensure that women have effective and real access to it. That includes, according to the Court, not only a legal framework to guarantee such access, but also an obligation for doctors who refuse performing abortions for reasons of conscience to refer the woman to another practitioner who is willing to perform the procedure. The glaring absurdity of this reasoning, which has no basis at all in the text of the Convention, is quickly understood when the newly discovered principle is applied to other circumstances. Nobody would agree, for example, that the State has an obligation to guarantee the availability of any other elective surgery (such as cosmetic surgery). Nor would anybody agree that a State that tolerates (i.e., does not criminalize) prostitution is under an obligation to guarantee the availability of prostitutes, or that a woman not wishing to prostitute herself is under an obligation to refer anyone who so requires to another woman who has no such objections. Thus the argument appears to have been crafted for the sole purpose of promoting abortion – but it fails to explain why (only) in this specific context of abortion the toleration of a practice should be considered to immediately create an entitlement to it.

[10] ECtHR, Schalk and Kopf v. Austria, Application no. 30141/04. In this decision, the Court decided that the Convention does not include an obligation for a State to allow for same-sex "marriages". This outcome is undoubtedly correct, but what is nevertheless surprising is (1) the fact that this manifestly ill-founded application was not dismissed *a limine*, (2) the very narrow four-to-three majority by which the Chamber adopted this decision, and (3) the fact that in the decision the Court seems to say that if the trend among European countries to legislate for same-sex "marriages" continues it might at some stage be argued that a new human right has emerged, and that the other States would have to follow. See: par. 105 of the decision: "The Court cannot but note that there is an emerging European consensus towards legal recognition of same-sex couples. Moreover, this tendency has developed rapidly over the past decade. Nevertheless, there is not yet a majority of States providing for legal recognition of same-sex couples. The area in question must therefore still be regarded as one of evolving rights with no established consensus, where States must also enjoy a margin of appreciation in the timing of the introduction of legislative changes". Reaching far beyond the specific issue of same-sex "marriages", the Court makes a statement that is truly breath-taking. It seems that if there were a (simple? or qualified?) majority of States providing for same-sex "marriages", the margin of discretion enjoyed by all other States would disappear, or at least be reduced. But this implies that the Convention has no certain meaning and that the Court's task, rather than interpreting the text of the Convention, is to take note of trends and tendencies, and to reinforce them. Strangely enough, however, the Court did not intervene to call back to order the first few States

A, B, and C. vs. Ireland,[11] E.B vs. France,[12] and Costa and Pavan v. Italy[13] have

that had introduced such legislation. At that time, the general consensus was that a marriage is between a man and a woman, and only one or two States started to act in contradiction to this consensus. Similar arguments could be made with regard to many other issues, such as abortion, euthanasia, divorce, assisted procreation, etc. The argument frequently used by the Court that the Convention is a "dynamic instrument" is thus used only to impose the choices of "progressive" jurisdictions on the conservative ones, and never the other way round. It is for this reason that one can say that there is a deeply entrenched bias in the jurisprudence of the Court, which has embraced progressivism as its unofficial guiding ideology. Obviously, there is no mandate for this in the Convention itself.

[11] This judgment follows the line of reasoning opened by the Tysiąc case (note 9), finding that, given that Ireland does allow abortions in cases where the continuation of a pregnancy would constitute a serious and real threat to the life and health of the pregnant woman, a legal procedure should be available to ascertain *ex ante* whether or not, in a given case, abortion is justified. This idea seems as reasonable as requesting States to foresee legal procedures that would allow assessing *ex ante* whether someone has the right to kill somebody else in an act of legitimate self-defence. Besides that, this case is also remarkable for a number of other reasons. Firstly, the ECtHR accepted to hear it although it had never been brought to any Irish law court, so that, given that the Court itself does not have a procedure to verify facts, it is unclear whether the underlying facts were not completely fictitious. Secondly, the case was built upon physical sufferings of the three applicants (such as pain and heavy bleeding) that were not the result of having had to *comply* with Irish legislation, but of having *circumvented* it. Had the three applicants complied with the Irish law in force, they would not have had abortion, and hence suffered no pain, no bleeding, no anguish, which were the (not untypical) consequence of the legal (but apparently botched) abortions they had undergone in the UK. It is difficult to understand why the applicants, rather than filing lawsuits against the medical practitioners who had performed the abortions in the UK, preferred to hold the Irish State responsible for their sufferings. In the light of all these circumstances, it is difficult not to view this case as a particularly conspicuous piece of evidence for the ECtHR's leanings towards judicial activism.

[12] ECtHR, E.B. v. France, Application no. 43546/02. The Court decided that France, which allows the adoption of children by individual persons (rather than restricting it to couples), was not allowed to use a person's homosexuality as a criterion to assess its suitability as an adoptive parent: a State is not obliged to foresee adoption by single persons, but if it does, it must do so without discrimination. The decision is questionable in that it arbitrarily extends the scope of Article 14 of the Convention, which only prohibits discrimination in regard to "the rights and liberties set forth in this Convention". In actual fact, there is no "Right to Adoption" in the Convention. There can indeed not be such a right, given that Article 21 of the Convention on the Rights of the Child (CRC) clearly foresees that in all questions related to abortion "the best interests of the child shall be the paramount consideration". That excludes any kind of *entitlement* to adopting children – not only for homosexuals, but for anyone. By inferring that the Convention contains such entitlement (in regard to which there could be discrimination), the ECtHR has in fact adopted a decision that stands in contradiction to the CRC.

[13] ECtHR, Costa and Pavan v. Italy, Application no. 54270/10. Once again, in this decision we find the argumentative pattern we already know from Tysiac v. Poland (see above, note 9): if a State does X, it must also do Y. In the case of Costa and Pavan, the Court finds that if a State has legalized therapeutic abortion, it must also legalize pre-implantation diagnostics in the context of medically assisted procreation procedures. Now it is certainly true that, for the reasons exposed by the Court, permitting the one and prohibiting the other would seem inconsistent.

raised widespread critique with regard to the ECtHR's poorly reasoned judicial activism, and this is but a very small selection of cases that could be cited in this regard. There is no reason to believe that these are isolated hiccups of a court that otherwise works reasonably well; instead, there is every reason to suspect that the judges of the Strasbourg court, or at least some among them, have an agenda of their own.[14]

Also, it has been amply demonstrated that the UN and its treaty monitoring bodies have for many years been following a concerted and systematic policy of subjecting international human rights treaties to new interpretations, in particular in relation to all issues related to "sexual and reproductive health and rights". That policy, which has aptly been described as "an attempt to create rights by stealth"[15] and as a "power shift to the un-elected",[16] goes back to a meeting between those bodies and a number of select NGOs behind closed doors at Glen Cove NY in 1996, which was convoked by UNFPD following the failure of attempts to obtain international support for a "right to abortion" at the International Conference on Population and Development (Cairo, 1994) and the World Conference on Women (Beijing, 1995).[17] We should therefore not be surprised by the opinions and recom-

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But nonetheless, the Court's reasoning is ill-founded. Firstly, it has no basis in the Convention, which contains no "Right to Consistency in Legislation". Secondly, it is ambivalent: one could with equal (or better) justification argue that a State that prohibits eugenic practices in vitro should also prohibit therapeutic abortion, and thus obtain the exact opposite conclusion. Like with the argument that the Convention is a "living instrument" (see above, notes 8 and 11), it becomes apparent that the "consistency argument" used by the Court in this case is not a neutral principle, but an instrument that the Court uses to promote the "progressive" social policies it finds desirable.

[14] A former ECtHR judge, Javier Borrego Borrego from Spain, attributes the ECtHR's judicial activism to the fact that a large majority of the Court's judges have little or no prior experience as judges, but predominantly a background as academics. As Borrego, in a commentary published on 17 December 2009 by the Spanish newspaper El Mundo, pointed out: "applying the law to the facts of a given case is not something that interests them. Instead, they believe that once they have been appointed ECtHR judges, the time has come for them to convert their academic theories into sentences, thereby transforming the Court into a legislative organ". Whoever takes a closer look at the biographies of the 47 ECtHR judges (they can be found on the Court's website) finds that most of them have no genuine judicial background, but have followed academic careers from where they often were directly promoted to serve as constitutional and/or ECtHR judges. It would be worthwhile to keep this observation in mind in regard to any future reform of the Court: none of the ECtHR decisions mentioned in this paper would have been adopted by judges who simply wanted to apply the law.

[15] D. Sylva, S. Yoshihara, *Rights by Stealth. The Role of UN Human Rights Treaty Bodies in the Campaign for an International Right to Abortion*, New York 2007.

[16] M.A. Peeters, *Hijacking Democracy. The Power Shift to the Unelected*, [United States] 2002.

[17] More detailed accounts of the Glen Cove meeting can be found at D. Sylva, S. Yoshihara, *Rights by Stealth…* The UN have published an official account: UN Population Fund, UN High Commissioner for Human Rights, and UN Division for the Advancement of Women, 'Summary of proceedings and recommendations', Roundtable of Human Rights Treaty Bodies

mendations issued by bodies such as the CEDAW or the HRC, but we should also not be impressed by them. They are not legally binding and the authority of those making them is quickly eroding, as the international community is increasingly becoming aware that statements emanating from such bodies in many cases cannot be taken as credible and disinterested legal expertise.

Of course, the subtle re-programming of human rights does not take place in a political and social vacuum. They are supported by a certain fringe of society (mostly in Western countries), by a number of governments (notably from the EU and North America), by certain NGOs and those who finance them, and by certain mass media. Some of the NGOs involved, like Amnesty International, have espoused this agenda only recently,[18] and are now depleting the worldwide respect and appreciation they had previously earned for their advocacy work on behalf of political prisoners. Others, like the International Lesbian and Gay Association (ILGA) or the Center for Reproductive Rights (CRR), are single issue lobbies that have been specifically created for the particular purpose of promoting LGBT and abortion rights. The involvement of such groups in international policy making at UN and EU level raises some important questions with regard to international governance, given that they all seem to draw their funds from a relatively small number of wealthy international foundations (such as George Soros' Open Society Institute,[19] the Hewlett Foundation, the Packard Foundation, etc.), who, by financing those and similar lobbies, create a misleading imagery of a "pluralistic civil society". With regard to the LGBT pressure group ILGA, it has recently been revealed that it receives roughly 70% of its funds from the EU budget and other government sources, thus raising doubts with regard to its status as "civil society" and "non-governmental organization".[20]

With particular regard to Europe, it is certainly noteworthy that the EU has set up its own human rights catalogue, the EU Fundamental Rights Charter, which once again follows the same pattern of "re-interpretation". When the Charter was drafted in the late 1990s, it was said that the task was not to create new human rights, but to improve the "visibility" and "accessibility" of existing human rights standards.[21] But how can the Charter achieve that objective, given its unclear relationship to the European Human Rights Convention? In some instances, the texts of the Charter and the Convention are very similar, but in other cases they differ

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on Human Rights Approaches to Women's Health, with a Focus on Sexual and Reproductive Health Rights, Glen Cove Report, 9-11 December 1996.

[18] With regard to AI's sudden shift towards pro-abortion advocacy see: R.T. Anderson, 'Amnesty International's Dirty Little Secret', *First Things*, 2 May 2007.

[19] George Soros is a major donor not only of Amnesty International and Human Rights Watch (to which he made a donation of 100 million US$ in 2007), but also of ILGA Europe, Catholics for a Free Choice, and a true plethora of similar organizations.

[20] The group's financial statements can be retrieved from its website: <http://www.ilga-europe.org>.

[21] See: the Conclusions of the Cologne European Council (June 1999).

widely.[22] How is that going to improve "visibility"? Or is this in fact a calculated attempt to subject the Convention to novel interpretations, cheekily suggesting that the text of the Charter, albeit quite different from that of the Convention, is how the Convention should *really* be understood? What implication does it have for human rights if the Charter introduces a veritable inflation of new rights, putting the "right to a high level of consumer protection"[23] and "the right to paid holidays"[24] on a par with the right to life or the freedom of opinion? Do EU policies on "equality" and "anti-discrimination"[25] really represent an internationally agreed pre-existing human rights standard? Or are they not Marxism clad in human rights vocabulary, providing the basis for unprecedented interference into citizen's lives?

And what, finally, should I say of the EU Fundamental Rights Agency? In the short time of its existence, this new institution has really done all it could to acquire a very questionable reputation. This has to do not only with the initial doubts whether yet another human rights institution was really needed,[26] but also with the

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[22] One of many examples is that, while Art. 12 of the Convention states that "men and women of marriageable age have the right to marry and to found a family", the Charter, in its Article 9, simply states that "the right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights". This could be more than the Convention foresees, or it could be less, but it is certainly not the same. The intention clearly is not to make the pre-existing right more visible, but to change its meaning. In its decisions Goodwin v. the UK and Schalk and Kopf v. Austria, the ECtHR quotes Art. 9 of the Charter in order to demonstrate that there is a new trend in Europe to legally recognize homosexual partnerships, and uses it as a pretext to conclude that the term "family life" (in Art. 8 of the Convention) should henceforth be construed to include homosexual relationships. Quite obviously, those references to Art. 9 of the Charter would have made no sense if the Charter said the same as the Convention. But it would be wrong to say that Art. 9 of the Charter simply widens the concept of "marriage" and "family" without potentially damaging them. Indeed, under a strictly positivistic interpretation of Art. 9 the State's obligation is that it must legislate for legal institutions that are called "marriage" and "family", but there is no further specification of what these names mean. Theoretically, therefore, a State could legislate that henceforth "marriages" can be concluded only by two persons of the same sex, and not by different-sex couples, or that they can be concluded only by three or more persons. The traditional concepts of marriage and family are therefore protected *only* under Art. 12 of the Convention, whereas they are *diluted* beyond recognition by Art. 9 of the Charter.

[23] See: Art. 38 of the Charter.

[24] See: Art. 31.2 of the Charter.

[25] See in particular: Art. 21 and 22 of the EU Fundamental Rights Charter, Art. 19 of the EU Treaty, and the secondary EU Law based thereupon.

[26] Terry Davis, then Secretary General of the CoE was quoted by *The Financial Times* (7 May 2005) as saying with regard to the new Agency: "With all the best will in the world, I can't understand what it (i.e., the new agency) is going to do". Of course, as it often happens in such cases, he may have had the CoE's own institutional interests in mind. But the point he made is a valid one: to ensure the protection of human rights in Europe, one supranational judiciary system (namely that of the CoE) is sufficient. If there are grounds for dissatisfaction with the CoE system, this system should be improved, but there is no need for a second one. The new Agency's function was thus restricted to "providing expertise and data on fundamental rights"

biased way in which the Agency seeks to involve certain civil society groups in its work while excluding others,[27] its unbalanced choice of priorities, and the rather shoddy output it has produced so far. Its official task of "providing expertise" on fundamental rights to EU institutions appears to be of little interest to the Agency, which instead seeks to play a role as political agenda-setter. The focus of the Agency is set on a narrow set of politically rather controversial issues, among which the relentless fight against so-called "homophobia" seems to be the most important one. But the reports that the Agency has published,[28] and the surveys it is carrying out,[29] can hardly be viewed as the result of objective and disinterested research. It is more appropriately described as propaganda.

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to the EU and its Member States. But this also raises questions: there are specialized human rights research institutes all over Europe, and there is certainly no lack of academics researching on human rights. But here as elsewhere, competition and plurality are likely to lead to a better output than the setting up of a central EU institution that will tend to monopolize its role as a provider of human rights related expertise. Regrettably, the output of the Agency has so far fully confirmed this concern.

[27] In this context, mention should be made of the Agency's "Fundamental Rights Platform", which is designed to be the interface between the Agency and "civil society". The rules that the Agency has set up for this Platform foresee that the Agency's Director is free to decide which non-governmental organizations are accepted as members of the platform, and which are not. There is a serious risk that this will ultimately not lead to a dialogue with the *real* civil society outside the Agency's precincts, but only to a dialogue with an *artificial* civil society that the Agency has made up according to its own purposes. One might describe this as political ventriloquism: in speaking to this platform, the Agency seems to speak to itself.

[28] I refer her to my detailed analysis of the Agency's report on 'Homophobia and Discrimination on Grounds of Sexual Orientation in the EU Member States': J. Cornides, 'Human rights pitted against man (II) – the network is back', *International Journal of Human Rights*, Vol. 14, No. 7 (2010), pp. 1139-1164, http://dx.doi.org/10.1080/13642980903301968.

[29] In spring 2012, the Agency, closely co-operating with the advocacy group ILGA-Europe, has carried out an 'LGBT Survey'. According to the Agency's website, this was done "to establish an accurate picture of the lives of lesbian, gay, bisexual and trans people" and to "set the agenda for years to come". The outcomes of the survey remain to be published. But is it really necessary to await them? The methodology that has been used is absurdly far away from any scientific standard that such studies are normally required to comply with. The survey was carried out via a website that was freely accessible on the internet, and there was nothing to prevent a person from responding however often it wanted. The initial questions related to the respondent's own sexual orientation, making sure that only persons identifying as LGBT were allowed to fill out the rest of the questionnaire (while non-LGBT persons were apparently not supposed to contribute to the Agency's intended "agenda setting"). The remaining questions were drafted in a highly suggestive way, so that it was hardly possible for any respondent to fill out the questionnaire without stating that he (1) had experienced "discrimination based on sexual orientation" and (2) endorsed new legislative proposal to strengthen protection against such discrimination. The anonymity of the survey means that no verifiable information on *real* cases of discrimination has been collected, but only the views of persons who are highly motivated to "tell their story" as self-perceived "victims". Without wishing to downplay the issue of "homophobia", and with all due respect for the Agency: such a survey can under no circumstances be qualified as

Last but not least, I should not forget to mention the activities of certain academics, some of whom hold offices in UN institutions, who, through the publication of declarations such as the "Yogyakarta Principles"[30] or the "Equality Principles",[31] seek to pass off controversial social agendas as "established human rights standards".

4. Points of Discernment

All these developments are well-documented and, by now, widely known and understood. There is no denying it: human rights today have no certain and universally agreed meaning anymore, but are subject to change. Some might describe that change as "progress", while others call it "manipulation".

This raises important questions: is it not in the nature of human rights to evolve, and to be adapted to the needs of the time? Is there no room for progress,

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serious-minded research. The fact that in times of economic crisis more than 300.000 Euro were spent on this project raises urgent questions with regard to this Agency's management.

[30] The 'Yogyakarta Principles' (YPs) are a document adopted by a group of 29 "international human rights experts", some of whom enjoy considerable prominence, which uses generally recognized international human rights standards as a basis for a comprehensive "LGBT rights" agenda. The approach is clever but fallacious: from the (uncontroversial) insight that LGBT persons enjoy human rights as everybody else, it infers that the (highly controversial) "LGBT equality" agenda is in fact nothing but the practical application of human rights to their specific situation. The document contains no less than 120 rights claims, each of which begins with the words "States shall…", as if these were generally recognized rights standards. But obviously, for any lawyer who is not ideologically blindfolded it must be obvious that many these warped claims (such as the claim for same-sex marriage, homosexual adoption, access to medically assisted procreation procedures, or – last but not least – gagging orders against critics of this agenda) do not reflect any existing human rights standards, but that they represent the most audacious attempt at manipulation that human rights have ever been subjected to. The document erects thus a monument to the intellectual dishonesty of its authors, but very disconcertingly those authors continue occupying high-ranking posts in the UN or in academia.

[31] The 'Declaration on the Principles of Equality' is a document that has been drafted by a group of lawyers that, according to its authors, "reflects a moral and professional consensus among human rights and equality experts". The question is: does this refer to all human rights experts (which would be a rather temerarious claim) or only to those who have signed the Declaration (which would turn it into a rather irrelevant piece of paper)? The Declaration is promoted through a London based NGO, the Equal Rights Trust (ERT). The document is certainly more honest than the Yogyakarta Principles in that (even if the authors might not object to seeing it interpreted that way) it avoids making the bold assertion that its content represents a summary of existing and generally recognized rights standards. It should thus be read as a roadmap indicating the direction into which the authors intend to steer the concept of human rights in the years to come. But even under such a cautious interpretation the document is disconcerting. It turns "equality" into a new fundamental right with wide implications not only for the relationship between individuals and the state, but also for the relationship between citizens, and in particular with regard to private autonomy (i.e., the freedom of contract).

for improvement? Are those who, as UN officials, judges, academic experts, or NGO activists, seek to push forward this evolution not perfectly legitimized to do so? If we think that this evolution leads to the creation of "false" human rights, where do we find the "true" human rights that we could oppose to the false ones?

4.1. Human Rights or Natural Law?

It all depends what we understand by the term "human rights". The term suffers from a certain ambiguity. On the one hand, it can refer to those rights that are enshrined in relevant international documents such as the Universal Declaration of Human Rights (UDHR), the European Convention on Human Rights (ECHR), the ICCPR, or similar instruments. On the other hand, we often hear that human rights are "pre-positive legal principles", i.e. legal rules that are pre-existent to, and should be complied with by, any written legislation.

But obviously, both cannot be true at the same time. What we read printed black on white in international conventions is *positive law*, i.e. it is part of the written legislation that should be *compliant with* those higher-ranking pre-positive principles, but it cannot itself be part of those principles. Inversely, one of the main characteristics of "pre-positive legal principles" is that they are pre-positive, i.e. not part of any written legislation.

I would thus propose to carefully distinguish between the principles and their expression, giving the name of "human rights" only to the rights enshrined in widely recognized international conventions or in national constitutions, whereas for the "pre-positive principles" I would suggest using the term that was traditionally used for them: Natural Law. I am aware that the term "Natural Law" is somewhat unfashionable these days, and that some will say that its meaning is uncertain. But I object that (1) the clear distinction between unwritten principles and their written expression is a necessity, and that (2) the problem of uncertainty with regard to the content of the pre-positive principles will always remain, whatever name is given to those principles. So, for the sake of clarity I think we should all stick to the term "Natural Law". For the comfort of the more secular-minded I should add that "Natural Law" is not a Catholic or Christian invention, but that it was known to the Romans long before they became acquainted with Christianity,[32] and that it was also generally and unquestioningly accepted in the era of enlightenment.[33]

[32] See, for example: M.T. Cicero, *De re publica*, III.33 (from Lactantius Inst. Div. VI, 8.6-9), one of the most famous definitions of Natural Law: "Est quidem vera lex recta ratio naturae congruens, diffusa in omnes, constans, sempiterna […] nec vero aut per senatum aut per populum solvi hac lege possumus […] nec erit alia lex Romae, alia Athenis, alia nunc, alia posthac, sed et omnes gentes et omni tempore una lex et sempiterna et immutabilis continebit".

[33] Notably, the 'Déclaration des droits de l'homme et du citoyen', which was adopted by the French National Assembly in 1791 and can be viewed as the founding document of modern

By speaking of Natural Law, we simply give expression to the insight that there is a moral law that is pre-existent to all positive legislation, because it is part of our human nature. This moral law is of universal application, remains the same at all places and at all times, and is accessible to human reason. All positive legislation must comply with it. Positive laws that contradict principles of Natural Law have no legitimacy; they are injustice clad in the outward appearance of legality. There is no moral obligation to abide by such laws, but there can be an obligation to oppose them.

It follows that human rights should, like all other positive legislation, comply with Natural law. It also follows that, like with all other positive legislation, it can happen that human rights (or their interpretations) stand in contradiction to Natural Law, and hence lose their legitimacy. In such a case the provisions called "human rights" would not only not be binding, but we would actually be bound to disobey and oppose them. And even in the best of cases, human rights law is only a reduction of Natural Law, always open to improvement, and sometimes open for error or, worse, for deliberate distortion. It is never possible to capture the full content of Natural Law in a short catalogue of rights, however well drafted.[34]

Although the concept of Natural Law is disliked by many, I do not believe that anybody seriously calls into question its existence. On the contrary: those seeking to promote the re-programming of "human rights" do so on the basis of what they appear to believe are precepts of Natural Law (always supposing, of course, that they are sincere in their convictions). For example, if the abortion lobby wants a new "right to abortion" to be formally recognized as a human right, it does so because (1) it knows that currently such a human right does not exist and (2) it believes that women are morally entitled to have access to abortion. In the same vein, if the gay lobby says that same-sex marriage is a human right, what it actu-

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human rights, makes explicit reference to Natural Law in its preamble: "Les Représentants du Peuple Français […] ont résolu d'exposer, dans une Déclaration solennelle, les droits naturels, inaliénables et sacrés de l'homme".

[34] Among the many differences between Natural Law and (positive) human rights, I would point out the following to be the most important ones: (1) Natural Law exists as a single organic body, whereas there is a plurality human rights. (2) While there can be a conflict between competing human rights, there can be no self-contradiction within Natural Law. (3) Natural Law is not the subject matter of any political or legislative process, but of exploration and discernment. There are primary directives on Natural Law (which are self-evident), secondary directive (which any person of average intelligence can easily derive from the primary directives), and tertiary directives (the discernment of which require a particular level of insight and reflection). Debates on the content of Natural Law usually concern only this tertiary level. For example, the precept "you shall not kill" is self-evident, and it does not require an extraordinary level of insight to derive from it the prohibition of reckless behaviour that might result in the unintentional killing of a person. But issues such as abortion or medically assisted procreation are less easily resolved, as this requires insight regarding the status of the human embryo. This is the area where expertise is needed. But such expertise is decidedly different from the subjectivism that is often displayed in these debates.

ally means is that it *should be made* a human right, i.e. their claim is that gays have a natural right to marry.[35]

Thus, the real question that we need to discuss is not *whether Natural Law exists*, but *what it contains*.

4.2. The Anthropology of Human Rights

But which criteria can we use to find out what is, and what is not, contained in Natural Law? I think that the answer to this question ultimately has to do with the anthropology that underpins human rights, i.e. our understanding of human dignity.

It appears that nowadays human dignity is an inexhaustible source of new rights and entitlements. Especially where the discussion is about "sexual rights" or "respect for different sexual orientations", the reasoning seems to be that because someone is a human being he must have the right to do whatever his sexual urges compel him to do, and that each and every choice is equally worthy of "respect". This is also what lies at the heart of the ECtHR's oftentimes rather excessive interpretation of Article 8 of the European Human Rights Convention, the provision protecting the right to privacy. This "privacy", it seems, is the right to do whatever one pleases, without being disturbed by anyone raising questions regarding the morality or practical impact of one's choices.[36] Even more, it is oftentimes pretended that our choices are not really choices, but that they are pre-determined in our individuality, our urges and instincts, likes and dislikes, preferences and inclinations.

Such a concept of human dignity is, of course, self-defeating: it boils down to saying something in the sense of: "we are human; therefore we have the right to behave like animals".[37]

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[35] I made that point in more detail in: J. Cornides, 'Natural and Un-Natural Law', *C-Fam Legal Studies Series*, No. 2 (2010).

[36] Hence the ECtHR's unquestioning acceptance of choices such homosexuality, transsexuality, abortion, use of medically assisted reproduction techniques (including sperm and ova donation, surrogate motherhood, pre-natal and pre-implantation diagnostics), euthanasia, assisted suicide, pornography, prostitution, etc. The Court never discusses the moral implications inherent in any of those choices, nor their practical consequences both for the individuals involved and for society at large, but simply treats them as part of "private life".

[37] At this point, there was heckling from some in the audience who said that this argument was "homophobic", and that I had described homosexuals as "animals". But this is obviously not the case. The point I was making here was about the *anthropologic assumptions* underlying the gay rights movement.

That assumption seems to be that somebody who is homosexual has no other choice than to engage in homosexual acts, and that, therefore, he must also be allowed to do so. In other words, people have compulsions that they have no choice but to follow, and they should be

criticized neither for these (non-elected) compulsions, nor for the sexual actions that, driven by those compulsions, they perform.

This raises several questions. The first (and certainly not the least important one) is whether someone can actually "be" homosexual: is the auxiliary verb "to be" really in its right place here? Certainly, one cannot "be" homosexual in the same way as one is a man or a woman, or in the same way as a dog is a dog. Many self-declared homosexuals did not always declare themselves such. Many have children from prior heterosexual relationships, which shows that their "sexual orientation" was not necessarily always the same one. Rather, it appears that sexual orientations can be transient. In the common language, we call "thief" someone who has stolen something. But does a thief always remain one, even if he has committed only one single theft during his lifetime? Or is he only one at the moment of the theft? What if he repents? If someone likes to smoke cigarettes, we call him a smoker. But does he continue to be a smoker when he gives up smoking? No, and we would stop calling him such. In all those circumstances, the word "to be" describes rather different realities.

What is certain is that some people experience homosexual compulsions, just as other people are feel addicted to smoking. Those compulsions can vary in strength and frequency, they can be transient or of longer duration. Some people indulge in them whereas others suffer from them and (in some cases successfully) try to overcome them. When we say that someone "is" homosexual, or that he "is" a smoker, we should be aware the diversity of situations, and of the different modes of the word "to be". This has evident implications for the question to which extent specific protection against discrimination is needed.

The second point is that the anthropology described above discards the fact that man is not driven by his instincts and urges alone, but that he is capable of forming reasonable moral judgments. This is precisely what distinguishes us from animals, and what lies at the basis of our specific human dignity. It is possible for man to overcome his instincts and urges (not only sexual urges, but also his emotions such as anger, jealousy, greed, fear, etc., or his longing for a cigarette) and to act in contradiction to them, if his better insight so demands. This is why we can be responsible for our actions.

Thus, what I have said is not that homosexuals are animals. They are certainly no more animals than any of us. But what I have in fact said is that the anthropology upon which the claim for "LGBT equality" is built discards the humaneness of humanity and reduces man (indeed *every* man, not only homosexuals) to the status of animals without reason and free will. This is a reasoning which appears to stand in contradiction to human dignity, and which I find highly offensive.

That homosexual behaviour is found in many animal species (including our own) and should therefore be accepted is nowadays a frequently used argument in favour of legal recognition of "LGBT equality" (see, for example: K. Goodall, *International Journal of Human Rights*, Vol. 14, No. 7, p. 1181). A group of Norwegian biologists even went so far as to organize an exhibition on the issue to prove the point (2006 in the Natural History Museum, University of Oslo). But this argument seems unconvincing for several reasons. Firstly, it is *superfluous* to recur to the homosexuality in animal species, when in fact it would seem completely sufficient to say that "homosexuality in the human species occurs in nature, ergo homosexuality is natural for human beings". Why point to animals when it suffices to point out the (uncontroversial) fact that some human beings have homosexual compulsions? Does this not unwittingly betray that those making such arguments view animals as our true role models? Secondly, one must ask what would follow if similar arguments were accepted in other contexts than homosexuality: could one not justify paedophilia, polygamy, incest, or cannibalism, in exactly the same way? All occur in various animal species. Thirdly, even if the argument – as I have proposed a few lines above – were reduced to concluding from (occasionally occurring) *human* behaviour to

But the difference between us and animals is that we, by virtue of our reason and free will, are capable of making moral choices, whereas animals do not have this capability. Our human dignity is derived precisely from this capability of making moral choices rather than being enslaved to our instincts and urges. This means that we enjoy a freedom that animals don't have, but that freedom is associated with responsibility. In other words, we have the *faculty* of freely choosing between good and evil, but we have no *right* to choose evil instead of good. Saying that human dignity confers on each of us a right to do as he pleases, or to adopt an autonomous moral code according to his own taste, is thus a patent absurdity.

In a recent paper,[38] British scholar Christopher McCrudden has observed that human dignity, while it is generally accepted to be the foundation upon which the whole edifice of human rights is built, has no certain meaning.

Beyond a basic minimum core – he writes – [it] does not provide a universalistic, principled basis for judicial decision-making in the human rights context, in the sense that there is little common understanding of what dignity requires substantively within or across jurisdictions. The meaning of dignity is therefore context-specific, varying significantly from jurisdiction to jurisdiction and (often) over time within particular jurisdictions. Indeed, instead of providing a basis for principled decision-making, dignity seems open to significant judicial manipulation, increasing rather than decreasing judicial discretion. That is one of its significant attractions to both judges and litigators alike. Dignity provides a convenient language for the adoption of substantive interpretations of human rights guarantees which appear to be intentionally, not just coincidentally, highly contingent on local circumstances.

As McCrudden demonstrates, the variety (and mutual contradiction) of rights claims that can be built on the concept of human dignity is indeed remarkable. It serves thus as a mere placeholder, but "unlike in linguistics, where a placeholder carries no semantic information", it carries "an enormous amount of content, but different content for different people".[39] In other words: anyone can read in it whatever he likes. There is only a very limited consensus, consisting of three elements, which McCrudden summarizes as follows:

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the *human* nature, would then not theft, murder, corruption, tax evasion, and even "homophobia", also be part of that human nature? In that case, is there anything that we could prohibit without doing violence to that human nature? That would be the end not of sexual mores, but of morality *tout court*.

Clearly, what is at fault here is the underlying concept of "human nature". Not everything that occurs among human beings corresponds to the human nature. But what clearly belongs to the human nature and distinguishes it from that of animals is the capability to form reasonable moral judgments.

[38] C. McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights', *European Journal of International Law*, Vol. 19, No. 4 (2008), pp. 655-724, http://dx.doi.org/10.1093/ejil/chn043.

[39] Ibid., p. 678.

The first is that every human being possesses an intrinsic worth, merely by being human. The second is that this intrinsic worth should be recognized and respected by others, and some forms of treatment by others are inconsistent with, or required by, respect for this intrinsic worth. The first element is what might be called the «ontological» claim; the second might be called the «relational» claim." The third element is "is the claim that recognizing the intrinsic worth of the individual requires that the state should be seen to exist for the sake of the individual human being, and not vice versa (the limited-state claim)".[40]

But McCrudden also offers some further thoughts, which, I think, open a path for fruitful reflection. Pointing out the original meaning of the Latin word *dignitas*, he writes: "The concept of *dignitas hominis* in classical Roman thought largely meant 'status '. Honour and respect should be accorded to someone who was worthy of that honour and respect because of a particular status that he or she had. So, appointment to particular public offices brought with it dignitas".[41] Thus, the bearer of dignity undoubtedly is entitled to be treated in a way that corresponds to his status. But he also must behave in a way that is not "below his dignity". Dignity is not only a source of rights and entitlements, but also of duty.

For Christians, the true origin of dignity is that man is created in the likeness of God. Non-believers will find it difficult to accept this point of view. But both, believers and non-believers alike, might accept the idea that the human existence is an office that brings with itself not only rights, but also obligations. An anthropology where rights are not accompanied with obligations, and where "self-fulfilment", or the pursuit of pleasure and happiness, are turned into the supreme values, is insufficient as a foundation for human rights.

4.3. Equality or Justice?

The over-emphasis put on the "right to privacy" (Art. 8 of the ECHR) is recently offset by a new current in the human rights discourse which puts similarly excessive emphasis on equality. While "privacy" can be considered a code word for extreme permissiveness (in particular with regard to sexual mores, abortion, birth regulation, or the family), there emerges with strange simultaneity a novel concept that is decidedly *illiberal*: it is called "anti-discrimination".

Of course, we have been taught to believe that discrimination is bad, so "anti-discrimination" must be good. But what is hidden behind this new mantra appears to be a new version of Marxist dialectics. While we used to understand 'equality' in the sense that everyone should be equal before the law, it now is interpreted as meaning that the law should make everyone equal. That is nearly the opposite. Indeed, this new understanding of equality requires that the world is divided into

[40] Ibid., p. 679.
[41] Ibid., pp. 656-657.

oppressed classes (e.g. women, disabled, LGBT, migrants…) and their oppressors (men, non-disabled, heterosexuals, whites…), and a class struggle is organised. What is presented as the solution for all problems is the gradual elimination of private autonomy (i.e., contractual freedom), a solution that is all too reminiscent of the elimination of private property in the Communist system. And of course, this also requires a "strong state", i.e. powerful new administrative structures that are created specifically for the purpose of enforcing "anti-discrimination" policies, and which enjoy wide margins of discretion…

The way in which "anti-discrimination" has recently been turned into the absolute top priority of human rights policies is remarkable and, to some extent, disconcerting. The EU Fundamental Rights Agency, for example, seems to view "equality" as the one and only human right that is worth dealing with, whereas rights of better pedigree (such as the right to life, freedom of opinion, freedom of religion, property…) receive considerably less attention, if any at all. Generally it appears that in the EU institutions "equality" is used more and more synonymously for "human rights". But both are not the same.

Here as elsewhere, we are confronted with ideologically committed "experts" seeking to promote a political agenda through the use of human rights language. 128 such experts have signed a document called the 'Declaration of Principles of Equality'.[42] For inadvertent readers the document must look like a careful and balanced legal expertise. In actual fact, however, it is a political manifesto. As the authors of the Declaration themselves assert, their document "establishes, for the first time, general legal principles on equality as a basic human right",[43] thereby implying "the most radical re-think of equal rights in two generations".[44]

4.4. Dream or Reality? Ideology or Realism?

Certainly, there is nothing wrong in "re-thinking" human rights. Indeed, I agree that re-thinking human rights is urgently necessary, given the situation I have described. However, to regain universal consensus, they must neither result from assiduous politicking at the UN or elsewhere, nor from the particular agendas of some pressure groups, nor from a particular religion or political ideology. Instead they must be grounded in *objective truth*. Essentially, this is what Natural Law provides: that "the law must correspond to the truth". In other words, what *ought to be* is derived from what *is*.

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[42] See above, note 31.

[43] The Equal Rights Trust, 'Mission Statement", at <http://www.equalrightstrust.org/mission-statement/index.htm>, 12 December 2012.

[44] The Equal Rights Trust, press release of 21 October 2008: 'Experts Urge New Era of Global Human Rights and Equality Amidst Economic Turmoil".

What does that mean? For example, if it is a scientifically proven fact that human life begins at conception,[45] then we cannot arbitrarily exclude the human embryo from the protection afforded by human rights. If we have reason to believe that "brain death" does not mean that a person really is dead, then we cannot accept that that person's organs are harvested for transplantation. When making laws, we cannot simply set aside reality and adopt new definitions of life and death just because that suits the interest of some pressure groups. Likewise, if a document like the Yogyakarta Principles defines a person's *"gender identity"* as "each person's deeply felt internal and individual experience of gender",[46] and requires States to ensure that a person be allowed to change its "gender identity" at any time,[47] how does that relate to reality? A man who feels that he is a woman must be legally recognized as such? Why don't we apply this approach also to other areas? I am in fact 43 years old, but feel as if I were 65, so please let me go into retirement. I have actually never studied medicine, but feel as if I had, so please allow me to practise as a doctor. Does that not mean that a person's subjective self-identification supersedes its objective identity, and that *wishful thinking replaces reality*? By adopting legal definitions, we create an imaginary dream world all of our own, which, it seems, is more to our liking than the one we were born to live in. We are emancipating ourselves from nature, from reality, from truth. We are emancipating ourselves from ourselves.

The quest for truth is painstakingly absent from today's human rights discourse. Indeed, one might get the impression that truth is itself the greatest threat to human rights. The claim that some statement be objectively true is dismissed as intolerant, and whoever dares to affirm that it is possible for the human mind to discern objective truth is called a fundamentalist. Our pluralistic and democratic society accepts no "truths", only "opinions". People seem to believe that the rejection of truth is "tolerant", or that it is a necessity in a pluralistic society that wants to live in peace.

But the opposite is the case. It is precisely the common quest for truth that creates a common ground on which a pluralistic society can be built. To claim truth for one's opinion means to expose that opinion to scrutiny in public discourse. If there is no truth, there can be no such scrutiny, and the public discourse degenerates into a mere struggle for political power: what remain are "prevailing" and "dissenting" opinions, and the latter are outlawed.

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[45] See: CJEU, Brüstle v. Greenpeace, C-34/10.

[46] YPs (2008), p. 6, at <http://www.yogyakartaprinciples.org/principles_en.htm>, 12 December 2012.

[47] YP 3. This wishful thinking became reality in Germany, where the Constitutional Court (Bundesverfassungsgericht) ruled that transsexual persons had an entitlement of legal gender reassignment even without undergoing any surgery, under the sole condition of producing of a certificate issued by an expert psychologist confirming the applicant's self-perception as a person of the opposite sex (see: BVerfG, 1 BvR 3295/07, 11 January 2011).

5. Conclusion: the Crisis of Human Rights and the Crisis of Western Democracy

I am drawing here a rather critical picture of human rights. It represents, as I must admit, only an overview of the current situation, which is maybe too negative in some respects, and which could be improved with regard to many details. But overall, I believe, the situation is correctly described. What we are facing is not just a number of more or less marginal problems in the application of human rights, but it is the idea itself that risks losing its credibility.

I foresee that some readers will accuse me of opposing human rights. Such an accusation would be absurd: I am in favour of human rights, and I do think that international mechanisms to protect them are needed. But if the human rights idea is dear to us, we must not close our eyes before the misinterpretations and manipulations to which it is subjected, and we must act decisively to restore their original credibility. This will be a difficult task, for the self-serving institutions and experts who currently exert control over them will not let go easily. What I am saying is not that we do not need human rights and the institutions that surround them, but that we should learn to view them more critically. There is no need to take each and every ECtHR judgment, CoE recommendation, or UN report, seriously, and at times it may be even wise to simply ignore them.[48]

It is perhaps no coincidence that the current crisis of human rights comes at a time when the political and social model of the West in its entirety is going through a period of serious tribulations. The crisis of the human rights idea and the crisis of Western democracy might be interconnected, as they seem to have very similar causes.

The business model of Western democracy since WWII was economic growth, which led to a permanent increase of wealth and living standard for everybody, including the working masses. But the rapid economic growth of the post-war years has considerably slowed down already some decades ago, and the mere redistribution of the wealth that was actually generated in the industrialized societies in the West does was insufficient to maintain their living standard and to finance their ever-expanding welfare systems. Therefore, they had to seek for other solutions,

[48] There is indeed a growing sense of distrust against these institutions, which finds also its expression in various court decisions at national level. Cf. the decisions of the Italian Corte costituzionale 311/2009 (at §6), and the Irish Supreme Court IESC 81 (2009). Note also the speech of British MP David Cameron delivered at the CoE Parliamentary Assembly on 25 January 2012, in which he warned that: "the concept of human rights is being distorted. As a result, for too many people, the very concept of rights is in danger of slipping from something noble to something discredited […] And when controversial rulings overshadow the good and patient long-term work that has been done, that not only fails to do justice to the work of the Court […] it has a corrosive effect on people's support for human rights. The Court cannot afford to lose the confidence of the people of Europe".

and the solution they found was to redistribute wealth from future generations to the present ones: this, more than anything else, is what lies at the heart of the over-indebtedness of nearly all Western countries, and oft their current economic and political crisis. The steady expansion of the welfare state has helped politicians to win elections and to keep the population in a state of tranquillity. But this business model of the West is coming to an end now: we could speak of the end of an era, the era of social democracy. I regret it very much, for it was an agreeable time to live in.

What Western societies would really need in such a situation are reforms of the social welfare systems, of the education systems, and of the labour market, in order to ensure competitiveness and sustainability. But those necessary reforms would be difficult to carry out, and unlikely to increase the popularity of the politicians enacting them.

By contrast, granting novel human rights to people seems to be a cheap kind of reform, which allows it to generously give something to some people, seemingly without having to take it away from others. It costs the State not very much to adopt pompous new rights catalogues, introduce new anti-discrimination laws, set up new human rights agencies or similar institutions, legalize abortion, euthanasia, same-sex "marriage", and so forth. People generally are happy to get new rights and entitlements if they don't have to pay for them, and politicians endorsing those new rights have the gratifying feeling of being courageous "reformers" or "liberators", as if they were bringing freedom after centuries of darkest oppression.[49]

The true cost of such innovations is hidden, but it is considerable. In a certain sense, the contemporary expansion of human rights and anti-discrimination policies is a massive expansion of the welfare state[50] – at a time when it becomes

[49] A shining example for such zealous reform policies was the government of Spain led by Mr. J.L. Rodriguez Zapatero. It liberalized laws on abortion, divorce, etc., and introduced same-sex "marriage", thus styling itself as a "reform government" with an ambition to profoundly transform Spanish society. At the same time, however, it was considerably less ambitious in carrying out reforms that might have averted or at least alleviated the current economic crisis. (See: I.A. Rato, M.V. Santos, *Proyecto Zapatero. Cronica de un asalto a la sociedad*, Madrid 2010).

[50] Nowhere is this seen more clearly than in the context of "LGBT equality". In a society that has become widely oblivious of the social purposes of marriage, marriage is simply a status that is connected with certain social and fiscal benefits, and it is then no wonder that homosexual couples want to have access to it. While discussions around same-sex "marriage" often have a more symbolic character, the true motivation behind "LGBT equality" appears to be is the extension of social and fiscal benefits that were designed for families with one income and children to care for to same-sex couples with double incomes and no children. See for example: CJEU, Tadao Maruko v. Versorgungsanstalt der deutschen Bühnen, C-267/06, and Jürgen Römer gegen Hansestadt Hamburg, 147/08. The first case resulted in the granting of a "widower's pension" and the second one in the granting of a family allowance to employees living in a registered homosexual partnership. It is hard to see why such benefits should be granted to persons who, not having to care for children, are perfectly capable of sustaining themselves. Such policies create new burdens for the welfare system that will have to be financed by the

increasingly clear that that welfare state approaches the verge of collapse. Nevertheless, we not only introduce new social benefits for those who do not seem to really need them, but we also undermine those institutions, namely marriage and family, on which people will have to rely once they discover that the welfare state is not going to keep its promises.

Although Dostoyevsky wrote these words more than 130 years ago, it seems that they fit perfectly well to describe the inflationary human rights talk of today: "…ибо права-то дали, а средств насытить потребности еще не указали".[51]

To summarize, I think that what we need today is a critical look at the human rights framework that has evolved over the last decades. The right place for human rights is that they must be subordinated to Natural Law. They must be founded not on cheap populism, but on a sound anthropology, in which man is seen as capable of making reasonable and moral decisions, and which therefore holds him responsible for his actions. They must be based on reality rather than on imagination. They must be oriented towards promoting the common good rather than individualistic-parasitic lifestyle choices. Finally they must be integrated into a framework where international treaty monitoring bodies assume the role of guardians, not of legislators. Only under these conditions can human rights retain their credibility.

Abstract

When we speak about human rights, the pre-supposition usually is that we all agree on what we understand by that term. But do we really? The affirmation of the universality of human rights conceals a bitter reality: while on the surface pompous human rights rhetoric gathers widest support, beneath it a hidden cultural war appears to be going on. The post-1968 cultural mainstream in the US and Western Europe uses the language and institutions of human rights to impose a system of "values" that are not universally shared. Ultimately what lies beneath conflicts on single issues (such as abortion, the legal recognition of same-sex "marriages", or the removal of crucifixes from the class rooms in public schools) appears to be a more fundamental conflict between different anthropologies. One of these diverging anthropologies derives from the concept of human dignity a radical autonomy of each human person, whereas the other views dignity as a source both of rights and duties. Radical subjectivism stands against the belief in an objective moral law, arbitrariness against reason, and a "political" against an ontological concept of human rights.

(non-homosexual) rest of society. An extreme case of such rent-seeking occurred in Austria, when a former Federal Minister for Equality entered into a registered partnership after the possibility such partnerships were introduced in 2010. She died only three weeks later, and her surviving partner (another female politician who earned a high income, including pension entitlements, as a member of the Vienna City Council) filed a claim for a widower's pension which in her case allegedly would amount to roughly € 9.000 – per month.

[51] "[…] for they have been given rights, but have not been shown the means of satisfying their wants". F. Dostoyevsky, *The Brothers Karamazov*, Part 2, Book 6, Chapter 3.

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Philosophical and Legal Aspects of Human Rights

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Bioethical Issues in the Framework of the EU Policy

EU competences and bioethics[1]

Ethical and bioethical questions in general were not seen, for a long time, as an issue for the European Community, given that it was primarily an economic entity. Even today, the European Union (EU) does not have any legislative competence for policy areas in which bioethical questions are central. Rather, the principle of subsidiarity applies; that means that it is the EU Member States that take the fundamental decisions in this area, such as whether or not to allow human embryo research in their country.

However, it has become more and more evident that:

- bioethical questions and the new developments in biomedical research are of a transnational nature;
- EU decisions in different policy fields impact upon the bioethical positions of the Member States (e.g. the Directive on the legal protection of biotechnological inventions which touched on the question of the possibility of granting patents on human embryos or DNA sequences).

In other words, bioethical questions in the EU law and policy appeared in connection with the execution of other tasks where the Union has competences. It is mainly about solving practical problems in the functioning of the common market or other common policies. Main areas of EU competence where bioethical issues

[1] In this presentation we refer directly to 'An overview report on bioethics in the European Union' prepared by Ms Katharina Schauer and published by the Secretariat of the Commission of the Bishops' Conferences of the European Community (COMECE) in October 2009, without always quoting it explicitly. Other quoted COMECE opinions were drafted by co-author José Ramos-Ascensão.

arise are: internal market (article 114 TFEU – previous article 95 TEC), public health (article 168 TFEU – previous 152 TEC), consumer protection (article 169 TFEU – previous 153 TEC), research and technological development and space (articles 179-190 TFEU – previous articles 163-173 TEC) and development cooperation (articles 208-211 TFEU – previous articles 177-181 TEC). The EU institutions, mainly the Parliament, may also stimulate a political debate on bioethical issues where they have no competence or create a kind of so-called "soft law" (resolutions, declarations, reports) which are not legally binding but create a political climate and pressure on national governments.

Major Drivers of the EU in the Context of Bioethics

The lack of direct legal competence in bioethical issues is not limiting the growing activities of the EU institutions in this area. It is possible because ethical problems in the debates are in a sense transformed mainly into financial and economical ones. This is quite natural as in the case of biomedicine and biotechnology it is very difficult to separate the ethical and commercial aspects.[2] Ethical questions appear in the context of free movement of goods and services where there is a need to define the meaning of the term "good" and what kind of limits are imposed on services (security standards included i.e. for organs transplantation). A similar thing happens in the field of research where the question of what kind of research should be financed appears (and in this way also promoted) by the European Commission (EC). Being totally conscious of the ethical importance of decisions of this kind, the EC created the European Group on Ethics in Science and New Technologies which should provide the Commission with an ethical assess of the proposals under discussion. In the whole law making and decision making process there are several ethical units involved in the Parliament, in the Commission and in the Council as well. Nevertheless the general impression is that all of them together can rather slow down the procedure or slightly redirect it but cannot stop it completely. This is linked with a general problem we have with contemporary ethics which – in its mainstream – is detached from anthropology. This detachment is weakening the position of ethicists in their confrontation with financial and political pressure. So, besides the fact that their ethical position is based on a "weak anthropology", it can be easily influenced by the industrial and political sectors.[3]

[2] See: M. Grzymkowska, *Standardy bioetyczne w prawie europejskim*, Warszawa 2009, p. 56.

[3] Ethics can be regarded as a human reflection on absolute good, as described by Kant. But can be also treated as an instrument to reach other then ethical goals: to grant a kind of moral comfort to the employees, to ensure staff loyalty, to create good social perception of the enterprise or even to disarm public opinion in the context of some very controversial initiatives.

The existing model of democracy aggravates the situation in the EU context. There is a longstanding discussion on the democratic deficit in the EU. The problem is not provoked by the ill will of the EU politicians and bureaucrats but results from the fact that democracy as a political regime in the ancient times was invented for small political units and now, in the modern times, has been 'enlarged' under the form of the democratic republic to the size of a nation-state. Whenever we are taking on more complicated forms of international cooperation and integration (such as the EU which is a *sui generis* political entity), we rather refer to a model of so-called deliberative democracy. In the case of the EU this results by the creation of special instruments of consultation with different social, economic, political and religious actors. Some of those actors, as i.e. the Catholic Church represented in Brussels by COMECE, stand for a big number of the European citizens. Some others represent big capital or important intellectual sectors (think thanks, academics). Many other still are just based in Brussels small NGOs, sometimes financed mainly by the Commission (i.e. ILGA – International Lesbian, Gay, Bisexual, Trans and Intersex Association). These lobby groups usually have in hands stronger arguments that just ethical.[4] It's worth to quote here a remark done by a German philosopher, Robert Spaemann, who stresses that those who question the fundamental ethical values are not always doing this disinterestedly. It's self-evident – says Spaemann in words that apply only to some researchers – that scientists making experiments on animals would like that no one disturbs them; that experts in human biology can get important cognitive results due to the experiments on human embryos and want that the embryos are at their disposal. But the desire to acquire knowledge isn't always knowledge in itself. It competes with other desires, struggling with the limits, which are of quite different nature. Therefore, researchers should not try to be judges in their own case. In the settlement of this desire rank compared to other desires, everyone is as much knowledgeable about as the scientist. Politicians should not be here intimidated by the scientists.[5] Before one issues an opinion on the value of arguments used by different actors, also on ethical arguments, it could be useful to reflect on who is taking a profit out of the political decision based on such arguments.

[4] How complicated are things one can observe reflecting on the last corruption affairs in the EC called "Tobacco Gate". The scandal appeared just few days before the Commission should launch a new regulation on tobacco. From the website of OLAF (European Anti-Fraud Office) one can learn that this organisation "has signed legally binding and enforceable agreements with the world's 4 largest tobacco manufacturers" (Philip Morris International, Imperial Tobacco Limited (ITL), British-American Tobacco (Holdings) Limited, Japan Tobacco International (JTI)), "in which they agree: to pay a collective total of $2.15 billion to the EU and countries participating in the agreement" (<http://ec.europa.eu/anti_fraud/investigations/eu-revenue/cigarette_smuggling_en.htm>). The question how independent in its investigations is the anti-fraud office arises.

[5] See: R. Spaemann, *Kroki poza siebie. Przemówienia i eseje*, Vol. 1, (*Schritte über uns hinaus. Gesammelte Reden und Aufsätze*, Bd. I), trans. by J. Merecki, Warszawa 2012, p. 217.

The most frequently used philosophical concept in bioethical and bio-juridical discussions – as stresses Laura Palazzani – is the concept of person.[6] The term is also popular in Brussels. But even if in the Charter of Fundamental Rights the respect and protection of inviolable human dignity (Article 1), the right to life (Article 2) and respect for physical and mental integrity of the person (Article 3) are declared, the consequences of these declarations are not always satisfactory. There are very good EU decisions, as i.e. the directive on organ donation and transplantation (based on the principle of non-commerciality of human body), and very problematic ones. Due to the weak anthropology behind the EU primary law, coherence in the EU secondary law is missing.

Three Concrete Cases

As it is always easier to explain the problems on bad examples, three of them are referred below.

i) The first is just the concept of so-called reproductive health, accompanied sometimes with the word "services" and presented with a claim to be recognised as one of the human rights. The whole EU policy in this field is based on Article 208 TFEU (Development Cooperation). Even if there is no EU competence on abortion, as the EC repeats always, in fact, under the term of sexual and reproductive health (SRH), EC is financing abortion and sterilisation in the developing countries.[7] In the recent 'Report on sexual and reproductive health' COMECE experts explain the ambiguity of the term "sexual and reproductive health" as it appears to include abortion as a "right", in contradiction with a strict interpretation of international law and European legislation.[8] The repeated use of the term – in declarations, resolutions and recommendations – tends to bring the phrase into common use and to contribute, through customary law, to the establishment of a "right", despite the fact that it is not mentioned in any convention or universal international treaty and despite the reservations made by many countries, the primary actors in international law.[9] The document therefore offers a clarification of this concept

[6] See: L. Palazzani, *Introduction to the Philosophy of Biolaw*, trans. by V. Bailes, Roma 2009, pp. 22-23.

[7] See: European Dignity Watch, 'The Funding of Abortion trough EU Development Aid. An Analysis of EU's Sexual and Reproductive Health Policy', March 2012, at <www.europeandignitywatch.org>.

[8] 'COMECE publishes the latest Opinions of its Reflection Group on Bioethics', *europeinfos*, No. 151, at <http://www.comece.eu/europeinfos/en/archive/issue151/article/5016.html>. The whole report, 'COMECE Reflections on Science and Bioethics', *Science & Ethics*, Vol. 2 (2012), can be found at <http://www.comece.eu/site/en/publications/pubsec>.

[9] In the COMECE Report we read: "The term «sexual and reproductive health» has now entered into international law because of its mention in the Convention on the Rights of Persons with Disabilities – recently ratified by the European Union – and the provisions of this Convention are binding on the States that have ratified it, where they have not stated any res-

as well as some recommendations to EU decision-makers: to refrain from using such a term in the official documents of the EU and to vote against its use or for its deletion whenever its use is included in any draft official document; to replace it, where used in draft texts, with expressions such as "health of the mother and child" or "maternal and child health", which are more appropriate as they are less subject to ideological use; and to stipulate that the term adopted as a replacement excludes destructive interventions, such as abortion. Where it is not possible, in a specific case, to avoid the use of the term, it should be clearly stipulated that, in accordance with international law and European legislation, this term does not include destructive interventions such as abortion.

ii) A second example is the Directive on protection of animal used for scientific purposes, published in the Official Journal of the European Union on 20 October 2010. The main ethical issue that this initiative raised is connected to the use of human embryonic stem cells (hESC) as an alternative to the use of animals in research for drug development, chemical toxicity and ecotoxicology, and product safety assessment (pesticides, food additives, cosmetics, or other substances with potential risks for the human health). In the 'Alternative Testing Strategies – Progress Report 2011' of the Commission, which gives examples of alternative testing strategies being developed, one finds that five out of twenty one strategies make use of hESC, obtained by the destruction of human embryos.[10] Moreover, the EU has financially supported these technologies through the 6th and 7th Framework Research Programmes.

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ervations. Article 25 states that «States Parties recognize that persons with disabilities have the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability […]. In particular, States Parties shall provide persons with disabilities with the same range, quality and standard of free or affordable health care and programmes as provided to other persons, including in the area of sexual and reproductive health and population-based public health programmes». The interpretation to be given to this concept of «sexual and reproductive health», as employed in the Convention, cannot lead to the surreptitious and insidious introduction into the international legal order of new rights, in particular the right to abortion, which the States have never wished to introduce into any international convention".

[10] The 'Alternative Testing Strategies – Progress Report 2011' of the European Commission (<http://cordis.europa.eu/documents/documentlibrary>). It gives examples of alternative testing strategies currently being developed. From a total of 21, the following 5 strategies make use of hESC:

- ReProtect: aims at developing reproductive toxicity testing using hESC treated with chemicals during their neuronal and cardiac differentiation;
- VITROCELLOMICS: aims at developing preclinical predictive drug testing by human hepatic *in vitro* models derived from hESC;
- INVITROHEART: aims at developing an *in vitro* model derived from hESC that reliably reflects human cardomyocytes for drug testing;
- ESNATS: aims at developing a new toxicity test platform, based particularly on hESC, to streamline the drug development process and evaluation of drug toxicity in clinical studies;
- carcinoGENOMICS: aims at developing a test for assessing genotoxic and carcinogenic properties of chemical compounds *in vitro*, using hepatocyte-like cells derived from hESC.

The original text of the Commission stipulated that, whenever it exists, an alternative "method of testing not involving the use of animals" must be used. Thus, Member States could be obliged to ensure the use of testing methods involving such ethically contentious cells. Later, the EP adopted, at first reading and by a large majority, an amendment which excluded such a possibility by means of better defining and legally confining the expression "alternative method". This amendment aimed at safeguarding respect for the competences of the Member States with regard to ethical issues which were not attributed by the Treaties to the Union, guaranteeing the plurality of ethical positions among the Member States, in accordance with the principles of respect for the national identity of the Member States and for the cultural diversity of their peoples, and serving to promote those numerous alternative strategies for which there is general consensus.

Later on, the Council adopted, at first reading, an intermediate wording allowing the Member States to prohibit the use of hESC as an alternative method; although this wording does not clearly prevent a possible interpretation in the sense that in the case where a Member State either has no specific legislation regarding hESC (e.g. Poland) or has restricting legislation regarding hESC but not plainly prohibiting their use (e.g. Germany), this Member State will be obliged to ensure the use of methods using hESC as an alternative. In the second reading, the EP ended by adopting this Council position as it stands.

Any alternative method using hESC must be validated by the competent EU body (ECVAM, European Centre for the Validation of Alternative Methods). Such validation is a necessary step towards the eventual regulatory acceptance of a method in the EU, a procedure for which the intervention of the national authorities is also required. This is a prerequisite for Member States to be obliged to ensure the use of an alternative method in the terms foreseen by the directive now adopted. In any case, however, the directive acknowledges the ultimate competence of Member States to explicitly prohibit a particular method, namely a method that makes use of hESC.

iii) Other interesting example is the current debate on the new Programme Horizon 2020 and the judgment of European Court of Justice (ECJ) on patenting of biotechnological inventions using hESC, known as *Brüstle case*. Horizon 2020 is the framework programme for research and innovation of the European Union to run from 2014 to 2020. It was launched by a pack of proposals of the European Commission on 30 November 2011 which includes, as the main feature, a proposal for a Regulation of the European Parliament and Council establishing Horizon 2020. Such proposal, however, encompasses an ethical framework which is in fact weaker than the one which is applicable under the current research programme (2007-2013), especially in the field related to funding of projects which make use of human embryonic stem cells. The procurement of hESC is ethically reproachable insofar as it entails the destruction of human embryos. A key element of the current framework is the commitment undertaken by the EC in its Statement on 30 December 2006 not to "submit to the Regulatory Committee proposals for projects

which include research activities which destroy human embryos, including for the procurement of stem cells". However, the proposal of the Commission does not exclude funding of research in hESC. It would be necessary, at least, to confer the abovementioned commitment true legal force. Furthermore, as the use of hESC stimulates their procurement and, thus, escalates human embryo-destructive research, any research using hESC should not be funded under Horizon 2020 as well. This position is also supported by sound scientific, economic and legal reasons – besides the strictly ethical ones. These reasons have been developed in a document prepared by the Secretariat of COMECE called "18 arguments for making funding of alternative stem cells an EU research policy priority as against EU funding of research using human embryonic stem cells".[11] A particular relevant reason is the recent ruling of the European Court of Justice in the Greenpeace v. Brüstle case where it clearly defines the human embryo as a human ovum, as soon as fertilized, or as the product of cloning, and confirms that biotechnological inventions using hESC cannot be patented. From the scientific side, it is noteworthy the continuing advances in fields of research involving alternative stem cells (adult, derived from umbilical cord or induced pluripotent) which present better prospects for clinical applications than hESC; or have indeed already widespread clinical results (and do not raise any special ethical problems). The 2012 Nobel Prize for Medicine rewarded precisely such kind of research.

The pack of proposals of the European Commission is now being discussed at the Council and European Parliament level. In the 3169th Council meeting, in 30-31 May 2012, a partial general approach was reached with an agreement on the essential elements of the Programme: no changes were introduced to the ethical framework of the Programme proposed by the Commission. Apparently, the Council would only accept to put forward any change if it has received a clear sign from the European Parliament in that direction. At such instance, on 18 September 2012, the Borys opinion was adopted by a majority (15 to 8) of votes of the members of the JURI Committee (the one competent, according to the Rules of Procedure, to the "interpretation and application of European law, compliance of European Union acts with primary law" and to assess "ethical questions related to new technologies"). Borys' opinion contains an amendment ruling out the funding of embryo-destructive research and of projects that make use of human embryonic stem cells. One day later, however, the ENVI Committee voted the Busoi opinion without any substantial changes to the Commission's proposals with this regard being adopted. In the final voting at the leading Committee ITRE on 28 November 2012 a so-called compromise amendment was approved.[12] This means that

[11] Position Paper of the Secretariat of COMECE on some Ethical Aspects of Horizon 2020, at <www.comece.eu>.

[12] Horizon 2020, Article 16, Paragraph 3 and 4, as approved by ITRE:

3. The following fields of research shall not be financed: (a) research activity aiming at human cloning for reproductive purposes;

the Committee rejected the ban on financing any research using hESC. Now final adoption of the Programme is being awaited.

Conclusions

Summarising one can say that in the EU institutions we have a very interesting debate on bioethics. There is no consensus and every new initiative of the Commission is reopening the discussion. Weak anthropological base, strong pressure of the industrial and research sector, lobbing of some NGOs and, finally, a culture of compromise, are provoking that the outcome of this debate is quite poor. A very positive and unique, in a sense, symptom was the ECJ judgement on *Brüstle case*; this means that probably the European Court of Justice is much more open for rational debate that any other EU institution. However, in the discussion on Horizon 2020, a strong tendency to neutralise the judgment is/was evident.

Once Sören Kierkegaard realised that "every time the Roman laws are interpreted, it will be remembered that many interpreted them more learnedly but no one more magnificently than Brutus".[13] It's a very good sign that we have so good guarantees of respect for human dignity in the EU treaties, that we have so many ethical committees in the EU institutional structures, and so passionate debates in the EP; unfortunately, at the end of the day the decisions rather follow, more often, a Brutus' argument instead of the one derived from the *Brüstle case*.

Abstract

The European Union does not have any legislative competence with regard to bioethical questions; however, EU decisions in some policy fields – related to the establishing and functioning of the internal market, public health, research and technological development or development cooperation – may impact upon the bioethical positions of the Member States. And the EU institutions, mainly the Parliament, often stimulate a political debate on bioethical issues eventually leading to the formation of a so-called "soft law" (resolutions, declarations, reports) which, although not legally binding, indeed create a political climate and pressure on national governments.

(b) research activity intended to modify the genetic heritage of human beings which could make such changes heritable;

(c) activities intended to create human embryos solely for the purpose of research or for the purpose of stem cell procurement, including by means of somatic cell nuclear transfer.

4. Research on human stem cells, both adult and embryonic, may be financed, depending both on the contents of the scientific proposal and the legal framework of the Member States involved. No funding shall be granted for research activities that are prohibited in all the Member States. No activity shall be funded in a Member State where such activity is forbidden.

[13] S. Kierkegaard, *Fear and Trembling*, Princeton–New Jersey 1983, p. 58.

This paper discusses three matters – the so-called reproductive health, presented as one of human rights; the protection of animals used for scientific purposes and the Research Framework Programme 'Horizon 2020' – where the EU activity, underpinned by a weak anthropological base and the culture of compromise, together with a strong pressure of the industrial and research sector and of the NGO' lobbying, is leading to an incoherent, shallow and unsound outcome, namely from the ethical perspective.

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It's All About the Court(s): General Remarks on the American Idea of Judicial Impact on the Scope of Civil Rights

A legal system is one of the most fundamental issues concerning the functioning of a state, because on the one hand it determines social, political and economic relations, and on the other its provisions and rules bind the government and citizens, ensuring that no one stands "above the law". The variety of regulated issues causes the weight and value of legal norms to relate to fundamental aspects of the political and social system of the state or to individual issues of everyday life. Regardless of the nature of regulations, one may derive from them the character and essential features of the legal system. While analyzing different kinds of norms of American law one should draw a conclusion that the main ideas of the Founding Fathers, who not only created the U.S. Constitution of 1787 but also influenced the first crucial years of the development of the American political and legal system, are still present. These ideas concern a system that is based on a few important principles: the significance of the common law system, the rule of precedent, the separation of powers of the government, the rule of law, the federal-state hierarchic relations, unique procedures in the courts of justice, and, last but not least, the protection of fundamental rights of the people. However, due to the expansion of the powers of the judiciary authorities, it is worth observing that some of the original ideas have been reshaped or even modified. Additionally, one should admit that American law is very close to the people: some civil law cases show surprisingly high activity of individuals bringing suits to the courts, and the multiplicity of cases concerning various aspects of civil rights, both the rights that are literally in the Constitution, and those derived from its essence. All of the mentioned issues need a brief commentary to prove their significance and indispensability in the U.S. legal system, which would lead to concluding remarks concerning the real attitude of American constitutional law towards civil rights issues in the 21st century.

At the beginning, one should look back into the rules of English common law that had the greatest impact on the creation of the American legal system. The common law, which developed in Great Britain after the Norman Conquest, was mainly based on the decisions of judges in the royal courts. The system consisted of rules based on precedents – whenever an English judge made a decision that was to be legally forced, this decision became a precedent: a rule that guided judges in making subsequent decisions in similar future cases.[1] Theoretically, common law could not be found in any code or legislation; it existed only in past decisions of the courts. However, some of the British lawyers decided to codify English common law, thus creating volumes of legal norms useful for the next generations of scholars and historians.[2] The most influential in executing that task was William Blackstone, whose *Commentaries on the Laws of England* became the most valuable document of English law read by the colonists in the 1770s.[3] The lecture of the *Commentaries* allowed the colonists to choose some of the English legal institutions and principles that matched their ideas of a perfect legal system, and to reject such rules and regulations which seemed difficult to adapt in the American reality. It was significant that the colonists accepted, without any hesitation, the fundamental rights of the individuals exposed by Blackstone, i.e. right to freedom, right to safety and right to property. They also appreciated the concept of the supremacy of law, the tradition of precedent, the role of the judges in the legal system, and some guarantees of the accused in the criminal trial.[4] At the same time the English idea of political system was rejected with all its features (such as monarchy, powers of the Parliament, the unitary system), as an objection to historical oppressions experienced by the colonists.

As a result, some of English common law features became part of a newly-born American common law system. This system may often be called (in its English or American version) *judge-made-law*, because of the powerful role of the judiciary in preserving the legal ideas and principles. The judges create the law and shape new regulations following an old latin phrase *stare decisis et non quieta movere*, which means: "to stand by precedents and not to disturb settled points".[5] Common-law courts do not rely on codes, but on previous courts' decisions or – if there is no similar decision – they create a new rule in a case, which is then called "the case of first impression". According to Oliver Wendell Holmes, a famous U.S. Supreme

[1] J. Knight, L. Epstein, 'The norm of stare decisis', *American Journal of Political Science*, Vol. 40, No. 4 (1996), pp. 1019-1020, http://dx.doi.org/10.2307/2111740.

[2] Among the most prominent codificators were Henry Bracton and Edward Coke. See: E. Bodenheimer, J.B. Oakley, J.C. Love, *An Introduction to the Anglo-American Legal System. Readings and Cases*, St. Paul 2001.

[3] See: W. Blackstone, *Commentaries on the Laws of England 1765-1769*, New Jersey 2004.

[4] A.E. Farnsworth, *An Introduction to the Legal System of the United States*, New York 1996, p. 12.

[5] W. Burnham, *Introduction to the Law and Legal System of the United States*, St. Paul 2006, p. 65.

Court Justice, the "law is only what the judges say it is".[6] Therefore, common law is often called *case law*, because legal cases play the main part in understanding the principles and provisions of a particular system. Whatever the theoretical sense of American common law may be, it is important to notice that without practical decisions the legal system wouldn't be so creative and effective as it should be from the perspective of the ever-changing social, political and economic reality. The main decisions concerning the character of American law were made during the Constitutional Convention that took place in 1787 in Philadelphia and led to the creation of legal foundations of contemporary United States, as well as the basis for future meaning of civil rights.

The main reason of the Convention, which gathered more than fifty representatives of the thirteen states, was to revise the Articles of Confederation – the first effort to establish a new country. The document turned out to be imperfect, creating a confederation in which the division of powers proved erroneous.[7] The delegates, among whom there were many distinguished statesmen (more than 60% of whom were lawyers!!!),[8] decided to prepare a new document that would organize the states into a federal republic. Despite many differences concerning the division of power, the role of federal government or the relations among states, the Convention turned out to be a big success: the delegates created a constitution which, after its ratification in 1788, became the fundamental document of the new country. The United States Constitution, as the supreme law of the land, regulated the most important issues concerning the American legal system, implemented in seven brief articles and six main principles resulting from its substance: democracy,[9] rule of law,[10] federalism,[11] supremacy of the

[6] Oliver Wendell Holmes in United States v. Schenck, 249 U.S. 47 (1919).

[7] The problems concerned i.e. such issues as: weak federal government, differences between rich and poor states, economic crisis, and lack of national judicial institutions. For more on the topic see: M. Jensen, *The Articles of Confederation. An Interpretation of the Social-Constitutional History of the American Revolution 1774-1781*, Madison 1963; P. Laidler, *Konstytucja Stanów Zjednoczonych Ameryki. Przewodnik*, Kraków 2007, p. 11.

[8] It is impossible to list all of the famous names of the Convention, but there was an active group of leaders, such as George Washington, Edmund Randolph, James Madison, Thomas Jefferson, John Adams, Banjamin Franklin, George Mason, to name a few.

[9] The Constitution and all the powers granted to the government are derived from the people and belong to the people. According to the Preamble of the Constitution, people of the United States have sovereignty. It was affirmed by John Marshall in the decision McCulloch v. Maryland, 17 U.S. 316 (1819). American community has the right to vote and therefore to choose the representatives that would govern in their name and in their favour. The Constitution grants voting power to the people in Congressional elections (article I) and Presidential elections (article II).

[10] "The government of the United States is […] a government of laws, not of men" – a famous statement by John Marshall from his opinion in Marbury v. Madison, 5 U.S. 137 (1803). The main role of the judiciary is to settle disputes regardless of who the party is (a governmental officer or a private person). The role of the judiciary is prescribed in Article III of the Constitution.

Constitution,[12] separation of powers,[13] checks and balances.[14] Especially the federalism issue made the American legal system significant, because it caused its complexity – there is one federal legal system of the United States and more than fifty separate legal systems of the states and incorporated territories linked by the supremacy of the Constitution. It is obvious that the federal system would have an enormous impact on the future division of powers, also it delineated the perspective of the scope of civil rights protection.

All of the mentioned principles have influenced the shape and character of the legal system of the United States. Unfortunately, during the Convention there was a disagreement between the delegates concerning the constitutional reference to the rights and freedoms of individuals. Lack of unity and lack of time led the Founding Fathers to give up on adding provisions regarding civil rights protection. Indeed, it was one of the reasons why not all of them decided to finally sign the new document.[15] The failure to attach regulations on the rights and freedoms of individuals was quickly repaired by the First Congress, which passed a group of ten amendments to the Constitution known as the Bill of Rights in 1791. From that moment the United States were equipped with a written document (supreme law of the land), which, among many important norms referring to the powers of the government, devoted significant space to a catalogue of guarantees given by the state to the people. Freedom of speech, freedom of the press, freedom of religion, the right to bear arms, and several procedural rights were given to U.S. Citizens,[16] thus limiting the powers of the government.

[11] The document is the highest law of the country and all other acts have to be consistent with its rules and provisions This principle is written down in Article VI of the Constitution. The Constitution is at the top of the hierarchy of the sources of law. Any federal, state or local law must be created in accordance with the Constitution, and can be declared null and void if it violates constitutional provision or principle.

[12] There is one federal government of enumerated powers and fifty state governments possessing all the other powers The Constitution defines all the powers of federal government and leaves the rest of the competences to the states, according to Article IV and X Amendment to the Constitution. Vertical federalism regulates relations between the federal government and the states, whereas horizontal federalism regulates relations between state governments. On the issue of federalism see: L. Fisher, *American Constitutional Law*, North Carolina 2001; J. Nowak, R. Rotunda, *Constitutional Law*, St. Paul 2001; T. Wieciech, *Ustroje federalne Stanów Zjednoczonych, Kanady i Australii*, Kraków 2009.

[13] No branch of government can obtain more powers than the others – S.D. Smith, *The Constitution and the Pride of Reason*, New York 1998, p. 33. The power of the government is divided among three competing branches of government: the executive, the legislative and the judiciary.

[14] Each branch checks the actions of the others and balances their powers. Sometimes the system is called "separate institutions sharing powers". See: R.E. Neustadt, *Presidential Power. The Politics of Leadership*, New York 1960, p. 33.

[15] Three delegates having serious impact on the shape of the constitutional provisions rejected the possibility to sign the document without Bill of Rights: For more on the topic see: M. Farrand, *The Records of the Federal Convention of 1787*, New Haven 1911.

[16] It is important to acknowledge that "citizens" in 1787 meant white male landowners.

The Founding Fathers believed that the Constitution would become the basis for future development of legal norms and regulations, and that the constitutional principles were the best available at that time. They imagined that the tripartite constitutional system was the one that could make the government better at fulfilling its responsibilities. However, they did not realize that a few years after the creation of the Constitution, the separation of powers doctrine would be modified by the U.S. Supreme Court. In one of the most important decisions in its history, *Marbury v. Madison*,[17] the Justices created the power of judicial review. It allowed the federal judiciary to declare null and void these actions of other branches of government which exceeded or contradicted their powers as expressed in the Constitution.[18] Such expansion of judicial powers had a crucial meaning for the character of American legal system. From that moment on, there had been a tribunal which could interpret any constitutional norm or principle, changing the sense of particular clauses or even obtaining some legal values literally absent in the document! Judicial review became the most significant aspect of the U.S. legal system, not only confirming the *judge-made-law* feature of common law, but expanding it to *judge-made-decisions-on-every-aspect-of-American-social-and-economic-and--political-reality*.

As a result one could observe the enormous influence of the Supreme Court on such issues as federal-state relations, powers of the Congress under the commerce clause, competences of the executive and legislative branches of government, and, above all, the scope of civil rights. The idea of the American legal system became an idea of nine[19] Justices who adjudicated in a specific period of time confirming or rejecting the basic concepts of the Founding Fathers. For example, the delegates to the Philadelphia Convention repeatedly emphasized that in creating a government capable of promoting the public good, the Constitution must at the same time protect the rights and respect the principles of justice.[20] Following that thought, the Supreme Court in the 20th century made numerous decisions protecting individual rights and freedoms of American society. The Founders wanted the freedom of speech to exist – the Supreme Court found that there are several different forms of speech, some of which should be protected, some not.[21] The Founders put the freedom of religion clause in the First Amendment – the Justices decided to what extent the clause should be in force.[22] The Founding Fathers *did not* directly relate to right to privacy while creating the Ninth Amendment – the Court derived this

[17] 5 U.S. 187 (1803).

[18] P. Laidler, 'Real Check v. Real Balance. Judicial review in the U.S. governmental system' in A. Mania et al. (eds.), *United States and Europe. Conflict v. Collaboration*, Cracow 2005.

[19] Since 1869. Before that date the number of Justices varied from 5 to 10.

[20] J. Korn, *The Power of Separation. American Constitutionalism and the Myth of the Legislative Veto*, New Jersey 1997, p. 20.

[21] For more on freedom of speech cases see: J. Nowak, R. Rotunda, *Constitutional…*, pp. 1025-1306.

[22] For more on freedom of religion cases see: ibid., pp. 1307-1428.

right from the Constitution and adjudicated it in cases concerning abortion, use of contraceptives or LGBT rights.[23] Even the general character of the Bill of Rights was defined by the Justices, who at first acknowledged that guarantees from the document bind only the federal government, and – almost a hundred years later – that state governments are also subject to limitations stemming from the Bill of Rights.[24]

No matter what the social attitude towards the judiciary is: it is the U.S. Supreme Court thanks to which Americans so strongly value freedom. It is obvious that the original idea of freedom as a symbol of American legal system came from the Founding Fathers, however, it had been clearly emphasized by the federal judiciary in the following 200 years. Of course, the Congress as the main national lawmaker continuously carried on creating particular laws regarding civil rights, thanks to its legislative initiative, legislation tools and political power. But whenever a regulation was considered unreasonable, individuals could bring action against the government appealing to judicial sympathy, sensitivity or sensibility. The challenged law was not always declared null and void, but it gave an opportunity to redefine the concept of civil rights and set direction for future judgments. Such situation occurred for example with major legislation concerning civil rights issues implemented in 1866, 1875, 1964, and 1965.[25] The Congress determined the rules guiding the treatment of minorities in specific circumstances, but the final word on their practical meaning and accordance with constitutional norms belonged to the Supreme Court.[26]

One should ask, what would have happened if the *Marbury* decision had not come into force. There were clear dangers in enforcing the idea of strong judicial control over the executive branch of government, consisting of political enemies of the Court. John Marshall's notion to confront American legal reality with the substance and essence of the Constitution, thus pointing out the legal mistakes of political bodies such as the Congress or the President, sounded irrational at the beginning of the 19th century and was difficult to sustain by the then-governing bodies. For example, that negative attitude towards judicial review could be observed during Andrew Jackson's tenure as a President, when he refused to adopt a constitutional interpretation of the legal status of Native Americans shaped in one of the Supreme Court's decisions.[27] Almost one hundred years later, the Court

[23] Respectively: Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965); and Lawrence and Garner v. Texas, 539 U.S. 558 (2003).

[24] Barron v. Baltimore, 32 U.S. 243 (1833); Gitlow v. New York, 268 U.S. 652 (1925), and several cases falling under the process of selective incorporation of Bill of Rights.

[25] Respectively: Civil Rights Act of 1866, 14 Stat. 27-30; Civil Rights Act of 1875, 18 Stat. 335-337; Civil Rights Act of 1964, 78 Stat. 241; and Voting Rights Act of 1965, Publ. L. 89-110.

[26] Examples of cases checking the constitutionality of the mentioned acts are, respectively: Jones v. Alfred H. Meyer Co., 392 U.S. 409 (1968); Civil Rights Cases, 109 U.S. 3 (1883); Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964), and South Carolina v. Katzenbach, 383 U.S. 301 (1966).

[27] Worcester v. Georgia, 31 U.S. 515 (1831) – legal status of American Indians.

itself imposed some self-limiting doctrines which influenced its future operation, called in general: judicial restraint. The idea of judicial restraint could be derived from official legal opinions written by particular Justices who perceived the necessity to control judicial activity of many of their colleagues[28]. However, the abovementioned efforts to limit judicial review do not change the general idea formed since 1803, that the courts, and especially the U.S. Supreme Court, have enormous impact on the directions of legal interpretation. If the Marbury decision has not come into force, the country would have quickly confronted a constitutional crisis stemming from inaccurate and diverse interpretations of the document by various bodies which in character would be more political than legal.

Today there are still many scholarly opinions leading to a conclusion that the Supreme Court is politicized and therefore does not guarantee clear legal opinions based on bipartisanship and objectivity (of which the Author is a strong follower),[29] but there is no doubt that politicization of constitutional tribunals can be observed everywhere in the world. For instance, in Polish Constitutional Tribunal one can notice that any kind of decision leading to the interpretation of particular clauses of the Polish constitution produces different reactions of politicians – the ones in favor of the verdict underline the impartiality of the Tribunal, but the opponents of the verdict criticize its politicization.[30] Similarly, from time to time political opponents of concrete decisions of the U.S. Supreme Court raise the alarm about the improper functioning of the constitutional interpretation, whereas others applaud its courage and objectivity. And it is highly visible in case-law confronting the scope of constitutional civil rights. In reality, the Marbury decision came into force to complete the work of the Founding Fathers, who omitted a very important instrument of constitutional control, indispensable nowadays for democratic countries. Therefore, the courts are the final interpreters of the law and it is the judges' role to shape the meaning of important social, political and economic issues of the American everyday life. According to the famous statement of President Woodrow Wilson, who called the Supreme Court "the constitutional convention in continuous session",[31] the difference is that during the original convention the delegates did not thoroughly discuss issues concerning civil rights, whereas the contemporary Court is mainly involved in the interpretation of the meaning of constitu-

[28] As stated by Justice Louis Brandeis in Ashwander v. T.V.A.: "[…] the Court will not pass upon the constitutionality of legislation in a friendly, non-adversary proceeding, it will not anticipate a question of constitutional law in advance of the necessity of deciding it, it will not formulate a rule of constitutional law broader than the precise facts to which it is applied […]", 297 U.S. 288 (1936).

[29] See: P. Laidler, *Sąd Najwyższy Stanów Zjednoczonych Ameryki. Od prawa do polityki*, Kraków 2011.

[30] It could be observed for instance in the Tribunal's decision concerning the unconstitutionality of the lustration laws in Poland: K2/07, May 11, 2007.

[31] A.T. Mason, G. Garvey, *American Constitutional History. Essays by Edward S. Corwin*, New York 1964, p. 127.

tional rights and liberties. Therefore it seems important to define when civil rights cases became the main area of concern for the U.S. judiciary.

There is no doubt that the change in the interpretation of the Bill of Rights began in the early 20th century, when the Court initiated the "incorporation doctrine" of the due process of law clause of the Fourteenth Amendment. Until that moment the guarantees written in the first ten amendments were addressed to the federal government and states were not bound by their provisions, but the implementation of the Fourteenth Amendment, followed by the active process of its interpretation undertaken by the Justices after WWI caused a significant change in the scope of states' rights. During a forty-year period, the Court proposed a so-called selective incorporation of Bill of Rights' guarantees, not only deciding about the scope of protection, but also defining which guarantees should enjoy broader constitutional protection. The boundary was also set by the Justices alone, who incorporated only those guarantees which were of fundamental character, and were "of the very essence of a scheme of ordered liberty", as was stated by Benjamin Cardozo in his *Palko v. Connecticut* opinion.[32] The direct effect of such an approach was the increase of the caseload concerning civil rights, as citizens of various states began to sue local governments for not respecting their constitutional rights. Such a change in the Court's docket was foreshadowed by the Justices in 1938 in the famous Footnote Four to *United States v. Carolene Products Co.*, when Harlan Fiske Stone predicted possible future limitations to the powers of government, provided they encroached on the rights of the people.[33] Robert MacKeever argues, that Stone initiated a new era in the Court's adjudication, when the judiciary became an advocate of the rights of minorities, who predominantly lost in the political sphere.[34] As a result, states are subject to various limitations emerging from most of the guarantees inscribed in the first ten amendments: freedom of speech, freedom of the press, freedom of association, freedom of assembly, free exercise of religion, guarantee against establishment of religion, right to bear arms, and several procedural rights, such as warrant requirements, protection against unreasonable searches and seizure, protection against double jeopardy, privilege against self-incrimination, right to public and speedy trial, right to an attorney, right to trial by jury, right to confront witnesses, as well as protection against cruel and unusual punishments.[35]

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[32] 302 U.S. 319 (1937).

[33] 304 U.S. 144 (1938), footnote four.

[34] R.J. MacKeever, *The U.S. Supreme Court. A Political and Legal Analysis*, Manchester 1997, p. 7.

[35] Respectively in cases: Gitlow v. New York, 268 U.S. 652 (1925); Near v. Minnesota, 283 U.S. 697 (1931); De Jonge v. Oregon, 299 U.S. 353 (1937); N.A.A.C.P. v. Alabama, 357 U.S. 449 (1958); Everson v. Board of Education, 330 U.S. 1 (1947); Cantwell v. Connecticut, 310 U.S. 296 (1940); McDonald v. Chicago, 561 U.S. 3025 (2010); Aguilar v. Texas, 378 U.S. 108 (1964); Mapp v. Ohio, 367 U.S. 643 (1961); Benton v. Maryland, 395 U.S. 784 (1969); Malloy v. Hogan, 378 U.S. 1 (1964); In re Oliver, 333 U.S. 257 (1948); Gideon v. Wainwright, 372 U.S. 335 (1963);

Justice William Brennan wisely observed that the original purpose of the Fourteenth Amendment was to broaden the powers of Congress, not the judiciary.[36] In reality, it was the Supreme Court which benefited most from the selective incorporation doctrine, gaining the final word in determining the scope of civil rights. Such a situation led to social and political discussion about the proper role of the judiciary in the American system of government. Famous researchers of this issue pointed out the growing political role of the federal judiciary, arguing for its role as a guard of constitutional values. Robert Dahl defined the Court as an institution deeply rooted in the dominating political coalition, the main role of which was to represent the United States and its interests. According to Dahl, the Court became the main legitimization of all constitutional and political changes in the country.[37] Several years later, Alexander Bickel offered a different approach, calling the highest judicial institution in the United States a "countermajoritarian" institution, playing the role of the final "anchor" in the minorities' fight for their rights and freedoms. Therefore, as Bickel suggested, the Justices were more often advocates of civil rights' groups than federal or state governments.[38] Both approaches were confronted by Richard Funston, who drew his own conclusion bringing together the opinions of Dahl and Bickel, that the role of the judiciary depends on the political configuration in the White House and Congress.[39] A careful analysis of the history of American constitutional law leads to a concept modifying Funston's arguments, that the role of the Supreme Court depends not on the configuration of the government, but on governmental policy towards crucial values of the society, such as freedom and safety. There is no doubt that, since 1950s, courts began to acknowledge broader rights of the people, and the only serious limitation to such policy, despite ideological differences, was the idea of protection of national security. One could observe this during the Cold War period, one can observe it today, when the United States are fighting against terrorism.

The analysis of American idea of civil rights protection should also be concerned with the characteristics of legal trials in U.S. courts. There are of course civil and criminal trials, the latter, however, seem to be more crucial for the topic in question, as a centerpiece of the criminal justice system.[40] The basic three significant features of the criminal procedure are: the adversarial system, the existence

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Duncan v. Louisiana, 391 U.S. 145 (1968); Pointer v. Texas, 380 U.S. 400 (1965), and Robinson v. California, 370 U.S. 660 (1962).

[36] J.C. Agresto, *The Supreme Court and Constitutional Democracy*, Ithaca 1984, p. 131.

[37] See: R. Dahl, 'Decision-making in a democracy. The supreme court as a national policy-maker', *Journal of Public Law*, Vol. 6 (1957).

[38] See: A. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, Indianapolis 1962.

[39] R. Funston, *A Vital National Seminar. The Supreme Court in American Political Life*, Palo Alto 1978.

[40] Criminal trials are centerpiece of criminal justice system because they are held before juries drawn from the community, are the most visible aspect of the justice system and often

of the jury, and a broad catalogue of rights of the accused. The adversary process means a litigation in which there are two sides that have different objectives but can employ the same means to achieve those objectives, and there is a judge whose main role is to observe the actions of the adversaries without participating in the investigative process.[41] Jury trials, originating from 13th century England, are trials in which a group of laymen, representatives of a cross-section of the community, having the duty and the opportunity to deliberate, free from outside attempts at intimidation, has to decide on the question of a defendant's guilt.[42] It is one of the most fundamental civil rights, and a very popular guarantee for the accused in criminal procedure, because *any* accused may waive the right to jury trial.[43] Among other guarantees of the accused (which have been reinterpreted by the Supreme Court), are: the right to counsel, right to a fair and speedy trial, right against self-incrimination, double jeopardy and exclusionary rule.

The existence of many limitations to the actions of prosecutorial agencies leads to a feeling that the American system of justice is constructed in a way which assures that the "presumption of innocence" rule shall never be violated. It also fits in the larger vision of a state the role of which is to protects the rights and freedoms of individuals. The criminal justice system proves that American society – and especially American political and legal establishment – believes that it is better to have a system where no innocent person shall suffer, whereas some guilty people may enjoy their freedom. Of course, the ideal situation would create conditions in which all guilty people are in jail and all innocent people are free, but there is no such system in the world. Meanwhile, Americans believe that their approach is fair enough,[44] despite allowing the existence of death penalty. It is the highest punishment in the federal criminal justice system and legal systems of thirty five states, due to the Supreme Court's interpretation[45] of the Eighth Amendment's cruel and unsual punishment clause. Nowadays, as a very controversial issue, the capital punishment seems to be a showcase of the system, even though it has proved erroneous many times in history.[46] Paradoxically, the idea of death penalty sentence was taken from the British common law, which later on abandoned its execution. It is also significant that a state aiming at broad protection of civil rights still con-

attract widespread media coverage, and often have an important impact on the administration of justice. See: J.M. Scheb, J.M. Scheb II, *Criminal Law and Procedure*, New York 2005, p. 470.

[41] J.M. Feinman, *Law 101. Everything You Need to Know about the American Legal System*, New York 2000, p. 324.

[42] Williams v. Florida, 399 U.S. 78 (1970).

[43] Duncan v. Louisiana, 391 U.S. 145 (1968).

[44] There are no statistical data, however, showing that the number of innocent people suffering from the wrong verdicts is higher in other legal systems of the world.

[45] Gregg v. Georgia, 428 U.S. 153 (1976).

[46] Especially in the 30s and 40s of the 20th century when courts imposed death penalty to African-Americans basing on weak evidence, whereas white Americans received "only" life imprisonment sentence for the same crimes.

firms the constitutionality of such controversial guarantees as death penalty or the right to bear arms. However, the proponents of the two institutions would justify their existence by … the willingness to protect one of the basic rights of the people: the right to safety. William Blackstone, one of the Founding Fathers, and the conservative majority on the 21st century Supreme Court would confirm such an approach!

While observing the activity of people in the United States, who often solve their problems in courts, one may ask about the reason and source of such behavior. Definitely it shows the attitude of citizens towards their judicial system: Americans believe that the court system is created to settle disputes between private parties or the individuals and the state. Law may express many competing values of the society, which often come into conflict.[47] In that dimension it is worth mentioning that most of the civil cases that take place every year in U.S. courts of first resort are so-called tort law cases. Torts are wrongful acts committed by a person or entity resulting in injury or loss to the victim.[48] There are three kinds of torts: negligence, intentional torts, and strict liability torts. Especially the last group seems very controversial, because it concerns cases against entities which may be held liable for an injury regardless of their intent or negligence.[49] In effect, American courts award enormous compensatory damages, which very often hamper an entity's development. However, all of it derives from the very essence of the American legal system, which can be found in the motto placed above the entrance to the Supreme Court: *Equal Justice under Law*. The law sets the rules and the society has to follow them. At the same time the court-activity of U.S. citizens leads to the indispensability of the legal profession. There are judges, prosecutors, attorneys (for litigation), there are legal officers in the highest political posts in both state and federal governments, and there are also legal advisers with private practice or working for business entities, without whom the system could not work properly.[50] It seems that the legal profession is naturally rooted in American reality. Since most of the participants of the Constitutional Convention were lawyers, it seems obvious that the American idea of a perfect legal system was created by the lawyers and it serves the lawyers, especially judges who are able to decide about social and political relations in the country.

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[47] Conflicts may concern such values as: freedom versus equality, privacy versus state control, national security versus freedoms.

[48] J.M. Scheb, J.M. Scheb II, *An Introduction…*, p. 159.

[49] Nowadays strict liability tort is imposed on those who engage in abnormally dangerous activities and can be imposed on designers and manufacturers of products.

[50] A.A. Levasseur, J.S. Baker (eds.), *An Introduction to the Law of the United States*, Lanham 1992, pp. 423-424.

Alexis de Tocqueville in his famous *Democracy in America* presented the actual meaning of law and legal relations in the United States. "Whenever the political laws of the United States are to be discussed, it is with a doctrine of sovereignty of the people that we must begin." And, "there is hardly a political question in the United States which does not sooner or later turn into a judicial one".[51] These two important statements show the position of law within the society and the position of society in the American legal reality. On the one hand, politics and law have always been very close to each other, thus creating another distinctive feature of U.S. legal system. On the other, the people of the United States created a Constitution which has been leading them for more than 200 years. Constitutional theory and practice produced a unique court system that has become the most distinctive feature of American legal thought. And although courts are fundamental elements of legal structure in most of the countries in the world, it is the U.S. judiciary that has the sole power to interfere in everyday life of the sovereign nation. Including the sphere of civil rights. The political aspect of the court's adjudication can be observed not only in cases regarding federal-state relations or powers of the government. It is visible in the ideological attitude of certain Justices towards the proper interpretation of constitutional clauses devoted to rights and freedoms of individuals. Liberal Justices, most of whom were appointed by Democratic administrations, tend to support broader protection of civil rights. During the times when liberal ideology was represented by the majority of Court members, American constitutional jurisprudence was enriched in such concepts as right to abortion, affirmative action, pure separation of state and religion, and homosexual right to privacy.[52] Conservatives, in contrast, do not neglect the idea that people should enjoy safeguards from encroachments of the government, but offer a narrower scope of protection of their constitutional rights. Still, there are areas where conservatives believe people should be given broader constitutional protection, such as the right to bear arms.[53] The ideological difference occurs also with respect to the approach to criminal procedure guarantees. Liberals support a so-called due process model aiming at awarding the accused considerable constitutional protection, whereas conservatives promote a crime-control model based on wider control of the accused by broadening the powers of law enforcement agencies. Historically, there were periods when one of the concurring models prevailed, but today one can observe the clash of liberal and conservative approaches, as an accused can enjoy broad guarantees provided they are not terrorist

[51] A. de Tocqueville, *Democracy in America*, trans. by B. Janicka, M. Król, Warsaw 2005, pp. 217-220.

[52] Resulting from cases: Roe v. Wade, 410 U.S. 113 (1973); Grutter v. Bollinger, 539 U.S. 306 (2003); Lemon v. Kurtzman, 403 U.S. 602 (1971); and Lawrence and Garner v. Texas, 539 U.S. 558 (2003).

[53] District of Columbia v. Heller, 554 U.S. 570 (2008); and McDonald v. Chicago, 561 U.S. 3025 (2010).

suspects.[54] Therefore it is impossible to understand American attitude towards the scope of civil rights without referring it to ideological trend in federal judiciary.

There is no perfect legal system in the world. One may point out the differences between the American common law and European civil law systems. This comparison may draw some positive and some negative aspects of both. Is it better to have law based on precedents or codified norms? Which of the systems produces a better idea of how to protect civil rights? Is an adversarial system able to produce just results in cases when the attitude of the attorneys is not always based on ethics and competence? Are thousands of lawyers working in American cities a guarantee of the old maxim *And Justice for All*? I think the problem concerns the people, not the system. In every country which is governed under the rule of law principle, the basic idea is the same: to protect the rights of the state and individuals, according to law. In every such country there are people who tend to be "above the law". Practice often proves that there are also people who can make mistakes while interpreting the law. That is why binding and persuasive precedents exist in common law countries and the structure of justice allows for recovering from interpretational mistakes. But not for long. If the system is efficient enough, the courts will correct the mistakes of ordinary people. Yet, what will happen if the mistakes are made by judges (wrong verdict)[55] or politicians (passing inappropriate laws)?[56] A perfect situation would occur if the system could correct its own wrongdoings, but that is hardly ever possible. And there will never be an ideal system of protecting civil rights, because people share different opinions and beliefs, as they expect different activities from the government. No matter who (the legislative, executive or judicial branch) has the final word in creating, executing and interpreting the law.

The future of civil rights in the United States is in the hands of the Justices. In the 2011-2012 term the Court interpreted the contemporary meaning of the rights of immigrants, and the scope of federal power over health service.[57] In its 2012-2013 term the Supreme Court is going to determine the scope of affirmative action, right to privacy, same-sex marriages, and will even confront human rights issues.[58] It is hard to imagine in contemporary democracies a more direct effect on

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[54] Since 9/11 Congress has broadened the powers of law enforcement agencies (i.e. *The U.S.A. Patriot Act*), and the Court did not declare unconstitutional any serious post-9/11 legislation aiming at investigation of terrorist suspects. Meanwhile, liberal Justices affirmed the ideas of due process model in Brown v. Plata, 562 U.S. 09-1233 (2011).

[55] For example Korematsu v. United States (323 U.S. 214, 1944) or death penalty cases against African-Americans in the 30s and 40s of the 20th century.

[56] For example *Alien and Sedition Acts* of 1798.

[57] Respectively: Arizona v. United States, 567 U.S. (2012); and National Federation of Independent Business v. Sibelius, 567 U.S. (2012).

[58] Respectively: Fisher v. University of Texas, Clapper v. Amnesty International USA, Department of Health and Human Services v. Massachusetts Kiobel v. Royal Dutch Petroleum Co., Inc.

social relations of a single governmental institution, which does not have direct democratic legitimization. Regardless of the priority of the legislative departments to create civil rights regulations, it is the judicial department which, having ability to review the constitutionality of such regulations, has the primacy in determining the proper scope of civil rights in America. It does not make the system perfect, but undoubtedly unique.

Abstract

Different legal systems provide different concepts of civil rights protection. In most countries the law is created by the legislative and is enforced by the executive, making the two powers dominating actors in the process of shaping the scope of the rights of the people. From time to time, such regulations are found unconstitutional by special Courts (Tribunals), which adapt them to constitutional reality. However, in common law countries, and especially in the United States of America, the concept of power of the legislative over civil rights is undermined by active judicial review undertaken by federal courts with the Supreme Court at the top. The lawmaking ability of the judges, their position within the branches of government, as well as the power of judicial review, leads to the dominating position of court-shaped principles and regulations over various social and political issues. Civil rights cases belong today to the most valuable legacy of the Supreme Court, in which precedents have enormous impact on the scope of protection of constitutional rights and freedoms.

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Educative Function of Law in the Fragmented International Legal Order

Case of Right to Water v. Investment Protection

1. Educative Function of Law

The very fundamental function of law is to direct human behavior: to maintain and preserve social peace and order. When legal regulations are coherent with other types of social norms, they provide individual and collective stabilization, as they are secured by the state's coercion.

Law may also promote social, cultural and economic change. Depending on predefined political paradigms, law has a capacity to direct transformations.[1] Especially in the area of human rights, which are strongly correlated with other types of norms and out-of-law values, law may promote evolutions which are in a line or in opposition to social preferences.

By incorporating values to legal norms, a lawmaker affirms and promotes them as socially relevant and worth to be protected by the state's coercion. Legislator's affirmation also plays an educative function. Particularly, acts of general nature like constitutions or certain international conventions play the "educative" role and may shape society's axiology. In this context, not only substance but also form and construction of legal acts are of particular importance. The order of legal norms in a particular act may indicate the hierarchy of incorporated institutions or values.[2]

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[1] See: T. Chauvin, T. Stawecki, P. Winczorek, *Wstęp do prawoznawstwa*, Warszawa 2011, p. 168; J. Jabłońska-Bonca, *Wprowadzenie do prawa. Introduction to Law*, Warszawa 2008, p. 22; L. Morawski, *Wstęp do prawoznawstwa*, Toruń 2006, pp. 28-30; A. Korybski, L. Leszczyński, A. Pieniążek, *Wstęp do prawoznawstwa,* Lublin 2007, pp. 47-48.

[2] E.g. Interpretation of the Constitution of the United States where Presidential Veto Clause was placed in art. I describing the powers of the Congress serves as an evidence of legislative nature of this power; separate art. I, II and III related distinctively to legislative, executive and judicial branches proof the principle of the separation of powers; A.R. Amar, 'Intratextualism', *Harvard Law Review*, Vol. 112, No. 4 (1999), p. 747, http://dx.doi.org/10.2307/1342297;

Legal norms on human rights are usually located in constitutions and international conventions. As a consequence of legal hierarchy, they have a capacity to influence whole legal systems.[3] The general nature of human rights regulations even strengthens this effect.

In particular cases, the broad character of human rights norms requires concretization by judicial branch. Jurisprudence, even if in theory serving as a subsidiary source of law,[4] becomes a fundamental indicator in resolving particular conflicts of values. The decisions of courts related to human rights may also play a significant role in legal education of a society. As they relate to fundamental aspects of social standards which are very often of moral and ethical nature, they have a capacity to attract a particular attention of public opinion. The role of courts is of primordial character in case of conflicts with values stemming from other subsystems of fragmented international law.

2. Specificity of International Law: Fragmentation

Since at least a decade, the fragmentation of international law has been a phenomenon which attracts attention of not only international lawyers but also of legal philosophers, political scientists and other experts.[5] It constitutes the very specificity of international law. Most of legal branches are distinguished on the criterion of object, i.e. a matter which they regulate: e.g. family law, labor law, commercial law, penal law etc. The international law is distinguished on the ground of method of regulation and its subjects. Its primary subjects are the states which mostly rely on methods of international treaties and custom. International law may relate to any object and becomes "international" when it is regulated by states on supranational level. The multitude of objects within legal system provokes its fragmentation.

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similarly art. 26 of the Polish Penal Code (published in Dziennik Ustaw, 1997, Vol. 78 Item 483) which regulates the state of necessity, requires that "the interest sacrificed has a lower value than that of the interest rescued" – a systematic and contextual interpretation of the Act, based on the order of protected values in the Code provides and answer in comparison of "interests".

[3] According to art. 27 of the Vienna Convention on the Law of Treaties, *United Nations Treaty Series*, Vol. 1155, p. 679, internal law may not be invoked as justification for a failure to perform a treaty, therefore international treaties are usually placed over domestic acts in legal hierarchy, see e.g.: Art. 91 para. 2 of the Constitution of the Republic of Poland, Dziennik Ustaw, 1997, Vol. 78 Item 483; art. 25 of the Basic Law for the Federal Republic of Germany (Grundgesetz), *Federal Law Gazette*, 23 May 1949.

[4] See: Art. 38 para. 1(d) of the Statue of the International Court of Justice, 26 June 1945, *United Nations Treaty Series*, Vol. 33, p. 993.

[5] See: 'Conclusions of the work of the Study Group on the Fragmentation of International Law. Difficulties arising from the Diversification and Expansion of International Law', *Yearbook of the International Law Commission*, Vol. 2 (2006), Part Two, at <http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/1_9_2006.pdf>, 23 December 2012.

Moreover, as a system it is developed by a plurality of lawmakers, works of which are often uncoordinated. Moreover, due to globalization, the amount of legal norms produced on supranational level has been constantly growing – the rising amount of issues are regulated or co-regulated by instruments of supranational nature. International regulations devoted to specific issues are enacted by specialized organs and bodies, which cannot always preview all possible conflicts with other norms of international law stemming from its other subsystems. This problem of multipolar lawmaking and a lack of a single body of constitutional rules provides that international legal order is at least potentially less coherent than domestic systems. Therefore, international courts and tribunals play a crucial role in resolving conflicts stemming from different norms of fragmented subsystems.

3. Investment v. Human Rights Protection

The split between human rights and investment protection is based on a paradox. Human rights and investment proceedings are based on a similar scheme: an individual's or an investor's claim against a violation of international law by public authorities. The very fundamental goals of investment treaties are to provide protection against expropriation and discrimination of economic operators and to assure a right to a fair and impartial trial. Right to property, protection against non-discrimination and a right to due process are at the same time one of the fundamental human rights.[6] Therefore, it is not surprising that several disputes led to parallel claims on human rights and investment grounds.[7] Moreover, international investment disputes arbitrators relied on human rights decisions in their reasoning. For example, in Roland S. Lauder v. Czech Republic case, the court evoked the distinction between "formal" and "de facto expropriation" which appeared in Mellacher v. Austria case before European Court of Human Rights (hereinafter ECHR).[8] Similar situation took place in Técnicas Medioambientales S.A. v. Mexico where reference was made to the report of Inter-American Court of Human Rights in Ivcher Bronstein v. Peru decision[9] and Matos e Silva v. Portugal which was used

[6] E.g. Art. 6, 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms; Art. 1 of the Protocol 1 to that Convention, *United Nations Treaty Series*, Vol. 213, p. 262.

[7] See: U. Kriebaum, 'Is the European Court of Human Rights an Alternative to Investor-State Arbitration?' in P.-M. Dupuy, E.-U. Petersmann, F. Francioni (eds.), *Human Rights in International Investment Law and Arbitration*, Oxford 2009, pp. 219-245.

[8] Ronald S. Lauder v. Czech Republic, 2001 WL 34786000, UNCITRAL Final Award, 3 September 2001, para 200, at <http://italaw.com/sites/default/files/case-documents/ita0451.pdf>, 4 December 2012; quoting Mellacher v. Austria, Eur. Ct. H.R., Vol. 169, (ser. A) (1989).

[9] Técnicas Medioambientales S.A. v. United Mexican States, ICSID Case No. ARB(AF)/00/2, 29 May 2003, para 119, at <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC602_En&caseId=C186>, 4 December 2012; quoting

to explain the principle of proportionality.[10] Therefore, the legal reasoning in two branches of international law may be mutually inspiring. The dichotomy between investment law and human rights is of economic background. Where human rights law is rather perceived to protect the weak, investment protection may appear as legal tool of rich multinational companies which often seek compensation against developing states.

4. Water Shortages and International Law

The recognition of human right to water as a distinct human right is rather recent. Several universal conventions have mentioned it. The 1979 Convention on the Elimination of Discrimination against Women obliged the state-parties to liquidate discrimination and assure the right of women to enjoy adequate water supply.[11] Similarly, the 1989 Convention on the rights of the child recognizes the states shall combat disease and malnutrition through the provision of adequate foods and clean drinking-water.[12] However, the recognition of the right to water as a universal and separate human right was done in General Comment No. 15 (2002)[13] of Articles 11 (right to adequate housing and adequate food) and 12 (right to the highest attainable standard of health) of International Covenant on Economic, Social and Cultural Rights.[14] On 28 July 2010, through Resolution 64/292,[15] the United Nations General Assembly explicitly recognized the human right to water and sanitation and acknowledged that clean drinking water and sanitation were essential to the realization of all human rights.[16]

The recognition of a freestanding human right to water is a result of growing water shortages in different areas. Due to different phenomena like urbanization, population growth and rising industrial production, the demand for water has been

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Inter-American Court of Human Rights case Baruch Ivcher Bronstein v. Peru, 6 February 2001, paras 120-124, at <http://corteidh.or.cr/docs/casos/articulos/seriec_74_ing.pdf>, 4 December 2012.

[10] European Court of Human Rights, In the case of Matos e Silva, Lda., and Others v. Portugal, judgment of 16 September 1996, para 85, at <http://hudoc.echr.coe.int>, 4 December 2012.

[11] Art. 14(2)(h) of the Convention on the Elimination of Discrimination against Women, New York, 18 December 1979, *United Nations Treaty Series*, Vol. 1249, p. 13.

[12] Art. 24(1)(c) of the Convention on the Rights of the Child, done at New York, 20 November 1989, *United Nations Treaty Series*, Vol. 1577, p. 3.

[13] Committee on Economic, Social and Cultural Rights, Geneva, 11-29 November 2002, General Comment No. 15 (2002), E/C.12/2002/11, 20 January 2003.

[14] *United Nations Treaty Series*, Vol. 993, p. 3.

[15] Resolution adopted by the General Assembly 64/292. The human right to water and sanitation, A/RES/64/292, 3 August 2010.

[16] See: <http://www.un.org/waterforlifedecade/human_right_to_water.shtml>, 10 December 2012.

growing. The "blue gold" becomes a scarce good. Nevertheless, water deficits are mostly of relative character: there is a lack of water in a given time and given place. International community tries to face this phenomenon. The recognition of human right to water gives it a "human right perspective" when water governance invokes legal regulations stemming from different subsystems of international law. Water management invokes also regulations of international environmental law and international economic law. The expressed recognition gives it an additional dimension. The international economic law provides a double track answer to the growing water demand. The first alternative is the international water trade. Technology progress makes water transport more affordable and requiring less infrastructural costs.[17] However, water deficits are due not only to water availability, but also to the lack of infrastructure. Water supply and sanitation by a system of pipelines is relatively expensive and not every state may afford it. Therefore, their construction requires investments which are not always affordable for public funding. In consequence, many states were forced to demand for foreign funding and the international investment law became relevant in assuring the human right to water. The recognition of human right to water is also a result of collision of this still emerging right with different internationally protected values, like investment protection.

5. International Investments in Water Projects

International investment often takes place when states are unable to fund themselves costly infrastructural projects. Privatization of services, which traditionally remained in public sphere, was due to at least two reasons. First, the definitive fall of the communism as an economic system seemed to indicate that only capitalism and privatization may serve as efficient tools of management. Secondly, the global tendency of trade liberalization was followed by dynamism of capital flows and investment. This would not be possible without the growing network of bilateral investment treaties which fostered foreign direct investment. They guaranteed protection to investors against expropriation, non-discrimination and a right to international arbitration proceedings. The privatization strategy was also promoted and required as a condition of the World Bank's co-financing of the project.[18]

Privatization often did not bring the expected results. In Bolivian city of Cochabamba the public opinion criticized the lack of transparency in awarding

[17] For example with the use of flexible barge (waterbags), see more details on <http://www.waterbag.com>, 4 December 2012.

[18] Suez, Sociedad General de Aguas de Barcelona S.A., and InterAgua Servicios Integrales del Agua S.A. and The Argentine Republic, Decision on Liability, 10 July 2010, ICSID Case No. ARB/03/17, para 33; Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, 24 July 2008, ICSID Case No. ARB/05/22, para 3.

the concession and was afraid of the future water rates.[19] In other Argentinean provinces, like Tucumán, some political options expressed "most solid opposition to transferring the patrimonies of the Province" when an investor doubled the water prices to the contractual maximum stipulated in the concession.[20] In the province of Buenos Aires, the investor faced considerable difficulties in collecting its rates what provoked discontinuation in its previously agreed expansion program.[21] Similar situation took place in Dar-es-Salaam.[22] In Argentinean Santa Fe, the state's financial crisis and depreciation of currency put the investor into an economically critical situation which, however, was not followed by the authorities' consent for raising the rates.[23] The refusal was linked with a "repeated calls of the Provincial governor and the other officials for non-payment of the bills by customers".[24]

The changing economic situation often pushed investors or states to renegotiate the contract of lease, which was unsuccessful.[25] Companies experiencing difficulties tried to exercise pressure on non-paying consumers by interrupting water services. However, in case of Impregilo v. Argentine this right was suspended.[26] Such failure led to unilaterally announced termination of contract which amounted to expropriation.[27] A similar scenario took place in Vivendi case.[28] In Cochabamba, the developments were more dramatic. The raise of water prices from 25 to 200 percent in a short period after the privatization agreement resulted in rebellion.[29] The civil unrest provoked in imposition of martial law and re-nationalization of water savings company.[30]

The deprivation or termination of concession formed an alleged expropriation. States used different arguments to justify their decisions. The right to water in context o international investment law appeared in different contexts.

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[19] Aguas del Tunari, S.A. v. Republic of Bolivia, Decision on Respondent's Objections to Jurisdiction, ICSID Case No. ARB/02/3, 21 October 2005, paras 63-66.

[20] Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic, 20 August 2007, Case No. ARB/97/3, para 4.8.2, 4.9.1.

[21] Impregilo S.p.A. v. Argentine Republic, 21 June 2011, ICSID Case No. ARB/07/17, para 21.

[22] Biwater…, para 163.

[23] Suez, Sociedad General de Aguas de Barcelona S.A., and InterAguas Servicios Integrales del Agua S.A. v. the Argentine Republic, Decision on Jurisdiction, 16 May 2006, ICSID Case No. ARB/03/17, para 24.

[24] Ibid., para 376.

[25] Biwater…, para 200; Suez…, Decision on Jurisdiction, paras 24-25.

[26] Impregilo…, paras 19, 39.

[27] Biwater…, para 519.

[28] Vivendi…, paras 4.18.1-4.18.6.

[29] W. Schreiber, 'Realizing the Right to Water n International Investment Law. An Interdisciplinary Approach to BIT Obligations', *Natural Resources Journal*, Vol. 438, p. 435.

[30] Ibid., p. 436.

5.1. State of Necessity

In Suez v. Argentine, the respondent-state was seeking defense of its actions by invoking the state of necessity.[31] Argentine argued that it

> adopted measures in order to safeguard the human right to water of the inhabitants of the country. Because of importance to the life and health of the population, Argentina states that water cannot be treated as an ordinary commodity. Because of the fundamental role of water in sustaining life and health and the consequent human right to water, it maintains that in judging the conformity of governmental actions with treaty obligations this Tribunal must grant Argentina a broader margin of discretion in the present case than in cases involving other commodities and services.[32]

The parties to the dispute agreed, that the customary international law regulating the necessity is reflected in Article 25 of the International Law Commission's (ILC) Articles on the Responsibility of States for Internationally Wrongful Acts (2001).[33] Its invocability is conditioned by several premises. One of them assumes that the measures taken constitute the only way to safeguard an essential interest.[34] In a given case, despite the severe character of the crisis acknowledged by the arbitrators, the Tribunal was not convinced that the only way that Argentina and the Province could satisfy that essential interest was by adopting measures that would subsequently violate the treaty rights of the Claimants.[35]

> The Province could have attempted to apply more flexible means to assure the continuation of the water and sewage services to the people of Santa Fe and at the same time respected its obligations of fair and equitable treatment. The two were by no means mutually exclusive.[36]

Another condition which the arbitrators assessed as unfulfilled was the "non-contribution of the situation of necessity".[37] In their opinion the term "to contribute" should be distinguished from expressions like "to cause" or "to create".[38] Thus, the fact that other actors, besides the State in question, may have contributed to that State's situation of necessity does not automatically mean that such State has

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[31] Suez v. Argentine…, Decision on Liability, paras 229 and subsequent.

[32] Ibid., para 232.

[33] Ibid., para 229; International Law Commission (ILC), Draft Articles on Responsibility of States for Internationally Wrongful Acts with commentaries, November 2001, Supplement No. 10 (A/56/10), at <http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf>, 13 December 2012.

[34] See: ILC, Draft…, art. 25(1)(a).

[35] Suez v. Argentine…, Decision on Liability, paras 235-238.

[36] Ibid., para 238.

[37] See: ILC, Draft…, art. 25(2)(b).

[38] Suez v. Argentine…, Decision on Liability, para 241.

not contributed to it.[39] The Tribunal found that a combination of endogenous and exogenous factors contributed to the Argentine crisis and such contribution was sufficiently substantial "and while exogenous factors did fuel additional difficulties they do not exempt the Respondent from its responsibility in the matter".[40]

In sum, the Tribunal assessed the lack of fulfillment of the "necessity test". Despite of that, its analysis serves the educational goal of law. First, it admits the possible interactions between international investment and human rights regulations. Secondly, it does not exclude the possibility of taking advantage of human rights based arguments in shaping the scope of investment protection. Third, it seems that if the crisis was provoked by purely external factors and the state, due to its situation would lack an alternative method of providing water to its inhabitants, the tribunal's conclusion could be different. Obviously, the two factors are of gradual nature. Nevertheless, the reasoning provided in the decision leaves space for potential limits of investment protection based on human rights premises.

5.2. *Amicus Curiae* Participation

The right to water was an issue raised by several non-governmental organizations which are active in the area of human rights and showed interest in participating in the investment procedures. The Tribunal in Biwater v. Tanzania[41] accepted the petitioners as third parties to the dispute. It did so, despite the opposition of the claimants, and argued it by a need of "information and submissions on the issues in dispute from all relevant standpoints" which are "of concern to the wider community in Tanzania".[42] As in the case of Methanex v. USA, the involvement of *amicus curiae* was justified by "public interest […] which arises from its subject matter. […] There is also a broader argument, […] the […] arbitral process could benefit from being perceived as more open or transparent".[43] Therefore, opening the process to *amicus curiae* submissions would contribute to another principle and human right: the one of due, transparent, public and impartial process.

By admitting the *amicus* submissions, the arbitrators stated that "petitioners would address broad policy issues concerning sustainable development, environment, human rights and governmental policy".[44] Those fields were indicated as being within the ambit of Rule 37(2)(a) of the ICSID Arbitration Rules which require

[39] Ibid.

[40] Ibid.

[41] Biwater…, para 356 and sequent.

[42] Ibid., para 358.

[43] Methanex v. United States of America, Decision on Petitions from Third Persons to Intervene as Amici Curiae, 15 January 2001, para 49, at <http://www.state.gov/documents/organization/6039.pdf>, 2 August 2013.

[44] Biwater…, para 366.

them to be "a factual or legal issue related to the proceeding".[45] In consequence the tribunal admitted the domain of human rights as issue related to the proceedings. The *amici*'s observations were estimated as useful and relevant to which the tribunal declared to return in particular context.[46]

In Biwater v. Tanzania the *amici* stated that "investor responsibility […] must be assessed in the context of sustainable development and human rights" which condition the nature of investor's responsibilities.[47] They related to numerous declarations according to which "water is a key to sustainable development". Access to clean water was, moreover, characterized as a basic human right by the United Nations Committee on Economic, Social and Cultural Rights in 2002.[48] Further, it was acknowledged that rights and obligations between investor and a host state shall be balanced. The *amici* claimed that the investor in case did not assure the promised number of new connections and the availability of water in many parts of Dar-es-Salaam over the period of the lease declined.[49] By not fulfilling the promises the investor had created a situation of urgency requiring governmental action. In fact, the Government, carrying the duty to provide access to water to its citizens, had to take action under its obligations under human rights law to ensure access to water for its citizens.[50]

5.3. Proportionality Test

Proportionality is at the very centre of legal reasoning. Law incorporates different values (see Part 1 *supra*) which may conflict with each other. One way of resolving those inconsistencies is to apply the proportionality test. The term "proportion" has its roots in Latin *pro poritone* – "in respect of (its or a person's) share".[51] It describes "the relation of one thing to another".[52] The test of proportionality is of special importance in the fragmented international legal order. Art. 31(3)(c) requires the interpreter of international treaties to apply the rule of systematic integration: "to take into account […] any relevant rules of international law applicable in the relations between the parties".[53] In case of investment agreements the arbitrators must not ignore all international legal background relevant in a given

[45] The ICSID Convention and the Regulations and Rules adopted pursuant to it are reprinted in ICSID Convention, Regulations and Rules, Doc. ICSID/15, April 2006, at <https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/basic-en.htm>, 2 August 2013.

[46] Biwater…, para 392.

[47] Ibid., paras 379, 380.

[48] Ibid., para 380.

[49] Ibid., para 383.

[50] Ibid., para 387.

[51] *The New Oxford Dictionary of English*, Oxford 1998, p. 1487.

[52] *Webster's New Dictionary and Thesaurus*, New York 1990, p. 435.

[53] Art. 31(3)(c) of the Vienna Convention…

case. Opening the interpretative context to a multitude of potentially applicable agreements provokes a higher potential of normative conflicts with the international normative amalgamate. The test of proportionality is the fundamental tool of balancing legal values, like the one of the access and affordability of water and protection of investment.

In Azurix v. Argentine,[54] which was an another case related to water services privatization and re-nationalization, the arbitrators referred to Tecmed v. Mexico[55] report in which the proportionality test of the European Court of Human Rights was quoted: "There must be a reasonable relationship of proportionality between the charge or weight imposed to the foreign investor and the aim sought to be realized by any expropriatory measure […] a measure must be both appropriate for achieving its aim and not disproportionate thereto".[56] The Court found relevant that non-nationals "will generally have played no part in the election or designation of its [of the measure] authors nor have been consulted on its adoption", and observed that "there may well be legitimate reason for requiring nationals to bear a greater burden in the public interest than non-nationals".[57]

The proportionality test is of critical importance in evaluation of public policy purposes leading to expropriation. The *Amici* brief in Suez v. Argentine case provided an interesting analysis of the problem. "It is generally accepted that measures adopted for public health reasons fall within the police powers doctrine. In the instant case, the measures adopted by Argentina sought to, *inter alia*, ensure access to water and sanitation to the population amidst a severe economic and social crisis. This measure thus averted the public health emergency that would have resulted from the lack of access to clean water and sanitation to millions of people in Buenos Aires. Under the light of human rights law, the police power doctrine operates to distinguish these measures from an otherwise compensable expropriation".[58]

The proportionality test appears to introduce a bridge between investment law and human rights law. Such a juxtaposition was questioned by *amici* in Suez v. Argentine. In their opinion, the human rights which reflect the recognition of the inalienable, inherent dignity of the human person, where as investor's right are economic policy tools. Such an approach was reinforced by lack of corporations' *ius standi before* Inter-American Commission on Human Rights and United Nations

[54] Azurix Corp. v. Argentine, Award, 14 July 2006, ICSID Case No. ARB/01/12, para 311.

[55] Tecnicas Medioambientales Tecmed S.A. v. The United Mexican States, Award, 29 May 2003, Case No. ARB (AF)/00/2, para 122.

[56] Case of James and Others v. The United Kingdom, 21 February 1986.

[57] Ibid., para 63, quoted in Azurix v. Argentine…, para 311.

[58] Amicus Curiae Submission in ICSID, Case No. ARB/03/19 between Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. and the Republic of Argentina, at 23, at <http://www.ciel.org/Publications/SUEZ_Amicus_English_4Apr07.pdf>, 15 December 2012.

Human Rights Committee.[59] However, this approach is not omnipresent. According to Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms, "[t]he Court may receive applications from any person, non-governmental organization or group of individuals".[60] This wording did not exclude from claiming corporations like Anheuser-Busch,[61] an American beer producer. One must not forget that the right of property, also of intangible goods is a human right and therefore juxtaposable with other values protected under the law.

5.4. Fair and Equitable Treatment

The Fair and Equitable standard of treatment (hereafter F&ET standard) is one of the objective standards i.e. non-related to host state's conduct towards other investments.[62] The goal is to provide the investor a minimum standard of international law. *Fairness* shall be understood as impartiality in investment treatment. Other components are protection of legitimate expectations, transparency, stability of legal framework, right to due process and protection against denial of justice.[63]

The arbitration decisions related to legitimate expectations component shall be analyzed as a possible tool of justification of states regulatory actions. As Jorge E. Vinuales has correctly put it:

> [t]he question is whether a foreign investor can reasonably expect, at the time it makes its investment, that if access to water and sanitation by the population becomes threatened, the State would not take measures to ensure access, even if such measures adversely impact the interests of investors. In such a hypothesis, could the investor claim that it has been unfairly and inequitably treated?.[64]

The mentioned doubt arises when tariff adjustments takes place or not as a result of changing economic and political circumstances. In Azurix v. Argentine the host state's authorities refused to adjust the tariff schedules, when as granted this right once the service was transferred to the new service provider. Politicization of tariff adjustment by the provincial government led with other factors to a cumulative conclusion of the breach of the FE&T standard.[65] Similar political circumstances took place in Vivendi II case, when "government, improperly and

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[59] Ibid., at 25.

[60] Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 34, *United Nations Treaty Series*, Vol. 213, p. 222.

[61] Anheuser – Busch Inc. v. Portugal, Judgment of Grand Chamber, 11 January 2007.

[62] See: M. Jeżewski, *Międzynarodowe prawo inwestycyjne*, Warszawa 2011, p. 245.

[63] See: ibid., pp. 221-284.

[64] J.E. Vinuales, 'Access to Water in Foreign Investment Disputes', *The Georgetown International Environmental Law Review*, Vol. 21 (2009), p. 755.

[65] Azurix Corp. v. Argentine…, paras 375-377.

without justification, mounted an illegitimate «campaign» against the concession, the Concession Agreement, and the «foreign» concessionaire from the moment it took office, aimed either at reversing the privatization or forcing the concessionaire to renegotiate […] tariffs".[66]

The *Amici* in their submission to the Suez case stipulated that:

> the Tribunal should take into account that no government may validly contract away its treaty-based obligations, including its human rights obligations. For example, any commitment that purported to freeze regulation on health, safety, and environmental matters may be incompatible with the government's positive duty to provide protection to the population, including from interference by third-parties. Thus, any BIT interpretation turning Argentina's specific commitments under the concession contract into a commitment to violate its human rights obligations would be contrary to the public order of the State.[67]

Nevertheless, the arbitrators estimated that "Argentina could have attempted to apply more flexible means to assure the continuation of the water and sewage services to the people of Buenos Aires and at the same time respected its obligations of fair and equitable treatment. The two were by no means mutually exclusive".[68] The tribunal applied an analogical path of reasoning as in the parallel dispute invoking the state of necessity (see Part 5.1 *supra*) and reached the same conclusion.

6. Conclusions

Human rights' dimension in investment disputes brings more attention to pending proceedings. Due to international protests, Bechtel and Abengoa companies which owned Aguas del Tunari decided to abandon their claims. For four years, citizen groups waged a global campaign to pressure Bechtel. They endorsed a legal petition to the World Bank demanding that the case be opened to public participation. Formally, the reason to terminate the concession was the civil unrest. However, its cause was clear: "For indigenous people water is not a commodity, it is a common good. For Bolivia, this retreat by Bechtel means that the rights of the people are undeniable".[69] This settlement demonstrates the power of public participation.[70] It also shows the scale of human motivation in case of right to water and the limits of commercialization of traditionally public services.

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[66] Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic…, para 7.4.19.

[67] Amicus Curiae Submission, Suez v. Argentina…, para 20.

[68] Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. The Argentine Republic, ICSID Case No. ARB/03/19, 30 July 2010, para 260.

[69] Statement by Oscar Olivera, a leader in the Bolivian water revolt, at <http://www.corpwatch.org/article.php?id=13144>, 17 December 2012.

[70] Statement by attorney Martin Wagner of Earthjustice, a non-profit, public interest law firm based in Washington, DC, at ibid.

The decisions related to human right to water and investment protection are of particular importance. They provide guidance in axiology of international law. The arbitrators acting in investment disputes did not close their eyes on human right issues. It proofs that subsystems of international law do not remain in clinical isolation. The method of systematic integration serves as the goal of integrity of international legal order.

The educative function in the area of international law is of particular importance. Judicial decisions, by their very nature "radiate" beyond single domestic legal system. In times of globalization when a growing amount of aspects are regulated by supranational regulations, the educative function of law and judicial decisions spread ideas and values which are encapsulated in them. For that reason, the judicial decisions in cases involving values from different subsystems of international law have a capacity to serve as "litmus paper" for moral and axiological differences within international community.

Abstract

The world is experiencing a water shortage. This is due not only to the growing population, but first of all to the rising needs of the "blue gold" in the industry and energy production. The liberalization of global and regional trade encourages competitiveness and privatization. As water is becoming a deficit good, the question of the applicability of international economic law shall be raised. Furthermore, the critical analysis is required to assess how the instruments of investment law assure the realization of the human right to water.

Protection of international investors may remain in tension with the fundamental rights of local communities. Foreign investor's right to pursue an economic activity possibly will sometimes hinder or prevent the exercise of the right to water, especially in case of the rise of water services. This, in consequences, raises the question of the legality of expropriation of the foreign investor in order to provide water access. There are already a few cases related to water and water services involving such states as Argentine, Bolivia, Venezuela, Tanzania and Canada. In each of those cases the arbitrators have/had to balance the rights to water and investment protection. This, in consequence, leads into the question on special nature of the human right to water and a need of a more holistic approach in resolving the investment disputes.

The analyzed case of right to water and investment protection is a particular example which presents adequately the problem of fragmentation of international legal order. Lack of uniform legislative centre and of hierarchy of legal sources form its particular nature. Moreover, international law embodied in treaties or custom is often composed of norms having vague and imprecise meaning. This is particularly true in the area of human rights regulations which often encapsulates norms particularly susceptible for a variety of interpretations. The educative function in the area of international law is of particular importance. Judicial decisions, by their very nature "radiate" beyond single domestic legal system. In times of globalization when a growing amount of aspects are regulated by supranational regulations, the educative function of law and judicial decisions spread ideas

and values which are encapsulated in them. For that reason, the judicial decisions in cases involving values from different subsystems of international law have a capacity to serve as "litmus paper" for moral and axiological differences within international community.

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The Role of the Constitutional Court of the Republic of Croatia in Human Rights Protection

1. Introduction

The socialist legal tradition in the Republic of Croatia came to an end in 1990. This turning point in the Croatian history was denoted by the adoption of a new Croatian Constitution based on the standards of liberal democracy. Respect for human rights, freedom, equality and national equality are depicted as "the highest values" and "the ground for interpretation of the Constitution" (Article 3 of the Constitution).[1] However, adoption of these principles did not momentarily bring to great shifts with respect to the former "authoritarian state practice"[2] which was based on the doctrine of assembly government, the dominant role of the Communist Party and the lack of judicial independence. Croatia was to face a long-lasting process of adoption of new values and conduct. Therefore, the Constitution granted the Constitutional Court special powers which had been intended for overcoming the lack of an appropriate legal culture.[3] Although the institution of the Constitutional Court has existed in Croatia since 1963, its main role was shaped after the democratic changes.[4] The Constitutional Court of the Republic of Croatia

[1] The Constitution of the Republic of Croatia (*Official Gazette*, No. 56 [1990]).

[2] See: A. Uzelac, 'Survival of the Third Legal Tradition', *Supreme Court Law Review*, Vol. 49 (2010), pp. 382, 395. See also: A. Visegrády, I. Tucak, 'Hungarian and Croatian Legal Culture' in T. Drinoczi et al. (eds.), *Contemporary Legal Challenges. EU – Hungary – Croatia*, Pécs–Osijek 2012, pp. 13-35.

[3] See: J. Omejec, 'Novi europski tranzicijski ustavi i transformativna uloga ustavnih sudova' in A. Bačić (ed.), *Dvadeseta obljetnica Ustava Republike Hrvatske. Okrugli stol održan 16. prosinca 2010. u palači HAZU u Zagrebu*, Zagreb 2011, p. 77.

[4] The period from 1963 to 1990 was characterized by the fact that constitutional courts of the socialist republics and the Federal Constitutional Court had no power to abolish an unconstitutional law. There was a six-month period after a decision of the Constitutional Court

has got broad competences,[5] out of which are the most important "abstract control of the constitutionality of laws and the legality of other regulations" and the power of dealing with constitutional complaints resulting from violation of constitutional human rights ("concrete control of individual acts of the governmental bodies and entities with public authority").[6]

The scope of this paper includes analysis of the role of the Constitutional Court regarding human rights protection and application of the provision on human rights. The paper is divided in two parts. The first part encompasses the analysis of the practice of the Constitutional Court in the period from 1990 to 1997 and the second one to its practice in the period from 1997 until today.

The issue of human rights protection and permissiveness of curtailment of particular human rights was rather troublesome in the period from 1990 to 1997. It was the vital period of the Croatian history, within which the former Yugoslav state fell apart and Croatia became independent in the middle of the military conflict. Although the Republic of Croatia can be considered an independent state since 25 June 1991 when the Croatian Parliament adopted the Constitutional Resolution on Proclamation of the Sovereign and Independent Republic of Croatia,[7] 8 October 1991 was chosen for the date of succession, i.e. the day when Croatia assumed international liabilities, since on that day, the Croatian Parliament confirmed the above resolution in its conclusion after months-long suspension.[8]

It was the period when the Constitutional Court passed a number of decisions which entailed strong reactions of the scientific, professional and broad public. The first part of the paper critically examines two major decisions of the Constitutional Court originating from the 1992: decision on the constitutionality of the emergency decrees of the Croatian president, restraining constitutional rights and the decision on the constitutionality of the article 26 of the Law on Croatian Citizenship. The objections of the scientific community oriented towards the practice of the Constitutional Court in this period were derived from the fact that the

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during which the Assembly could harmonize the law with the Constitution. Otherwise, the law would cease to be effective *ex constitutione*. P. Bačić, Konstitucionalizam i sudski aktivizam (a doctoral thesis), Split 2009, pp. 283, 338. In Omejac's opinion, the Croatian constitutional judicature possessed features of continental law systems already at that time, but its "most important competence was curtailed". J. Omejec, 'O potrebnim promjenama u strukturi hrvatskog ustavnog sudovanja' in J. Barbić (ed.), *Hrvatsko ustavno sudovanje. De lege lata i de lege ferenda. Okrugli stol održan 2. travnja 2009. u palači HAZU u Zagrebu*, Zagreb 2009, p. 37.

[5] See: Article 125 of the Constitution of the Republic of Croatia from 1990, a now Article 128 of the Constitution of the Republic of Croatia – consolidated text (*Official Gazette*, No. 85 [2010]).

[6] Article 125 of the Constitution of the Republic of Croatia from 1990. See also: J. Omejec, 'O potrebnim promjenama…', p. 41.

[7] *Official Gazette*, No. 31 (1991).

[8] A. Metelko-Zgombić, 'Sukcesije država od 1918. do danas na području Republike Hrvatske i njihov utjecaj na državljanstvo fizičkih osoba', *Zbornik Pravnog fakulteta Sveučilišta u Rijeci*, Vol. 32 (2011), p. 846.

Constitutional Court neither created nor followed the existing theories on human rights.[9]

The situation changed significantly in 1997 when the European Convention for the Protection of Human Rights and Fundamental Freedoms became effective in the Republic of Croatia. This period was characterized by rising activism in the practice of the Constitutional Court when interpreting and applying the provisions on human rights, which represents the standpoint supported in this paper by the referring recent judgments.

2. Emergency Decrees

Even though there was no declaration of war, Croatia was facing state of emergency from August 1991 to the spring of 1996.[10] During that time, the Croatian president on the basis of Article 101 paragraph 1 of the Constitution of 1990 passed a number of "decrees with the force of law", precisely emergency decrees which were aimed at establishment of "a state of war in the legal sense".[11] These decrees regulated important issues of state functioning such as defence, internal affairs, judiciary and media.[12] They appeared as a special kind of decrees that are not uncommon to numerous constitutions and that can be passed by executive bodies (the government or president) in the state of emergency.[13] The power of decree-making is granted to executive bodies since they are more "homogenous" than legislative bodies and thus can act prompter and more efficient.[14] This power of executive bodies leads to imbalance of competences in their favour and to the detriment of legislative bodies. A particularly delicate situation in this context might occur if such a power is granted to the president since it can bring to a "concentrated and personalized power".[15]

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[9] These were theses made by prominent Croatian scientists Miomir Matulović and Ivan Padjen whose papers have encouraged us to divide the practice of the Constitutional Courts into two periods. See: I. Padjen, M. Matulović, 'Cleansing the Law of Legal Theory', *Croatian Critical Law Review*, Vol. 1 (1996), p. 31.

[10] See: B. Smerdel, 'Konstitucionalizam i promjena vlasti', p. 26, at <www.pravo.unizg.hr/_download/repository/KONST_I_PROMJENA_VLASTI.doc>, 20 September 2012. See also: I. Kosnica, 'Uredbe iz nužde predsjednika Republike Hrvatske iz 1991-1992', *Zbornik Pravnog fakulteta u Zagrebu*, Vol. 61 (2011), p. 157.

[11] I. Kosnica, 'Uredbe iz nužde predsjednika…', p. 164.

[12] See: B. Smerdel, 'Konstitucionalizam…', p. 26. The president passed the first emergency decree on 9 September 2001. This decree was aimed at dismissal of members of the territorial defence forces. From September to December 1991, the president passed almost 30 emergency decrees. For more details see: I. Kosnica, 'Uredbe iz nužde predsjednika…', p. 159.

[13] I. Kosnica, 'Uredbe iz nužde predsjednika…', p. 150.

[14] Ibid., p. 151.

[15] B. Smerdel, 'Konstitucionalizam…', p. 26. See also: I. Kosnica, 'Uredbe iz nužde predsjednika…', p. 151.

According to the 1990 Croatian Constitution, the president had the power to pass emergency decrees "in the state of war or immediate threat to the independence and unity of the Republic of Croatia or if the government bodies were prevented from performing their constitutional duties" (Article 101 paragraph 1). The scope of restriction of human rights based on those decrees should have been proportional to the threat and it should not have discriminated against citizens on any basis (Article 17 paragraph 2). Also, some fundamental human rights should not have been restrained even in such a situation: "the right to life, prohibition of torture, cruel or unusual treatment or punishment, and on the legal definitions of penal offenses and punishments, and on freedom of thought, conscience and religion" (Article 17 paragraph 3).

The Constitution has set out additional restriction to this power of the president in a way that the president is obliged to submit his emergency decrees to the parliament for acknowledgement at its first forthcoming session (Article 101 paragraph 2), which represents certain subsequent control of the constitutionality of these decrees.[16]

The Croatian Parliament approved all the decrees of the Croatian president.[17] However, opponents of such a practice submitted to the Constitutional Court proposals for initiation of the procedure for assessment of the constitutionality of 24 decrees made by the Croatian president in September and October 1991.[18] The Constitutional Court was entrusted to determine the president's powers pursuant to Article 101 of the Constitution.[19] The reasons for the unconstitutionality of the decrees and the basis for those proposals were as follows:[20]

First of all, the decrees were passed without previous proclamation of "state of war" or "an immediate threat to the independence and unity of the State".

Second of all, when passing them, due respect was not given to Article 17 paragraph 1 stipulating the modes of restraining constitutional freedoms and rights. In compliance with this Article of the Constitution, the Croatian parliament shall make a decision on this issue by a two-thirds majority and if the parliament is unable to convene, then the president is entitled to make a respective decision. The applicants claimed that the parliament regularly met at the time of the adoption of those decrees.

Third of all, the decrees were unconstitutional based on their entry into force since they came into force "on the day of their adoption" and not "on the day of their publishing in the Official Gazette".

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[16] I. Kosnica, 'Uredbe iz nužde predsjednika…', p. 152.

[17] Decrees passed from September to December 1991 were acknowledged by the Croatian Parliament at its sessions of 8 October, 8 November and 28 December 1991. For more details see: ibid., pp.161-163.

[18] Ibid., p. 175.

[19] S. Rodin, 'Kontrola ustavnosti i dioba vlasti', *Zbornik Pravnog fakulteta u Zagrebu*, Vol. 46 (1996), pp. 173-174.

[20] See the Decision of the Croatian Constitutional Court: U-I-179/1991 of 24 June 1992 published in the *Official Gazette*, No. 49 (1992).

At its session of 24 June 1992, the Constitutional Court passed a decision which was aimed at termination of the procedure for assessment of the constitutionality of the decrees that ceased to be effective during the procedure.[21] The "applications for reviewing the constitutionality"[22] of the presidential decrees that were still effective at that time[23] were rejected.

The Constitutional Court reasoning can disclose the arguments for the rejection of the proposals. First,

> The right to pass effective decrees in the state of emergency granted to the Croatian president by the Constitution is not restricted by any means and hence he has the power to pass decrees with all the segments of the legislative competence of the Croatian Parliament […] Article 101 of the Constitution of the Republic of Croatia sets out that the Croatian president can independently make judgements on possible presence of circumstances entailing an immediate threat to the independence and unity of the Republic of Croatia. The Constitution does not prescribe that emergence of such circumstances shall be previously confirmed by a special decision.

Second,

> […] the adoption of the respective decrees did not mean violation of the provisions of Article 17 of the Constitution of the Republic of Croatia since the constitutional requirements needed for adoption of the decrees had been met and their viability had been acknowledged by the Croatian parliament […].

Third,

> […] decrees […] in part governing that they shall come into force on the day of their adoption are not contrary to Article 90 of the Constitution of the Republic of Croatia permitting that laws, exceptionally, might have retroactive effect, which means that they can become effective prior to their publishing in the Official Gazette […] Taking account of the exceptional circumstances in which these decrees were made, it was legitimate to prescribe that they shall enter into force on the day of their adoption by the Croatian president.

The decision of the Constitutional Court brought to harsh criticism of the scientific and broad public. Although some authors accept the standpoint that the Croatian Parliament was not in position to meet and act properly in September and October 1991 and consequently, find the president's emergency decrees justifiable,[24] the reasoning of the decision was not welcome at all by the experts and

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[21] See their list in item I of the Decision of the Croatian Constitutional Court.

[22] Compare for translation I. Padjen, M. Matulović, 'Cleansing the Law…', p. 51.

[23] See their list in item II of the text of the Decision of the Croatian Constitutional Court: U-I-179/1991 of 24 June 1992 published in the *Official Gazette*, No. 49 (1992).

[24] I. Kosnica, 'Uredbe iz nužde predsjednika…', p. 175.

scientific public. The Constitutional Court only reaffirmed that the requirements stated in Article 17 had been met.[25]

Croatian theoretician Petar Bačić think that when making this decision, the Constitutional Court was guided by the American political question doctrine, meaning that it came to "procedural activism" since the Constitutional Court did not take into consideration procedural restrictions stipulated by Article 17 and thus narrowed the possibility of "a major intervention".[26] Application of this doctrine, the roots of which stretch back to the case of Marbury v. Madison,[27] have been disputable in the practice of the Supreme Court of the USA.[28] The doctrine can be defined in the following manner: "a substantive ruling by the justices that a constitutional issue regarding the scope of a particular provision (or some aspects of it) should be authoritatively resolved not by the Supreme Court by rather by one (or both) of the national political branches".[29] Accordingly, court should abstain from resolving constitutional issues which can be resolved by national political branches more efficiently.[30]

It is important to note that the Constitutional Court, when making the referring decision, did not shed light on the fact that acting in the state of emergency and the possibility of human rights restriction are both foreseen by international treaties, out of which Article 4 paragraph 1 of the International Covenant on Civil and Political Rights bears great importance for the Republic of Croatia since it is one of the successors of the former Yugoslavia which signed this Covenant and since the respective provisions set out that human rights can be restrained in the state of emergency but such a state shall be officially announced.[31]

After the termination of the armed conflict, the last decrees were abolished in 1996.[32] The warfare accounted for the concentration of powers in the Croatian president, which was not one of the original intentions of the 1990 Constitution. The disputable emergency decrees, which have been qualified as usurpation of power by a fair number of critics, have certainly contributed to the thesis that Croatian scientists describe the first period of the Croatian constitutionality as

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[25] Ibid. See also: I. Padjen, M. Matulović, 'Cleansing the Law…'

[26] P. Bačić, Konstitucionalizam…, pp. 355-356.

[27] J.H. Choper, 'The Political Question Doctrine. Suggested Criteria', *Duke Law Journal*, Vol. 54 (2005), p. 1458.

[28] Ibid., p. 1457

[29] Ibid., p. 1461.

[30] The clearest definition of the doctrine can be found in the case of Baker v. Carr (369 U.S. 186 [1962]). See: ibid., p. 1458.

[31] See: I. Padjen, M. Matulović, 'Cleansing the Law…' and I. Kosnica, 'Uredbe iz nužde predsjednika…', p. 156.

[32] Information on the termination of the last decrees was published in the *Official Gazette*, No. 38 (1996) and No. 103 (1996). For more details see: I. Kosnica, 'Uredbe iz nužde predsjednika…', p. 175.

"constitutional dictatorship"[33] or "imperial presidency".[34] The advancement of the democratic potential of the new Croatian state and the wish for exercise of the rule of law, the principle of the division of powers and other values foreseen by the Constitution led to, after the leading party which had ruled Croatia for 10 years had lost the 2000 election (Croatian Democratic Union), amendment of the Constitution and replacement of the semi-presidential system in which the president had strong executive powers with a parliamentary system.[35]

3. Acquisition of Croatian Citizenship by Naturalization

The Croatian example of regulation of the issue of citizenship resembles those in Eastern and Central European countries which have gained independence in the last twenty years, i.e. since the dissolution of their predecessor states.[36] After dissolution of a state, many issues remain open for quite a long time and their resolution requires long-lasting negotiations, which is not possible in terms of citizenship issues.[37] Such issues have to be dealt with urgently because their effects on the life of people and exercise of their civil and political as well as economic, social and cultural rights are enormous.[38] Foreigners do not exercise many rights that are enjoyed by the citizens or more precisely the former do enjoy them but under additional conditions. These rights include the right to employment, the right to pension and the right to healthcare.[39] Therefore, the Law on Croatian Citizenship is one of the first acts to have been passed since the proclamation of independence.[40] On the same day when the Resolution of Independence entered into force, i.e. on 8 October 1991, the Law on Croatian Citizenship became effective too.[41]

As far as the dissolution of the former Yugoslavia is concerned, each of the successor states has utilized its internal legislation to deal with citizenship issues. Due to the fact that apart from federal citizenship, every citizen of the former Yugoslavia also possessed citizenship of a particular republic, which was substantiated by special records, nothing seems to be controversial at first glimpse in the context of acquisition of new citizenship, not even the criterion of all the new states stipulat-

[33] I. Padjen, M. Matulović, 'Cleansing the Law…'

[34] B. Smerdel, 'Konstitucionalizam…', p 22.

[35] See: ibid., p. 26.

[36] I. Štiks, 'Uključeni, isključeni, pozvani. Politike državljanstva u postsocijalističkoj Europi i Hrvatskoj', *Politička misao*, Vol. 47 (2010), pp. 77-100.

[37] A. Metelko-Zgombić, 'Sukcesije država…', p. 830.

[38] Ibid., pp. 830-831.

[39] Ibid., p. 831. See also: J. Zorn, 'Politika isključivanja u stvaranju slovenske države. Slučaj izbrisanih', *Revija za sociologiju*, Vol. 35 (2004), p. 3.

[40] Law on Croatian Citizenship (*Official Gazette*, No. 53 [1991], No. 70 [1991], No. 28 [1992]). See also: A. Metelko-Zgombić, 'Sukcesije država…', p. 847.

[41] I. Štiks, 'Uključeni, isključeni…', p. 85.

ing that the main point in this context was the citizenship of a particular republic and not the current residence of a person.[42] However, since the Yugoslav citizenship granted the same rights to all citizens, most people did not pay any attention to republic citizenship which was based on the principle of *ius sanquinis*, so some people, though born in the Republic of Croatia or living in it for years, have become aliens since the entry into force of the new Law on Croatian Citizenship.[43] Beside those who had possessed the republic citizenship and thus automatically acquired citizenship of the Republic of Croatia (Article 30 paragraph 1 of the referring Law), members of the Croatian nation who did not have Croatian citizenship on the day of the entry into force of the Law on Croatian Citizenship but by the same day had had registered residence in the Republic of Croatia for at least 10 years could become Croatian citizens if they were willing to make a written statement that they consider themselves Croatian citizens (Article 30 paragraph 2).[44]

Thus all the individuals who were not ethnical Croats had to submit an application for acceptance into Croatian citizenship according to Article 8 of the Law on Croatian Citizenship. The conditions for acquisition of Croatian citizenship were as follows: that the applicant has turned at least 18 years of age and "has the capacity to act";[45] that they have been released from foreign country citizenship or they have to submit evidence that they will be granted the release if they are granted Croatian citizenship; that by the time of the application submission, they have resided on the Croatian territory for at least five consecutive years; that they can speak Croatian and they are familiar with the Latin alphabet; that their conduct implies that they respect the legal order and customs of the Republic of Croatia and embrace the Croatian culture.

Due to the war, many applicants faced serious trouble when trying to acquire Croatian citizenship following the procedure prescribed by the Law on Croatian Citizenship. Particularly aggravating was the fact that the Ministry of Interior,

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[42] A. Metelko-Zgombić, 'Sukcesije država…', p. 851.

[43] See: I. Štiks, 'Uključeni, isključeni…'

[44] A. Metelko-Zgombić, 'Sukcesije država…', p. 847.

Igor Štiks emphasized that the legal regulation of the citizenship and the administrative practice have lead to occurrence of three categories of people on the Croatian territory:

"The included" – this category comprises all the residents who held the citizenship of the former Socialist Republic of Croatia, regardless of their ethnic affiliation.

"The excluded" – this category involved those who resided on the Croatian territory and held the citizenship of some other Yugoslav republic.

"The invited" – this category encompassed ethnical Croats who lived abroad and who were promised, similarly to solutions in other eastern European states, a privileged status when acquiring Croatian citizenship. In this view, it is interesting to quote Petričušić who speaks about "ethnic nationalism of the Eastern European kind" as "the trigger for establishment of nations-states in Eastern and South-Eastern Europe". A. Petričušić, 'Preporuke iz Bolzana/Bozena o nacionalnim manjinama u međudržavnim odnosima: značenje i implikacije za Hrvatsku i regiju', *Politička misao*, Vol. 49 (2012), pp. 174-175.

[45] See: I. Padjen, M. Matulović, 'Cleansing the Law…', p. 43.

which was competent for acceptance of the applications, was not legally bound to deal with the applications within a specified period of time[46] nor to state the reasons for the rejection in the explanation of the decree (Article 26 paragraph 3).

On 8 December 1993, the Constitutional Court of the Republic of Croatia abolished the provision of Article 26 paragraph 3 of the Law on Croatian Citizenship as being contrary to the Constitution and the reason for such adjudication referred to violation of the constitutional right to appeal against individual legal acts of bodies in charge of first instance decisions (Article 18 paragraph 1).[47] Also, the Court addressed the respect for the right to an effective legal remedy regulated by Article 8 of the Universal Declaration of Human Rights and Article 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. It is vital to indicate that the Constitutional Court referred to the European Convention despite the fact that Croatia was not a member to the Council of Europe and thus was not in position to ratify the Convention.

However, the liability of honouring the rights granted by the Convention was imposed on the Republic of Croatia by itself, which was asserted by the Constitutional Court in its decision on abolishment of the controversial provision of the Law on Croatian Citizenship and in the Constitutional Law of Human Rights and Freedoms and the Rights of National and Ethnic Communities or Minorities in the Croatia (Article 1 and Article 2 item lj.).

The Constitutional Court declared that

> the Republic of Croatia as a sovereign state accepts the standpoint that exercise of human rights is no longer a *domaine reserve* of the Republic of Croatia but also a common concern of the international community, which is meant to express its acceptance of effective rules of the democratic world which Croatia belongs to, so the provision of Article 13 of the Convention is no exception thereto.

Irrespective of the reference to the Constitution and fundamental international documents protecting fundamental human rights, part of legal experts have not been satisfied with this decision since the Constitutional Court did not analyze the content of the right to citizenship.[48]

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[46] Ibid.

[47] Decision of the Constitutional Court of the Republic of Croatia: U-I-206/1992, U-I-207/1992, U-I-209/1992 and U-I-222/1992 of 8 December 1993 (*Official Gazette*, No. 113 [1993]).

[48] See: I. Padjen, M. Matulović, 'Cleansing the Law…', p. 44.

4. Since 1997 – the Influence of the Practice of the European Court of Human Rights

November 1997 represents a particular breakthrough in the practice of the Constitutional Court. It was the time when the European Convention for the Protection of Human Rights and Fundamental Freedoms became effective in Croatia and the country came under the jurisdiction of the European Court of Human Rights.[49] This part of the paper attempts to prove that the Constitutional Court, since losing the first cases, has consequently adapted its practice and approach to human rights protection to the practice of the European Court of Human Rights, i.e. "it has come nearer to the doctrine of the European Court of Human Rights".[50] In other words, the paper tries to acknowledge that since the ratification of the Convention,

> judgements of the Constitutional Court in which the standards of human rights protection developed by the European Court have been embraced by the Croatian legal order have become an important instrument for enhancement of human rights protection in the Republic of Croatia and a relevant factor in the modernization of the Croatian legal order in that field.[51]

Although the practice of the European Court implies that the Constitutional Court used to refer to the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms and the practice of the European Court of Human Rights prior to 1997,[52] which is actually the outcome of the fact that

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[49] European Convention for the Protection of Human Rights and Fundamental Freedoms was ratified on 17 October 1997 and published in the *Official Gazette*, No. 18 (1997). The Convention became effective in Croatia on 5 November 1997. Since its entry into force, the Convention has, pursuant to Article 141 of the Constitution of the Republic of Croatia, become part of the internal legal order of the Republic of Croatia and above law in terms of legal effects.

[50] M. Matulović, 'Europa, hrvatski Ustav i teorija ljudskih prava. (Silna) promjena hrvatskog Ustava kao rezultat ujecaja prakse Europskog suda za ljudska prava u Strasbourgu na praksu Ustavnog suda Republike Hrvatske u zaštiti ljudskih prava', at <http://www.hr.boell.org/downloads/matulovic_-_ustav.pdf>, 20 September 2012.

[51] Ž. Potočnjak, M. Stresec, 'Europski sud za ljudska prava i Ustavni sud Republike Hrvatske u zaštiti ljudskih prava' in J. Barbić, *Hrvatsko ustavno sudovanje [Croatian Constitutional Judicature]. De lege lata and de lege ferenda. Okrugli stol održan 2. travnja 2009. u palači HAZU u Zagrebu*, Zagreb 2009, p. 217.

[52] For instance, from the Decision No. U-I-892/1994 of 14 November 1994 on initiation of the procedure for assessment of the constitutionality of Article 94 of the Housing Act (*Official Gazette*, No. 83 [1994]) and Decision No. U-I-130/1995 of 20 February 1995 on initiation of the procedure for assessment of the constitutionality of Article 70 of the Housing Act (*Official Gazette*, No. 12 [1995]) it is obviously that the Constitutional Court posited that the Convention "had been incorporated into the Croatian legislation" due to Article 1 of the 1991 Constitutional Act on Human Rights and Freedoms and on the Rights of Ethnic and National Communities or Minorities.

based on Article 1 of the Constitutional Act on Human Rights and Freedoms and the Rights of National and Ethnic Communities or Minorities in the Republic of Croatia, the Convention became part of the Croatian internal legal order already in 1991,[53] there is no doubt that the influence of the reasoning of the European Court of Human Rights on the practice of the Constitutional Court has become clearly and vastly evident since the ratification of the Convention. The positive and transparent attitude of the Constitutional Court to the practice of the European Court reflects in the promptness of the former to amend its practice as a reaction to the cases of the European Court lost by the Republic of Croatia. This dynamic process of the harmonization of the practice of the Constitutional Court with the practice of the European Court is substantiated by a fair number of cases of the Constitutional Court. However, the things are not so idyllic and this assertion is derived from the fact that there are cases in which the Constitutional Court has failed to adjust its practice and reasoning to those of the European Court of Human Rights, which indicates that the Constitutional Court should "keep track with the practice of the European Court even more intensively and persist in its application in judgements".[54]

The practice of direct application of the provisions of the Convention, on one hand, and the practice of acceptance of the interpretation of the legal principles and institute of the Convention by the European Court, on the other hand, are witnessed by a fair number of judgements of the Constitutional Court, which has undoubtedly enhanced the standards of human right protection in Croatia.[55]

4.1. The Practice of Direct Application of the European Convention for the Protection of Human Rights and Fundamental Freedoms

In its previous practice, the Constitutional Court has directly applied the provisions of the Convention in several cases of abstract control of constitutionality. The reasons for such infrequent application of the Convention are revealed by the fact that the Constitution of the Republic of Croatia contains a rather respectable and broad list of the ways of human rights and fundamental freedoms protec-

[53] Pursuant to Article 1 of the Constitutional Act, "the Republic of Croatia is bound to respect and protect national and other fundamental rights and freedoms […] in compliance with the Convention of the Council of Europe for the Protection of the Rights of Man and Fundamental Freedoms and appertaining protocols". Constitutional Act on Human Rights and Freedoms and on the Rights of Ethnic and National Communities or Minorities (*Official Gazette*, No. 65 [1991]).

[54] Ž. Potočnjak, M. Stresec, 'Europski sud…', p. 241.

[55] The division of the previous practice of the Constitutional Court with respect to the Convention has been performed according to: J. Omejec, The Implementation of the European Court's of Human Rights Rulings in Practice of the Constitutional Court of the Republic of Croatia, International Forum of Constitutional Justice, Moscow, 9-10 December 2005.

tion[56] (Chapter III of the Constitution, Articles 14-70, encompass a list of personal, political, economic, social and cultural rights), so one can "often hear the assertion that all the rights guaranteed by the Convention are also guaranteed by the Constitution".[57]

The Constitutional Court directly applied a provision of the Convention in its Judgement no. U-I-149/1999 of 3 February 2000,[58] which abolished the provisions of Article 10 paragraphs 3 and 4 of the Law on Associations that limited the right of aliens and foreign legal entities to found associations in the Republic of Croatia with respect to the right of Croatian citizens and legal entities (pursuant to the principle of reciprocity).[59] The Constitutional Court abolished the disputable provisions referring to a (broader) provision of Article 11 paragraph 1 of the Convention, according to which "everybody" has the right to association, regardless of their citizenship or some other circumstances.

Furthermore, an example of "the broadest and most comprehensive application of the Convention"[60] is definitely Judgment no. U-I-745/1999 of 8 November 2000,[61] with which the Court abolished Articles 22, 25 item 7 and 36 paragraph 3 of the Act on Expropriation of Property since they were contrary to Article 6 paragraph 1 of the Convention and hence to the provisions of Articles 3, 5 and 134 of the Constitution. In this case, the Constitutional Court came, based on comparison of guarantees from the field of procedural law and requirements set out in Article 6 paragraph 1 of the Convention with the solutions defined in the Croatian regulations on expropriation of property,[62] to the conclusion that the latter do not meet the requirements of the Convention in the part relating to the

[56] See: S. Sokol, 'Ustavnopravne osnove i primjena Europske konvencije za zaštitu ljudskih prava i temeljnih sloboda u ostvarivanju nadležnosti Ustavnog suda Republike Hrvatske' in Regional Counselling: *The Position and Role of the Constitutional Court in Application of the European Convention on Human Rights*, Digest, Podgorica, 2007, p. 19, at <http://89.188.32.41/download/pravni_zbornik.prd>, 20 September 2012.

[57] S. Rodin, 'Ustavnopravni aspekti primjene Europske konvencije za zaštitu ljudskih prava i temeljnih sloboda', *Zbornik Pravnog fakulteta u Zagrebu*, Vol. 48, No. 1-2 (1998), p. 103.

[58] Judgement of the Constitutional Court, No. U-I-149/1999 of 3 February 2000, *Official Gazette*, No. 20 (2000) and No. 28 (2000).

[59] The disputable provisions of the Law on Associations read as follows: "The founder of an association in the Republic of Croatia can be an alien who has been granted permanent residence in the Republic of Croatia or who has been issued a work visa or who has extended stay on the Croatian territory for over a year based on the principle of reciprocity" (Article 10 paragraph 3); "A foreign legal entity can be the founder of an association based on the principle of reciprocity" (Article 10 paragraph 4).

[60] S. Sokol, 'Ustavnopravne osnove…', p. 16.

[61] Judgement No. U-I-745/1999 of 8 November 2000, *Official Gazette*, No. 112 (2000).

[62] Article 6 paragraph 1 of the Convention stipulates that "for the sake of defining their rights and liabilities of civil nature or in case of bringing criminal charges against them, everybody has the right to be heard at legally established, independent and impartial court within a reasonable period of time".

bodies deciding on expropriation and their powers in the proceedings. In fact, as the legislative solution on the expropriation proceedings – which stipulated that a decision on expropriation should be made by an administrative body and that the Administrative Court should supervise its legality – could correspond to the requirements stated in Article 6 paragraph 1 of the Convention only under the condition that the Administrative Court was truly a court full jurisdiction, the Constitutional Court challenged the assumptions that the Administrative Court needed to fulfil in order to be deemed a court of full jurisdiction. These assumptions are as follows: first, to have the right and duty to independently produce and assess evidence or in other words, to autonomously decide on the facts whenever a party challenges the regularity and completeness of its adjudication in the administrative proceedings, regardless if the adjudication concerns the legality of an administrative act or the right of the claimant who the administrative act refers to, and second, to have the right and duty to schedule and hold an oral and a contradictory hearing whenever it comes to a claim against an administrative act which has dealt with a civil right or liability, i.e. that the court is in any case obliged to organize a hearing when it is required to by a party in the proceedings. After adequate analysis and elaboration of the Law on Administrative Disputes, the Constitutional Court judged that the Administrative Court fulfilled neither of the assumptions to an appropriate extent and thus it cannot be considered a court of full jurisdiction.

4.2. The Practice of Accepting the Principles and Institutions of the Convention Interpreted Through the European Court of Human Rights' Case Law

The practice of accepting the principles and institutions of the Convention interpreted through the European Court of Human Rights' case law is expressed both in the cases of abstract control of the constitutionality and in individual cases of human rights protection.

As regards the cases of abstract control of the constitutionality, the decisions of the Constitutional Court related to the principles of proportionality and the rule of law are typically referred to as the best examples of the acceptance of the principles of Convention interpreted through the European Court of Human Rights' case law. In the first case, specifically Decision No. U-I-1156/1999 of 11 January 2000,[63] by which the Constitutional Court abolished Article 8 paragraph 1 and a part of Article 25 paragraph 1 item 5 of the Act on Restricting the Use of Tobacco Products because they had been contrary to (primarily) Art. 48 paragraph 1 of the Constitution which guarantees the right of ownership, the Constitutional

[63] Decision No. U-I-1156/1999 of 11 January 2000, *Official Gazette*, No. 14 (2000).

Court for the first time in its case law "fully accepted and explaine"[64] the relevant principle.[65] The disputed provisions in this case were the prohibition of the sale of tobacco products from automatic devices effective as of 1 January 2000 (Art. 8 para 1) and the foreseen monetary penalty for this offence (part of Art. 25 para 1 item 5). In its consideration of the issue whether the conditions under which the restriction of entrepreneurial freedoms and property rights in the concrete case were proportionate to the legitimate goal which is aimed to be achieved by the prohibition, the Court took the position that the prohibition of sales of tobacco products from vending machines was not proportionate to the legitimate goal. Namely, the Court took the attitude that

> the limitation of entrepreneurial freedoms and property rights, despite having been undertaken with a legitimate goal,[66] would breach the economic rights prescribed by the Constitution of the Republic of Croatia in each case where it is clear there is no reasonable proportion between the method or scope of restricting the entrepreneurial freedoms and property rights of individuals and goals aimed to be achieved in the public interest.

Namely, proportionality, in the Court's opinion, can exist "only if measures undertaken are no more restrictive than necessary to ensure a valid (legitimate) goal". Taking into account the fact that the principle of proportionality is not directly

[64] Ž. Potočnjak, M. Stresec, 'Europski sud…', p. 218.

[65] Still, it should be noted that an earlier Constitutional Court Decision, i.e. Decision and Resolution No. U-I-673/1996 of 21 April 1999 (*Official Gazette*, No. 39 [1999]) is considered to be "the cornerstone of the general constitutional principle of proportionality in the Croatian constitutional and legal order", even despite – as stated by S. Rodin – "the non-existence of a structured analysis of individual elements" of this principle. In this case, the Constitutional Court, while conducting control of the constitutionality of the Act on Compensation for Property Seized During the Yugoslav Communist Regime, speaking of the constitutionally stipulated possibility for limitation of liberties and rights, established the following […] any restriction (even when it is necessary and based on the Constitution) represents an exceptional state, since it deviates from the general rules of constitutional liberties and rights. Therefore, limitations should be not only based on the Constitution, but proportionate to the goal and purpose which is aimed to be achieved by a law, i.e. such goal or purpose must be achieved with minimum interference with the constitutional rights of citizens (provided, of course, that limitations can be determined by gradation). This rule of proportionality of restrictions with the goal and purpose aimed to be achieved by a law is a general constitutional principle, which is immanent to all constitutional provisions related to the liberties and rights of humans and citizens". More on the principle of proportionality and its application in the Constitutional Court practice: S. Rodin, 'Načelo proporcionalnosti – porijeklo, ustavno utemeljenje i primjena', *Zbornik Pravnog fakulteta u Zagrebu*, Vol. 50, No. 1-2 (2000), pp. 31-53.

[66] Namely, somewhat earlier in the respective Decision, the Constitutional Court stated that the prohibition of sale of tobacco products from automatic devices had been done in order to achieve a legitimate goal, provided by the Constitution of the Republic of Croatia, i.e. in order to protect the human health. In the disputed case, the protection is reflected in the removal of devices that prevent the control of sales of tobacco products to minors.

regulated by the Constitution, which quite certainly cannot negate the "ubiquitous significance" of this principle, the Constitutional Court derived the principle of proportionality from Article 17 of the Constitution which regulates the possibility for restrictions of fundamental freedoms and rights guaranteed by the Constitution in the so-called extraordinary circumstances. Accordingly, in a situation when the Constitution expressly stipulates the application of the proportionality requirement, i.e. test of proportionality in extraordinary circumstances, the Court took the position that "this requirement is even more so valid for the duration of 'regular conditions' in the country".

The legal positions of the European Court of Human Rights in relation to the rule of law were accepted by the Constitutional Court in its Decision No. U-I-659/199 et al. of 15 March 2000,[67] where it assessed the compliance of certain provisions of the Act on the National Judicial Council with the Constitution of the Republic of Croatia. The respective Decision is a clear example of "a significant expansion of the basic stipulation of the constitution-maker on the rule of law as a fundamental value" and the rise of "the free interpretation of the Constitution (S. Sokol) and an activist attitude that encourages the strengthening of the rule of law and democracy in the Republic of Croatia".[68] Namely, under item 11 of the Decision,

> the rule of law is more than a mere requirement to act in accordance with a law: it includes requirements concerning the contents of laws as well. Therefore the rule of law itself cannot be considered as law in the same sense as laws enacted by a legislator. The rule of law is not only the rule of laws, but rule according to law which – along with the requirement for constitutionality and legality, as the foremost principle of every developed legal order – also contains additional requirements concerning laws themselves and their contents.

In the above sense the Constitutional Court specifically emphasized "that in a legal order based on the rule of law, laws must be general and equal for all, and legal consequences should be certain for those to which a law shall apply".[69]

The practice of accepting the rules of the Convention, i.e. the positions of the European Court is supported by quite a few examples of the Constitutional Court's case law in individual cases of the protection of human rights, which we will, for the sake of clarity, strive to discuss according to types of human rights violations.

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[67] U-I-659/1994, U-I-146/1996, U-I-228/1996, U-I-508/1996, U-I-589/1999 of 15 March 2000, *Official Gazette*, No. 31 (2000).

[68] P. Bačić, Konstitucionalizam…, p. 354.

[69] In addition, under item 11.1. of the Decision, the Court also noted that "legal consequences must be appropriate to the legitimate expectations of parties in each concrete case in which a law directly applies to them".

4.2.1. The right to a fair trial

Of all the violations of human rights identified in relation to the Republic of Croatia, the breach of the right to a fair trial, i.e. breach of Article 6 of the Convention is the most widely represented.[70] The aforesaid claim is supported by the available statistical data related to violations of this right identified in the judgments of the European Court concerning the Republic of Croatia in the period from 1999 until 2011.[71] Therefore, it can be substantially concluded that violations of the right to a fair trial have been "not only the most frequent cause of instituting proceedings before the European Court, but that they have a lion's share of approximately 90 per cent in the total number of judgments related to the Republic of Croatia and having identified violations".[72] However, the Annual Report of the European Court of Human Rights for 2011 shows a decline in the percentage of judgements passed due to violation of the right to a fair trial (from 90% to less than 50%)[73] and, hopefully, thanks to further reforms of the Croatian legislation first and foremost, the latter percentage will decline even more or be completely eliminated.

As it is known, the right to a fair trial implies an entire set of procedural rights, but for the purposes of this paper we will limit ourselves to the right to a hearing within reasonable time, and this is for two reasons: firstly, because this is a right that was most frequently violated (and, symbolically, the first judgment of the European Court passed in relation to Croatia established a violation of this very right – i.e. the Rajak case of June 2001) and secondly, because the violation of the respective right is a good example of the harmonization between the practice of the Constitutional Court of the Republic of Croatia with the positions of the European Court of Human Rights, which has ultimately resulted in the fact that due to this violation amendments were made to the Constitution of the Republic of Croatia and the Constitu-

[70] For the purposes of this paper the right to a hearing within reasonable time, i.e. Article 6 paragraph 1 of the Convention, should be particularly noted, stating the "in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled of a fair and public hearing within a reasonable time".

[71] According to the Annual Report of the European Court of Human Rights for 2011, there were 216 judgements passed in relation to the Republic of Croatia, in 177 of those at least one breach of rights were found, 10 judgments were without breaches and 26 were settlements, plus 3 "other judgments". Among the 177 identified breaches, (no less than) 83 were related to the duration of proceedings, 59 to the right to a fair trial (in narrow sense), and 27 to the right to an effective remedy. See: European Court of Human Rights, Annual Report 2011, Registry of the European Court of Human Rights, Strasbourg 2012, p. 160, at <http://www.echr.coe.int>, 20 September 2012.

[72] A. Uzelac, 'Pravo na pravično suđenje u građanskim predmetima: nova praksa Europskog suda za ljudska prava i njen utjecaj na hrvatsko pravo i praksu', *Zbornik Pravnog fakulteta u Zagrebu*, Vol. 60, No. 1 (2010), p. 102.

[73] According to the 2011 Annual Report of the European Court of Human Rights (see note 22), during 2011 there were 25 judgements related to the Republic of Croatia, 23 of which had at least one breach of rights identified, and no breaches were found in two judgments. Among the 23 identified breaches, 3 were related to the length of proceedings and 8 to the right to a fair trial.

tional Act on the Constitutional Court of the Republic of Croatia, as well as a number of other acts (this primarily refers to the Courts Act and Civil Procedure Act).

Since the first judgment of the European Court in which a violation of the right to a hearing within reasonable time was found, that is, the above mentioned case of Rajak v. Croatia from 2001,[74] a certain constant is noticeable in the identifications of the said violation, to which was frequently – even regularly – in conjunction with the violation of Article 13 of the Convention, i.e. the violation of the right to an effective remedy. While for the purposes of this paper we would not discuss the reasons why the lengthiness of court proceedings has become an "almost endemic disease of the Croatian justice system",[75] clearly this cannot a matter of one or two typical problem, but rather a set of various "procedural and organizational difficulties"[76] Still, it should be noted that with the ratification of the European Convention in Croatia "a legal activity commenced, and has not ceased until today, the purpose of which is to establish effective normative mechanisms to protect citizens from the procedural inactivity of Croatian courts".[77]

Thus, it was (only) in 1999[78] that the protection of the right to a hearing within reasonable time was introduced in Croatia, pursuant to Article 59 paragraph 4 of the Constitutional Act on the Constitutional Court, specifically by introducing the possibility for lodging a constitutional complaint even before all available remedies are exhausted (which was otherwise a precondition for a constitutional complaint), with the fulfilment of two cumulative conditions (a grossly violation of constitutional rights and the risk of serious and irreparable consequences).[79] Furthermore, it should be noted that with the 2000 Amendment to the Constitution of the Republic of Croatia, the right to a hearing within reasonable time became part of the constitutional order of the Republic of Croatia.[80]

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[74] Rajak v. Croatia, 49706/99, judgment of 28 June 2011.

[75] For more information concerning the main reasons why the case law of the European Court of Human Rights resulted in violations of the right to a hearing within reasonable time in relation to the Republic of Croatia see: A. Uzelac, 'Pravo na pravično…', pp. 135-141.

[76] Ibid., p. 137.

[77] M. Šikić, 'Pravo na suđenje u razumnom roku u postupcima pred Upravnim sudom Republike Hrvatske', *Zbornik Pravnog fakulteta Sveučilišta u Rijeci*, Vol. 30, No. 1 (2009), p. 336.

[78] The Constitutional Act on the Constitutional Court, *Official Gazette*, No. 99 (1999).

[79] Namely, according to Article 59 paragraph 4 of the 1999 Constitutional Act, "the Constitutional Court may, exceptionally, examine a constitutional complaint prior to exhaustion of other available remedies, if it is satisfied that a contested act, or failure to act within a reasonable time, grossly violates a party's constitutional rights and freedoms and that, if does not act, a party will risk serious and irreparable consequences". It can be concluded that "in this period the Constitutional Court decided on instituting proceedings as a result of a constitutional complaint pursuant to the aforesaid article at its own discretion". I. Perin Tomičić, 'Zaštita prava na suđenje u razumnom roku u Republici Hrvatskoj s osobitim osvrtom na problem okončanih predmeta', *Zbornik Pravnog fakulteta Sveučilišta u Rijeci*, Vol. 28, No. 2 (2007), p. 1357.

[80] According to Article 29 paragraph 1 of the Constitution 2000, "everyone shall have the right to have an independent and impartial court established by law determine, in a fair manner

However, it transpired very soon that these changes would not be sufficient. Namely, in the well known judgment Horvat v. Croatia from July 2001,[81] the European Court stated that "a complaint pursuant to Section 59(4) of the Constitutional Court Act cannot be regarded with a sufficient degree of certainty as an effective remedy" for the protection of the right to a hearing within reasonable time. The European Court based such a conclusion primarily on the fact that the procedure pursuant to Article 59 paragraph 4 of the Constitutional Act on the Constitutional Court may only be instituted if the Constitutional Court, after a preliminary examination of a complaint, decides to allow it (therefore, the instituting of a procedure depends on the Court's discretion). Further, the Court stated that lodging a constitutional complaint based on the relevant provision required two cumulative conditions, with the terms used in identifying those conditions ("grossly violated", "serious and irreparable consequences") being susceptible to various and wide interpretation. In the end, the European Court found that the fact that until that time the Constitutional Court only once (!) accepted a constitutional complaint pursuant to Article 59 paragraph 4 of the Constitutional Act quite certainly was not sufficient to show there was a "settled national case-law that would prove the effectiveness of the remedy".

The judgment in the Horvat case was actually an incentive for the authorities to change the corresponding provisions related to the protection of the right to a hearing within reasonable time. Moreover, this was "the first judgment of the European Court that affected the modification and amendment of legislation in the Republic of Croatia".[82] Thus, the preceding Article 59 paragraph 4 was significantly amended by the Constitutional (Amendments) Act on the Constitutional Court in 2002.[83] Namely, the feature of extraordinary institution of proceedings following a constitutional complaint was abolished[84] and it was stipulated that the Constitutional Court shall – in case that a constitutional complaint is accepted – set a time limit for a competent court within which it must issue a decision, and the proponent of the constitutional complaint shall in such case be awarded appropriate compensation.

The above mentioned Amendments to the Constitution from 2000 and those made to the Constitutional Act in 2002 resulted in a change of the European Court's position, already in the case Slaviček v. Croatia from July 2002.[85] In this

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and within a reasonable time, his right and obligations, or a suspicion or charge of a punishable offence". The Constitution of the Republic of Croatia, *Official Gazette*, No. 124 (2000).

[81] Horvat v. Croatia, 51585/99, judgment of 26 July 2001.

[82] M. Šikić, 'Pravo na suđenje…', p. 338.

[83] Constitutional (Amendments) Act on the Constitutional Court of the Republic of Croatia, consolidated version, *Official Gazette*, No. 49 (2002).

[84] The previous formulation "The Constitutional Court may *exceptionally* institute proceedings…" replaced by the present formulation "The Constitutional Court *shall* institute proceedings…".

[85] Slaviček v. Croatia, 20862/02, Decision as to the Admissibility of 4 July 2002.

case, namely, the European Court found that, due to the changes that had been undertaken, there was an effective remedy in Croatia for a violation of the right to a hearing within reasonable time, i.e. that "the newly introduced Section 63 of the 2002 Constitutional Act on the Constitutional Court does provide […] an effective remedy in respect of the length of the proceeding".

However, while undoubtedly positive, these changes resulted in a large influx of constitutional complaints due to the violation of the right to a hearing within reasonable time. The solution for the overload of the Constitutional Court was found in a new legal instrument, introduced by the Courts Act of 2005[86] – application for protection of right to a hearing within reasonable time, which is submitted directly to a higher instance court than the one before which an unreasonably lengthy proceedings are pending. The Constitutional Court still retains jurisdiction in these issues, but only as the last instance, i.e. in case of lodging a constitutional complaint against a decision by the Supreme Court of the Republic of Croatia.

Even though the above changes have had a positive impact on the protection of the right to a trial within reasonable time, which has become "faster, more efficient and more accessible to applicants because more courts now have jurisdiction",[87] taking into account also that "in a series of decisions relating to other members states of the Council of Europe the Court pointed out the Croatian model as a positive example in facing the issues of lengthy court proceedings",[88] there is no question that the need to improve this protection still exists. This is supported by a number of European Court judgments where insufficient financial compensations awarded by the Constitutional Court have been found in cases where the right to a hearing within reasonable time was found to be violated,[89] as well as the issue of exceeding time limits set by the Constitutional Court for the adoption of appropriate decisions in proceedings where violations of the said right were identified.[90]

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[86] Courts Act, *Official Gazette*, No. 150 (2005).

[87] Ž. Potočnjak, M. Stresec, 'Europski sud…', p. 223.

[88] A. Uzelac, 'O razvoju pravnih sredstava za zaštitu prava na suđenje u razumnom roku. Afirmacija ili kapitulacija u borbi za djelotvorno pravosuđe', *Zbornik Pravnog fakulteta u Zagrebu*, Vol. 62, No. 1-2 (2012), p. 376.

[89] Namely, the Constitutional Court awarded compensations that typically were in the range of 20-40% of the amount awarded by the European Court in such cases. Thus, for example, in the Kaić case (Kaić and Others v. Croatia, 22014/04, judgment of 17 July 2008), the compensation awarded by the Constitutional Court in the amount of 530 EUR was found to be insufficient by the European Court, which awarded a compensation amounting to 1,350.00 EUR per applicant.

[90] For instance, in the Oreb case (Oreb v. Croatia, 9951/06, judgment of 23 October 2008) the European Court found as follows: "[…] in the instant case, where the applicants did not receive sufficient compensation for the inordinate length of their proceedings and where the competent court has failed to comply with the time-limit set in relation to it and thereby has failed to implement the Constitutional Court's decision thus far, it cannot be argued that the constitutional complaint the applicants resorted to as an effective remedy for the length of those proceedings. The compensation of these factors in the particular circumstances of the present case rendered an otherwise effective remedy ineffective".

4.2.2. The Right to Respect for Private and Family Life

The judgments of the European Court in which violations of Article 8 of the Convention were found, i.e. the right to respect for private and family life, have also resulted in the corresponding changes of laws, as well as in the changes of positions taken by the Constitutional Court. Still, in this case also there is definitely room for further improvement and harmonization.

In the period from 1999 until 2011, the European Court passed 14 judgments in relation to Croatia where violations of Article 8 of the Convention were found (4 of which occurred in 2011). For instance, in the 2002 case Mikulić v. Croatia[91] the applicant was an extramarital child who attempted to determine who her biological father was through court proceedings. Since the court proceedings of identifying paternity had taken four years (due to which the European Court found that Article 6 paragraph 1 of the Convention was violated as well), due to the behaviour of the respondent who on several occasions ignored scheduled tests and failed to attend hearings, the Court found that the inefficiency of courts had brought the applicant into "a state of prolonged uncertainty as to her personal identity. The Croatian authorities have therefore failed to secure to the applicant the «respect» for her private life to which she is entitled under the Convention". Namely, the applicant did not actually claim that in this case the state should abstain from action, but that it should take steps to provide appropriate measures in the context of the dispute to determine paternity. The Court noticed that there had been no measures in the national law to ensure or force the respondent to undergo DNA testing. As the consequence of this judgment, and with the aim to secure the presence of the respondent in paternity disputes and to subject him to DNA testing, provisions of the Family Act and Civil Procedure Act have been amended.

In a 2005 case, Karadžić v. Croatia,[92] the European Court came to a conclusion that the Croatian authorities had failed to take appropriate and efficient measures to return to the applicant, a Bosnia and Herzegovina national with residence in Germany, her son who had been "unlawfully" taken away by his father to Croatia several years before. Consequently, Article 8 of the Convention was violated. The issue in the relevant case was whether a constitutional complaint could be considered an effective remedy in enforcement proceedings where a competent court had already issued an enforcement decision. Namely, until 2 February 2005, the Constitutional Court regularly declared such constitutional complaints as inadmissible, which was why the European Court concluded that prior to the above date a constitutional complaint cannot be considered as an effective remedy in such cases. However, in its decision of 2 February 2005, the Constitutional Court changed its case law, i.e. it decided to also examine, when deciding on the length of the enforcement proceedings, the time that elapsed from the moment of the

[91] Mikulić v. Croatia, 53176/99, judgment of 7 February 2002.

[92] Karadžić v. Croatia, 35010/04, judgment of 15 December 2005.

enforcement decision. In doing so, the Constitutional Court expressly referred to the European Court practice, specifically to the judgment Horsnby v. Greece.[93] For that reason, the European Court stated that as of 2 February 2005 and the change of the applicable Constitutional Court case law, a constitutional complaint can be considered an effective remedy as regards enforcement proceedings.

The first judgment of the European Court where a violations of the right of a parent divested of the capacity to act in relation to her child referred to the case X of 2008,[94] where the breach of Art. 8 of the Convention occurred because the applicant, who suffered from paranoid schizophrenia and was divested of the capacity to act, was not enabled to participate as a party in the proceedings in which her daughter had been given up for adoption. Another such case was judged on 21 June 2011 – this was the case Krušković v. Croatia,[95] where the applicant had been prevented from acknowledging paternity of his daughter because he had been divested of the capacity to act. It is important to mention that in both cases the European Court pointed to the need for a change of approach on the part of the Constitutional Court, but also of all the state authorities in these and other similar cases. Namely, since under the national law no action by a person divested of the capacity to act, including the lodging of a constitutional complaint, produces legal effect, the European Court pointed to the need to change the purely formalistic approach to an approach that would achieve a fair balance between the public interest to protect persons divested of their capacity to act and the interests of persons divested of their capacity to act in concrete situations, such as, for instance, in the case of acknowledgment of paternity.

4.2.3. The Right to Life

A violation of the right to life, protected by Article 2 of the European Convention, on the part of the Republic of Croatia, was for the first time found in the 2009 case Tomašić and Others v. Croatia.[96] Since Article 2 of the Convention imposes on the state to take appropriate measures to protect the lives of persons under its jurisdiction, the Court had to determine whether the competent Croatian authorities had taken all measures in order to protect the lives of a mother (M.T.) and child (V.T., the child of M.T. and M.M.), even though they had known that threats by M.M. against their lives had been serious. Since the circumstances of the case had undoubtedly indicated that the competent authorities had known that the threats against the lives of M.T. and V.T. had been serious and that all reasonable measures should have been taken to protect them from those threats,

[93] Hornsby v. Greece, 18357/91, judgment of 19 March 1997.
[94] X. v. Croatia, 11223/04, judgment of 17 July 2008.
[95] Krušković v. Croatia, 46185/08, judgment of 21 June 2011.
[96] Tomašić and Others v. Croatia, 46598/06, judgment of 15 January 2009.

the Court examined whether the authorities had taken all reasonable measures in the circumstances of this case. In doing so, the Court identified a series of failures: even though M.M. had on multiple occasions mentioned that he had had a bomb, his flat and vehicle had not been searched during the criminal proceedings; even though the psychiatric report composed for the purposes of the criminal proceedings against M.M. had indicated as to the need for his continuous psychiatric treatment, his treatment had lasted only two months and five days; there had been no assessment of the state of M.M. immediately before he had been released from prison. Due to all the above, the Court found a breach of the substantive aspect of Article 2 of the Convention because the competent national authorities had failed to take all necessary and reasonable measures under the circumstances of this case to protect the lives of M.T. and V.T. This kind of judgment provides for the interpretation that the state has the obligation to amend appropriate laws,[97] but also to change the method in which the competent authorities proceed with the aim to fulfil the obligations pursuant to Article 2 of the Convention.

In addition, one of the more recent judgments delivered by the European Court refer specifically to a violation of Article 2 of the Convention. In its judgment in the case Bajić v. Croatia of 13 November 2012[98] the Court found that Croatia had breached its procedural obligation under Article 2 of the Convention because it had failed to carry out an efficient investigation of the death of a patient due to medical negligence. The court found that the national system (the relevant hospital, the Medical Chamber, the Office of the Public Prosecutor, the courts) which had faced the accusation of medical negligence had failed.

4.2.4. Prohibition of Torture, Inhuman or Degrading Treatment or Punishment

The judgments of the European Court relating to the violation of Article 3 of the Convention are of extreme importance, not only because they concern the violations of one of the most significant fundamental values of democratic society (which is why they can be viewed as "the most difficult judgments that the European Court delivered in cases instituted against the Republic of Croatia"),[99]

[97] For instance, under item 57 of the Judgment, the Court noticed that the regulation stipulating the administration of the measure of compulsory psychiatric treatment, i.e. the relevant provisions of the Enforcement of Prison Sentences Act, was of a very general nature. According to the Court's opinion, this case thus proved that such general rules fail to appropriately address the issue of the administration of compulsory treatment as a security measure, fully leaving the decision on how to proceed to the discretion of prison authorities. The Court, however, holds that such regulations should be sufficiently detailed to enable the proper realisation of prison sentences.

[98] Bajić v. Croatia, 41108/10, judgment of 13 November 2012.

[99] Ž. Potočnjak, M. Stresec, 'Europski sud…', p. 233.

but also because of the fact that they have resulted in improved standards of occupancy conditions (e.g. the cases Cenbauer v. Croatia of 2006[100] and Štitić v. Croatia of 2007[101] have resulted in a series of measures aimed to improve conditions in prisons) and medical treatment in Croatian prisons (e.g., the cases Pilčić v. Croatia of 2008[102] and Testa v. Croatia of 2007[103] have resulted in a series of measures for the improvement of medical treatment during imprisonment or detention).

Additionally, the judgments of the European Court relating to the violation of Article 3 of the Convention have led to corresponding changes in the Constitutional Court case law, particularly concerning damages due to inhuman prison conditions (Decision U-III-1437/2007 of 23 April 2008) and the extension of the legal remedy for the protection of the rights of prisoners to include prisoners as well (Decision U-III-4182/2008 of 17 March 2009).

As regards the violation of the Article 3 of the Convention, the 2007 case of Šečić v. Croatia[104] is of particular note, since it, in addition to a violation of Article 3, for the first time in relation to Croatia included a violation of Article 14 of the Convention, i.e. the violation of the prohibition of discrimination. These violations occurred due to the failure by the Croatian authorities to carry out an adequate ("promptly and with reasonable expedition") investigation of the attack on the applicant. Namely, the applicant (of Roma ethnicity) had been brutally beaten by a group of (due to superficial investigation) unidentified skinheads (private individuals). The Court's position was that "the failure of the State authorities to further the case or obtain any tangible evidence with a view to identifying and arresting the attackers over a prolonged period of time indicates that the investigation did not meet the requirements of Article 3 of the Convention". In relation to Article 14 of the Convention, the Court "defined an additional segment of procedural obligations of the states according to Article 14 of the European Convention in conjunction with Article 14 of the European Convention".[105] Namely, the Court stated that "[…] when investigating violent incidents, State authorities have the additional duty to take all reasonable steps to unmask any racist motive and to establish whether or not ethnic hatred or prejudice may have played a role in the events… The Court considers the foregoing necessarily true also in cases where the treatment contrary to Article 3 of the Convention is inflicted by private individuals". Ultimately, the Court deemed unacceptable that the police, aware that the relevant incident had been most likely motivated by ethnic hatred, allowed the investigation to last more than seven (!) years without taking any serious steps to identify or prosecute the perpetrators. The

[100] Cenbauer vs. Croatia, 73786/01, judgement of 9 March 2006.

[101] Štitić vs. Croatia, 29660/03, judgement of 8 November 2007.

[102] Pilčić vs. Croatia, 33138/06, judgement of 17 January 2008.

[103] Testa vs. Croatia, 20877/04, judgement of 12 July 2007.

[104] Šečić vs. Croatia, 40116/02, judgement of 31 May 2007.

[105] V. Batistić Kos, 'Mjerila Europskog suda za ljudska prava za učinkovitu istragu zlostavljanja motiviranog rasnom diskriminacijom (slučaj Šečić protiv Republike Hrvatske)', *Hrvatski ljetopis za kazneno pravo i praksu*, Vol. 15, No. 1 (2008), p. 56.

judgment has resulted in the introduction of hate crime in the Criminal Code, and corresponding educations in relation to this type of crime have been carried out under the competence of the Ministry of the Interior.

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Although the practice of the European Court of Human Rights implies that the Constitutional Court of the Republic of Croatia used to refer to the provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms and the practice of the European Court prior to 1997, there is no doubt that the influence of the reasoning of the European Court on the practice of the Constitutional Court has become clearly and vastly evident since the ratification of the Convention. The positive and transparent attitude of the Constitutional Court to the practice of the European Court reflects in the promptness of the former to amend its practice as a reaction to the cases of the European Court lost by the Republic of Croatia. This dynamic process of the harmonization of the practice of the Constitutional Court with the practice of the European Court is substantiated by a fair number of cases of the Constitutional Court. However, the things are not so idyllic and this assertion is derived from the fact that there are cases in which the Constitutional Court has failed to adjust its practice and reasoning to those of the European Court of Human Rights, which indicates that the Constitutional Court should "keep track with the practice of the European Court even more intensively and persist in its application in judgements".

Abstract

The socialist legal tradition in the Republic of Croatia came to an end in 1990 when the new Constitution was adopted. This Constitution was founded on the standards of liberal democracy. Respect for human rights, freedom, equality and national equality is depicted as the ground for interpretation of the Constitution (Article 3 of the Constitution). However, adoption of these principles did not momentarily bring to great shifts with respect to the former authoritarian state practice which was based on the unity of government, the dominant role of the Communist Party and the lack of judicial independence. Croatia was to face a long-lasting process of adoption of new values and conduct. Therefore, the Constitution granted the Constitutional Court special powers which had been intended for overcoming the lack of an appropriate legal culture. Although the institution of the Constitutional Court has existed in Croatia since 1963, its main role was shaped after the democratic changes. A particularly important role of the Constitutional Court refers to the power of dealing with constitutional complaints resulting from violation of constitutional human rights.

The scope of this paper is a survey of the role of the Constitutional Court regarding human rights protection and application of the provision on human rights. The paper is divided in two parts. The first part encompasses the survey of the practice of the Consti-

tutional Court in the period from 1990 to 1997 and the second one to its practice in the period from 1997 until today.

The issue of human rights protection and permissiveness of curtailment of particular human rights was rather troublesome in the period from 1990 to 1997. It was the vital period of the Croatian history, within which the former Yugoslav state fell apart and Croatia became independent in the middle of the military conflict. It was the period when the Constitutional Court passed a number of judgments which entailed strong reactions of the scientific, professional and broad public. Those judgments included obtaining Croatian citizenship, eviction from flats in the possession of the former Yugoslav People's Army, emergency decrees of the President of the Republic of Croatia aimed at restriction of constitutional human rights etc. This part of the paper will critically assess the practice of the Constitutional Court within the aforementioned period of time. The objections of the scientific community were derived from the fact that the Constitutional Court neither created nor followed the existing theories on human rights (these were theses made by prominent Croatian scientists Miomir Matulović and Ivan Padjen whose papers have encouraged us to divide the practice of the Constitutional Courts into two periods).

The situation changed significantly in 1997 when the European Convention for the Protection of Human Rights and Fundamental Freedoms became effective in the Republic of Croatia. This period was characterized by rising activism in the practice of the Constitutional Court when interpreting and applying the provisions on human rights, which represents the standpoint supported in this paper by the referring recent judgments.

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Law of Occupation vs. *Ius Post Bellum*

Significance of Provincial Reconstruction Teams in Afghanistan

Introduction

This article addresses some of the legal challenges arising from non-international armed conflicts, arguing that the general principles of international humanitarian law do not fully meet the requirements of the task. Particularly, I will address the issue of Provincial Reconstruction Teams and the law of occupation. To address these issues, I will refer the concept of counterinsurgency and insurgency. It helps better understand the dynamics related to the modern armed conflicts. The principle of distinction will be presented as part of the discussion on the role of military-oriented humanitarian projects, such as the Provincial Reconstruction Teams. Further, the article will refer to the validity of the law of occupation in the light of concepts such as *ius post bellum* from the perspective of modern counterinsurgency.

Humanitarian Law vs. Modern Conflict

The law of armed conflict, also known as the laws of war or international humanitarian law, was developed and codified to govern state-to-state conflicts.[1] That was ideological, moral and ethical assumption or background behind the creation of humanitarian law. The traditional, symmetrical warfare is to be understood as an armed conflict between states of roughly equal military strength[2]. War-

[1] L. Blank, A. Guiora, 'Teaching an old dog new tricks. Operationalizing the law of armed conflict in new warfare', *Harvard National Security Journal*, Vol. 1 (2010), p. 45.

[2] T. Pfanner, 'Asymmetrical Warfare from the Perspective of Humanitarian Law and Humanitarian Action', *International Review of the Red Cross*, Vol. 87, No. 857 (2005), p. 152, http://dx.doi.org/10.1017/S1816383100181238.

ring parties operate under similar principles using similar means and methods of warfare[3]. In traditional conflicts, the need to destroy an enemy has traditionally been considered the centre of gravity, reflecting the concept of Frederick the Great of "complete destruction of one's enemies" which can be accomplished by death, injury, or any other means[4].

However, modern conflicts are – in most cases – non-international in character. During such conflicts, non-state actors employ asymmetric means and methods against state military forces.[5] Inequalities in arms and significant disparity between belligerents have become a prominent feature of various contemporary armed conflicts such as the one in Afghanistan. The spread of innovations like portable hand-held missiles, difficult to detect or undetectable explosives, and communication tools offered loosely-organized insurgents affordable and effective means of confronting stronger opponents.[6] Democratization or privatization of the means of warfare provided opportunities for non-state actors to challenge not only their own governments but also the international powers[7] and superpowers.

Additionally in conventional conflicts the centre of gravity of the military operations was to kill or capture the enemy or its military forces. Current conflicts show a significant change in emphasis. The centre of gravity is a civilian population and the war is often conducted to win the "hearts and minds" of the population.[8] What is more, the traditional doctrine to kill and capture is sometimes changed to a more holistic one. The new "win-the-population" doctrine imposes different types of obligation on military forces.[9] The only effective way of "winning" a modern armed conflict is to bring stability, sound economy and rules of law. For that purpose, military means and methods have to be mixed with policing ones. Currently as Pfanner argues "it is debatable whether the challenges of asymmetrical war can be met with the contemporary law of war".[10] It seems that the current situation may require modification of rules of international humanitarian law. The most recent substantive amendments to Geneva law occurred with the adoption of the Additional Protocols to the Geneva Conventions in 1977. Since then, despite rapid development in international law, little has been done to address burning questions of modern humanitarian law, notwithstanding the adoption of instruments restricting or prohibiting the use of certain types of weapon, including anti-personnel landmines.

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[3] E. Benvenisti, 'The legal battle to define the law on transnational asymmetric warfare', *Duke Journal of Comparative and International Law*, Vol. 20 (2010), p. 340.

[4] G. Sitaraman, 'Counterinsurgency, the war on terror, and the laws of war', *Virginia Law Review*, Vol. 95 (2009), p. 1751.

[5] D. Stephens, 'Counterinsurgency and Stability Operations. A New Approach to Legal Interpretation' in R.A. Pedrozo (ed.), *The War in Iraq. A Legal Analysis*, Newport 2010, p. 291.

[6] E. Benvenisti, 'The legal battle…', p. 339.

[7] Ibid., p. 339.

[8] Field Manual, op. cit., p. 1-28.

[9] G. Sitaraman, 'Counterinsurgency…', p. 1757.

[10] T. Pfanner, 'Asymmetrical Warfare…', p. 158.

Modern Counterinsurgency

Counterinsurgency (COIN) in general "is military, paramilitary, political, economic, psychological and civic actions taken by a government to defeat insurgency".[11] This non-legally binding definition embraces a broad spectrum of activities.[12] A counterinsurgent's task is different from a conventional warrior's one. He or she is supposed to work smarter rather than harder during planning and executing counterinsurgency strategy.[13] Since insurgents derive their support from the local population, only when the local population turns against the insurgency can counterinsurgency be considered successful".[14] This approach requires a multidisciplinary approach both from scholars and practitioners. During modern counterinsurgency operations it is necessary for military forces to melt into local environment by collecting tribal and demographical intelligence as well as threat intelligence.[15] It is also vital to require knowledge on subjects such as governance, economic development, public administration and the rule of law.[16]

Modern counterinsurgency operations are not a new development, but they have never before seemed to be so essential to future conflicts.[17] Counterinsurgency embraces holistic activities orientated on civilian population. Killing the opponent is considered a last resort.[18] This argument is supported by gen David Petraeus in his Manual on Counterinsurgency where he presents some of the major principles of conducting anti insurgency operations. They are as follow: a) sometimes, the more you protect your force the less secure you may be, b) some of the best weapon for counterinsurgent is do not shoot, c) sometimes, the more force is used, the less effective it is, and d) the more successful the counterinsurgency is, the less force can be used and the more risk must be accepted.[19]

During counterinsurgency operations shift of the weight has to be addressed on defensive, and stability operations. In particular it is civil security, essential services, governance, economic and infrastructure development.[20] The balance of offensive and defensive operations is essential to counterinsurgency. In that

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[11] U.S. Army and U.S. Marine Corps Counterinsurgency Field Manual. U.S. Army Field Manual No. 3-24. Marine Corps Warfighting Publication No. 3-33.5, Chicago 2007, p. 1.1 50 McGill L.J. 285 (hereinafter: COIN Manual).

[12] J. Kelly, 'Legal aspects of military operations in counterinsurgency', *Military Law Review*, Vol. 21 (1963), p. 95.

[13] D. Stephens, 'Counterinsurgency…', p. 292.

[14] G. Sitaraman, 'Counterinsurgency…', p. 1773.

[15] D. Kilcullen, 'Intelligence' in T. Rid, T. Keaney, *Understanding Counterinsurgency. Doctrine, Operations, and Challenges*, Routledge–London 2010, p. 147.

[16] COIN Manual, p. X.

[17] G. Sitaraman, 'Counterinsurgency…', p. 1770.

[18] D. Kilcullen, 'Intelligence', p. 5.

[19] COIN Manual, p. 1-149, 1-153, 1-150, 1-151.

[20] Ibid., p. 1-19.

respect COIN differs from peacekeeping operation. In peacekeeping operations absence of violence is a goal. In COIN situation the goal is much more compound where lack of violence may mask insurgent's preparation for combat.[21] However the cornerstone of any counterinsurgency is to establish security for the civilian population. Without secure environment, no reforms can be implemented.[22] Security based not on military presence in military bases and travelling in armoured vehicles from point A to B, but rather on proximity to the local population, foot patrolling etc.[23] To be successful in counterinsurgency troops have to engage with the populace. Close contact with local population allows soldiers to learn to understand social environment, to build trust and to have opportunity to obtain intelligence.[24] According to gen Petraeus "kindness and compassion can often be as important as killing and capturing insurgents".[25] To successfully counter insurgents one must also heavily rely on the indigenous security and military forces. It embraces sponsoring, training and mentoring local forces.

All parties to the asymmetric conflict conduct both civilian and military actions. Insurgents are blended with the civilian population as the enemy moves within and through the population, whereas the governmental and foreign armed forces carry out projects which are often not military in nature. As a result during counterinsurgency operation it is difficult to define what military effort is and what is not. This issue have to be considered with the one fundamental assumption in mind. Observance of humanitarian and human rights law is in case of counterinsurgency of an utmost importance. Any human rights or humanitarian law abuse committed by intervening forces – apart from strictly moral dimension has also a pragmatic one. Each such an event quickly becomes known throughout the local population and eventually around the world. Illegitimate actions undermine counterinsurgency effort in both long and short term aspect.[26]

Provincial Reconstruction Team

One of the best known ISAF programmes, which constitutes a part of counterinsurgency effort, is the Provincial Reconstruction Teams (PRTs) project. Such teams operate in each province under control of the ISAF countries and coordinate, develop, and fund local projects. Their aim is to rebuild the country in cooperation with local population which is to determine what is needed to make society stable and secure from the insurgent ideology. Provincial Recon-

[21] Ibid., p. 1-20.
[22] Ibid., p. 1-23, par. 1-131.
[23] D. Kilcullen, 'Intelligence', p. 35.
[24] COIN Manual, p. 5-9, table 5-1.
[25] Ibid., p. 5-12, table 5-2.
[26] Ibid., p. 1-24, par. 1-132.

struction Teams are considered as a mean to extend the reach and enhance the legitimacy of the central government. They usually consist of 50 to 300 troops and representatives of development and diplomatic agencies.[27] In secure areas PRTs maintain low profile whereas in more volatile PRTs work closely with combat units and local government.[28] In every case PRT's activity embraces security sector reform, building local governance, reconstruction and development.[29] Despite their humanitarian agenda they constitute an element of counterinsurgency warfare with military aims as a goal. These projects are used to gain the trust and support of the local population and this way supporting the counterinsurgency efforts. The Provincial Reconstruction Team may be seen as military answer addressing the security sector reform, reconstruction, development and governance which are domains of humanitarian organizations.[30] But in reality the establishment of PRT by the Coalition forces in Afghanistan has blurred the lines between the role and objectives of political and military players on the one hand and humanitarian players on the other.

The question of the legality of the PRT is important. PRTs focus their humanitarian activity on civilian population. But it has to be noted that PRTs are included in the military structure. Personnel engaged in these projects wear uniforms and are under military chain of command and responsibility. These projects are orientated toward a military (politically motivated) gain. As such their activities blur the line between what is and what is not military action and may affect the principle of distinction.

It is difficult to establish a legal framework for PRT activities. This is because it is a new invention, not regulated by humanitarian law. To address legal ramification of PRT it is necessary to refer to the already existing humanitarian law norms. Common article 3 says "in the case of armed conflict not of an international character […] each party to the conflict shall be bound to apply, as a minimum, the following provisions: Persons taking no active part in the hostilities, […] shall in all circumstances be treated humanely".[31] Lengthy definition of expressions such as "humane treatment" or "to treat humanely" is unnecessary, as they have entered sufficiently into current parlance to be understood.[32] So humanitarian projects run by military forces may be considered as being correspondent with the common Art. 3. Similarly Geneva Conventions Additional Protocol II also states the

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[27] Ibid., p. 2-12, par. 2-51.

[28] Ibid.

[29] Ibid.

[30] R.J. Bebber, 'The Role of Provincial Reconstruction Teams (PRTs) in Counterinsurgency Operations: Khost Province, Afghanistan', *Small Wars Journal*, 31 March 2011.

[31] Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949, 75 U.N.T.S. 31, entered into force 21 October 1950.

[32] ICRC Commentary on GC I, p. 53, at <http://www.icrc.org/ihl.nsf/COM/365-570006?OpenDocument>.

principle of humanitarian treatment by art. 4.[33] A good example is provided by Art. 4.3 of AP II which states that children shall be provided […] (a) education. This corresponds to the PRTs activity in terms of building schools and providing relevant educational materials such as books. The above mentioned regulations indicate that treaty law does not forbid humanitarian activities which enter within the scope PRT's effort.

The analysis becomes more complicated if we try to look at the legal constraints of the PRT's activity from the perspective of the principle of distinction. The principle of distinction holds that "parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives".[34] The principle is expanded to non-international armed conflict by article 13 of Additional Protocol II which provides that "the civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations".[35] The importance of the principle is highlighted by art 85 (3) (a) Additional Protocol I, which states that violation of the principle of distinction is deemed a grave breach and under art 85 (5) a war crime. Additionally the principle of distinction attained customary status which means that it is applicable for both international and non-international armed conflicts (also these regulated only by common Art. 3 of Geneva Conventions).

This issue becomes even more complex when we approach the notion of military objectives. AP II applicable during non international conflict such as in Afghanistan has little to say about the principle of distinction in terms of military objectives. In this respect customary law is more specific. Rule 8 of the ICRC study on customary law says: "In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose partial or total destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage".[36] This definition of military objectives is currently "widely accepted".[37]

PRT's effort is an intrinsic part of counterinsurgency and constitutes an effective contribution to military effort, in the sense that it enhances the likelihood of success. Every school, every police building, every road and every hospital built by

[33] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1125 U.N.T.S. 609, entered into force 7 December 1978.

[34] Art. 48 AP I.

[35] International Institute of Humanitarian Law, *The Manual on the Law of Non-International Armed Conflict With Commentary*, p. 11, at <http://www.dur.ac.uk/resources/law/NIAC-ManualIYBHR15th.pdf>.

[36] ICRC Customary rules index, at <http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule8>.

[37] Ibid.

PRT forms a part of the military counterinsurgency measures. It is a part of a battle for "hearts and minds". It is smart, it is pragmatic but it is still warfare. Especially since PRTs are responsible not only for construction of civilians orientated buildings like schools but also for construction buildings which are police or military in nature such as for example police academy in Nuristan Province.[38] It some respect it resembles the situation of the Israel in occupied territories. Building infrastructure of governance increases governmental control over the land. Although infrastructure is civilian, the results are military and they constitute a response toward insurgency.[39] PRT's projects are positively resulting on behalf of central government in Kabul. Thus they directly support both governmental control over provinces and actions against former, Taliban government. So the question is whether military built objects are military objectives?

There are two possible ways of qualifying PRT projects in legal terms. The first option is that we will consider the status of schools, and other community orientated constructions, as military. It is because all NATO's PRT sponsored actions could be considered as a winning hearts and minds strategy. It is part of counterinsurgency and offers definite military advantage. This approach is supported by the gen Petraeus position presented in COIN manual. According to him "all operations have an intelligence (military) component. All soldiers and marines collect information whenever they interact with population. Operations should therefore always include intelligence collection requirements".[40] As a result of such approach PRT's projects and achievements need to be considered as a military objectives and legitimate target.

The second option is to accept PRT activity as partially civilian in character and exclude their results from being considered as legitimate targets for insurgents. PRT staff is included in the military chain of command and responsibility. They wear uniforms and a distinctive sign. They are protected by military escort. While performing their task they are legitimate target. But when their task is finished a school or a road which was built becomes a civilian object protected by the humanitarian law.[41]

Nowadays there is no alternative to military-sponsored aid. PRTs are part of a counterinsurgency effort. Their actions may affect principle of distinction. But also there is little choice. Only governments are able to provide the amount of money which significantly changes the situation in places like Afghanistan. Only

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[38] Army Staff Sgt. G. Caligiuri, 'Nuristan PRT brings professional training to ANP', at <http://www.blackanthem.com/News/Allies_20/Nuristan_PRT_brings_professional_training_to_ANP5055.shtml>, 24 November 2011.

[39] G. Swiney, 'Saving Lives. The Principle of Distinction and the Realities of Modern War', *The International Lawyer*, Vol. 39 (2005), p. 754.

[40] COIN Manual, p. 3-1, par. 3-4.

[41] It is also disputable. For insurgents destruction of the school offers a definite military advantage when hearts and minds or terrorizing of the local community is at stake.

governments are able to provide some form of protection to PRT specialists. In asymmetric, non-international armed conflict PRTs are a necessary element.

Law of Occupation from the Perspective of Modern Conflicts

Provincial Reconstruction Teams are an element of a bigger phenomenon i.e. a responsibility to bring the particular state to stability. Their activities are often conducted within the framework of nation building or quasi occupation. The important question here is what is and what is not allowed under the law of occupation? Is it allowed under international law to use PRT to change the country? These questions bring us to the issue whether PRTs activities violate the law of occupation.[42]

The legal status of the occupier is regulated by the 1907 Hague Regulation (articles 42-56). The most relevant article 43 states: "the authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country".[43] This regulation (already in existence for more than a hundred years) reflects the position at that time. The final status of occupied territory was a matter to be resolved by the parties in a peace treaty. In the meantime, the task of international law was to preserve status quo.[44]

Complementary to the Hague Regulation was the IV Geneva Convention relating to the protection of civilian persons in time of war[45] – particularly articles 27-34 and 47- 48 which refer to the legal obligations of the occupier. These articles establish a minimum standard of governance.[46] IV GC also introduces a cessation of the applicability of Convention. It states in Art. 6 "that the application of the present Convention shall cease on the general closure of military operations. In the case of occupied territory, the application of the present Convention shall cease one year after the general closure of military operations". Additional Protocol I de-

[42] G.T. Harris, 'The Era of Multilateral Occupation', *Berkeley Journal of International Law*, Vol. 24 (2006), p. 2. More on notion of occupied territory see: Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Reports 136, p. 78 (9 July): "Territory is considered occupied when it is actually placed under the authority of the hostile army, and the occupation extends only to the territory where such authority has been established and can be exercised".

[43] Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907.

[44] Ch. Garraway, 'From relevance of jus post bellum. A practitioner's perspective' in C. Stahn, J.K. Kleffner, *Jus Post Bellum. Towards a Law of Transition, from Conflict to Peace*, Hague 2008, p. 153.

[45] Y. Dinstein, *The International Law of Belligerent Occupation*, Cambridge 2009, p. 7.

[46] G.H. Fox, *Humanitarian Occupation*, Cambridge 2008, p. 238.

velops these standards. As a supplementary to treaty law several customary rules were also recorded in the ICRC study on particular aspects of occupation.[47] Short summary of the treaty law and customary law indicates that occupation should fulfil three assumptions: occupation is temporary, non transformative, and limited in scope.[48] As a result any attempt to permanently reform or change an occupied state would be unlawful.[49] But the premise that occupiers will preserve *status quo ante*, as convincingly Kirsten Bonn writes, demonstrated to be a fiction.[50] The issue related to the applicability of the law of occupation is that the consistent and almost universal disuse of it calls into question to what extent this branch of humanitarian law retains legal authority.[51] State practice indicates almost no compliance with the law of occupation; this is sometimes illustrated by the general lack of meaningful international condemnation when it is disregarded.[52] As Harris says "the law of occupation long had been in a state of innocuous desuetude".[53] What makes this law even less relevant to modern challenge is that the main body of treaty and customary regulations are applicable only during an occupation resulting out of international armed conflict.

If law of occupation importance has decreased in recent years, than the question is what next? Should the intervening states rebuild the country which was invaded? Is international community responsible for Afghanistan or other conflict areas? It seems that the answer is yes. Without positive western world contribution these areas may turn into rouge states where human rights violations occur and international terrorism and organized crime finds shelter.

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[47] See: rule 41 and 51 of ICRC study on customary law, at <http://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter12_rule41?OpenDocument&highlight=occupation>.

[48] N. Bhuta, 'The Antinomies of Transformative Occupation', *European Journal of International Law*, Vol. 16, No. 4 (2005), p. 726, http://dx.doi.org/10.1093/ejil/chi145. See: Hague Convention (IV) on respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907. Art. 55: "The occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct".

[49] G.T. Harris, 'The Era…', p. 9. "For example change of the laws of the occupant is permissible if 'necessitated' by the occupant's interest or by military necessity". Prof. Openheim quoted by the E.H Schwenk in 'Legislative Power of the Military Occupant under Article 43 Hague Regulations', *Yale Law Journal*, Vol. 54, No. 2 (1945), p. 400.

[50] K.E. Boon, 'Legislative Reform in Post-conflict Zones. Jus Post Bellum and the Contemporary Occupant's Law-Making Powers', *McGill Journal of Law*, Vol. 50 (2005), p. 306.

[51] G.T. Harris, 'The Era…', p. 11. Similar situation of transformative occupation took place not only in Afghanistan and Iraq but also in Kosovo, Bosnia and Herzegovina, Cambodia and East Timor just to mention a few. More on it see: N. Bhuta, 'The Antinomies…', pp. 735-736.

[52] G.T. Harris, 'The Era…', p. 11. It is difficult to find any example of occupation which is conducted according to all principles of occupation law within last 100 years.

[53] Ibid., p. 10.

Is There a Need for a New Law?

Popularity of the PRTs, the new approach to counterinsurgency and law of occupation *desuetudo* brings us to a concept which embraces all of it i.e. *ius post bellum*. It is a broad concept embracing both conflict and post conflict societies.[54] It is perceived as a framework to deal with challenges of post conflict transformation and state building. It has also been associated with the conduct of legislative reforms in post conflict areas and the consolidation of the rule of law.[55] This concept has a long history since it was already recognized by the German philosopher and just war theorist, Immanuel Kant, at the end of eighteen century.[56] But from the perspective of contemporary legal discussion the question is however, whether it has any legal meaning.[57]

As argued previously, the law of occupation is increasingly perceived as an insufficient answer to the legal challenges of peace building[58] or modern counterinsurgency. So the fundamental question is whether *ius post bellum* can be understood in a normative sense, as a concept which regulates the relationship between participants of armed conflict in situations of transition, rather than a moral principle or a legal catchphrase.[59]

The regulation which may indicate the *in statu nascendi* character of *ius post bellum* is UN SC Resolution 1483.[60] The Security Council created a framework where the Special Representative of the Secretary General acting in collaboration with Coalition Provisional Authority in Iraq (CPA) was given a specific task to undertake changes in Iraqi infrastructure which went far beyond what might be per-

[54] E. van Zadel, I. Österdahl, 'What will jus post bellum mean? Of new wine and old bottles', *Journal of Conflict & Security Law*, Vol. 14, (2009), p. 176.

[55] C. Stahn, 'Jus post bellum. Mapping the discipline(s)', *American University International Law Review*, Vol. 23 (2008), p. 321.

[56] R.P. DiMeglio, 'The evolution of Just war tradition. Defining jus post bellum', *Military Law Review*, Vol. 186 (2005), p. 133.

[57] E. van Zadel, I. Österdahl, 'What will jus…', p. 175.

[58] C. Stahn, 'Jus post bellum…', p. 321.

[59] Ibid.

[60] S/RES/1483 (2003). This particular Resolution on is interesting. On one hand it support law and institution revision when at the same time it support idea of respecting the same laws and institutions, what is seems to be contradictory. See Art. 4 Calls upon the Authority, consistent with the Charter of the United Nations and other relevant international law, to promote the welfare of the Iraqi people through the effective administration of the territory, including in particular working towards the restoration of conditions of security and stability and the creation of conditions in which the Iraqi people can freely determine their own political future; where Art. 5 Calls upon all concerned to comply fully with their obligations under international law including in particular the Geneva Conventions of 1949 and the Hague Regulations of 1907. The same point of view is represented by many scholars, see: D.J. Scheffer, 'Beyond Occupation Law', *American Journal of International Law*, Vol. 97, No. 4 (2003), p. 844, http://dx.doi.org/10.2307/3133684.

mitted under a conservative approach toward the law of occupation.[61] As a result the CPA adopted over 100 measures designed to remove the legal and institutional instruments of the Husain regime.[62] The Security Council's resolutions played similar role in other "quasi-occupation" situations, such as Kosovo[63] and East Timor.[64] This raises questions about the relationship between UN regulations and international humanitarian law. To what extent may UN Security Council Resolutions supplement and override the provisions of humanitarian law?[65] This particularly worth looking at in the light of Art. 103 of the UN Charter which states: "in the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail".[66] This article provides clear interpretation guidance. In case of conflict between treaty law and Security Council resolutions the latter overrides.

The notion of *ius post bellum* was utilized not only by Security Council in its resolutions but also in other UN documents. For example United Nations Secretary General Boutros Boutros Ghali in his proposal for post conflict peace building in "Agenda for Peace from 1992 referred to the *ius post bellum* concept.[67] These may indicate *in statu nascendi* process of *ius post bellum* concept.

This approach of disuse of GC IV leads countries to refer mostly or entirely to the UN resolutions which govern multilateral peace or peace enforcement operations. Taking into consideration the asymmetrical character of modern conflicts, nation building and counterinsurgency under the UN umbrella seem to be not only an interesting but a necessary option. The Development of the concept of human rights obliges the international community not only to intervene but also to create an environment where mass atrocities/war crimes/genocide are much less likely to take place in the future. To prevent this, state building, implementation of good governance, and the support of a sound economy have to take place. All these activities constitute a broad interpretation of *ius post bellum*.

Interestingly modern counterinsurgency and *ius post bellum* share the same principles and methods vide Afghanistan or Iraq. In terms of principles both are orientated towards bringing and sustaining peace to a civilian population as the

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[61] Ch. Garraway, 'From relevance…', p. 155.

[62] B.H. McGurk, 'Revisiting the law of nation building. Iraq in transition', *Virginia Journal of International Law*, Vol. 45 (2005), p. 461.

[63] SC enacted Resolution 1244 which provided a legal basis for the international presence with power to build democratic institutions and reform economic structures in Kosovo. This resolution did not refer to the international law of occupation although Kosovo was occupied by international forces. More on it see: ibid., p. 455.

[64] Ch. Garraway, 'From relevance…', p. 155.

[65] Ibid.

[66] United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI.

[67] M. Pugh, 'The challenges of post conflict intercession. Three issues in international politics' in C. Stahn, J.K. Kleffner, *Jus post bellum…*, p. 116.

centre of gravity. As to the methods, they are orientated toward nation building, rule of law and development of the country infrastructure and economy. Of course counterinsurgency is only relevant in situations where insurgency exists, whereas *ius post bellum* is relevant both where insurgency exists and situations where it does not exist. Counterinsurgency is considered as a method of warfare. *Ius post bellum* is considered as an *in statu nascendi* legal concept. In both cases PRT is an important element of bringing peace and stability.

Conclusion

Modern counterinsurgency rejects kill-capture strategy. Instead, counterinsurgents follow win-the-population strategy, which is directed on building a stable and legitimate political order.[68]

Modern conflicts pose a challenge toward treaty law. Treaty law was created to fit conventional wars. Such wars are no longer dominant. A brief analysis of the last 60 years of world's history indicates clearly that international wars constitute a minority. The new standards require not only military interventions with humanitarian agenda but also better protection of human rights. This approach is confirmed not only by strategists but also by the international community. For example, UN Resolution 1674 on importance of preventing conflicts through development emphasized the importance of preventing an armed conflict through the promotion of economic growth, poverty eradication, sustainable development, national reconciliation, good governance, and democracy, the rule of law, as well as respect for, and protection of human rights.[69] Transformations of Bosnia and Herzegovina, Kosovo or East Timor are good examples of such approach. At the same time, the lack of engagement of Americans in state building in Afghanistan in 1988 after Russian's withdrawal is an example how things may go wrong. The same type of international failure at the beginning of 1990's led to genocide in Rwanda.

Humanitarian law needs to be adapted to work in an asymmetric environment of non-international armed conflict. What is allowed under conventional IHL may not be acceptable in a modern counterinsurgency policy.[70] Killing a member of a particular community instead of arresting him may fuel insurgency rather than limit it.[71] This is because protecting the population is a centre of gravity to the counterinsurgent's strategy.[72] Particularly with the rise of instant communication and publicity, any kill-capture operation could easily be found unreasonable by

[68] G. Sitaraman, 'Counterinsurgency…', p. 1745.
[69] UNSC Resolution 1674, at <http://www.un.org/News/Press/docs/2006/sc8710.doc.htm>.
[70] G. Sitaraman, 'Counterinsurgency…', p. 1775.
[71] Ibid., p. 1788
[72] Ibid., p. 1790.

domestic and international opinion and reduce the legitimacy of the intervening counterinsurgent forces and their ability to win "hearts and minds".[73]

The issues discussed above share one common feature – uncertainty of applicability of law. It is difficult to convince a local population that heavy armoured vehicle, full of looking like robots soldiers are much needed humanitarian help provided by PRT. It is not easy for an Afghan farmer to understand that destruction of his crops was legal collateral damage under international humanitarian law. It is also complicated to convince members of national Shura that the laws and types of government which NATO forces support are better than their own, hundreds years old system. This uncertainty also applies on global level. States are unable or unwilling to intervene in to affairs of other states even failed one. It is also difficult to find states willing to provide military or humanitarian support to rebuild the state for ten or fifteen years.

New wars where counterinsurgency is fought do not pose strategic threat to superpowers such as the USA, the UE or China. However these low intensity conflicts may not be left alone. They will be more and more common. Justification of the future asymmetric character of the conflicts also lays in economy. According to Kuźniar, 16% of world's population spends 75% of global military expenses. As he argues an overwhelming power and range of military burden expenditure of rich countries will push poorer countries and entities into asymmetric warfare.[74] This is why it is so important to face the challenge and try to analyse law applicable during modern asymmetrical, non-international armed conflicts. These wars modify traditional, conventional laws of war. Humanitarian law created for Eurocentric world needs to be foremost applicable in places such as Rwanda or Afghanistan.

Western hemisphere is particularly responsible for bringing peace and stability to places where violation of human rights occurs. It is due to fact that most of these places were exploited in the past by westerners. This obligation has to be combined with rebuilding of a state. It means that maybe it is time to think how to change the law in order to meet the challenges of the modern armed conflicts.

Abstract

The establishment of the Provincial Reconstruction Team (PRT) by the Coalition forces in Afghanistan has blurred the lines between military and civilian targets and has affected the principle of distinction. This paper argues the legality of PRT's activity in Afghanistan and raises general questions addressing legal challenges resulting out of modern armed conflict. This issue is particularly important especially taking into consideration that modern armed conflict overlaps with responsibility to rebuild of the country where the conflict takes place.

[73] Ibid.

[74] R. Kuźniar, *Polityka i siła. Studia strategiczne. Zarys problematyki*, Warszawa 2005, pp. 294-295.

The paper was divided into five substantial parts: Humanitarian law vs. modern conflict – which addresses the law applicable during conflicts of our times; modern counterinsurgency – which describes a new approach toward asymmetric conflicts; Provincial Reconstruction Team – which addresses a notion of a vital element of a counterinsurgency effort; Law of occupation from the perspective of modern conflicts – which discuss that law of occupation is not longer as relevant as it was at the time of its creation; Is there a need for a new law? – which argues that above mentioned concepts leads to necessity to critically approach some element of humanitarian law.

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Russia's Human Rights Record

Case of Chechnya

Introduction

On 27th of January 2001, when the conflict in Chechnya reached its peak, during Parliamentary Assembly of Council of Europe Mr. Zhirinovsky as a representative of the Russian Federation said: "The Russian Federation did not want to be part of a Europe that stood shoulder-to-shoulder with bandits".[1] This sentence represents the views that Russia was and is holding nowadays about relations with the EU, USA and other major international actors. Some of these views have distinct origins in the imperialistic experience of the state. One of these views is called Neo-Eurasianism, an ideological path which ostensibly led the Russian state to the war with Chechnya and shaped the dominant opinion about Chechen people throughout the media and society, articulated with hate speech and generalizing the facts about this ethnic minority.

For Russian Human Rights record, the conflict in Chechnya is the biggest loophole, next to other wars with Ingushetia, Georgia and constant domestic violations of basic rights of citizens through political murders, imprisonments, restrictions of freedom of expression etc. In those circumstances it is very important to discuss and analyze what international society has done to prevent farther deterioration of this situation. How were the nongovernmental organizations involved in reporting all the crimes that had been committed during the second Chechen war?

Thus, when the war erupted, all international human rights organizations recommended the Russian government to cease the operation. Here the question arises: Were there any mechanisms that could have stopped the war in Chechnya? Allegedly there were some, but they were not properly used by the world's authorities. The major point was how the USA would react to the war crimes, but the

[1] Council of Europe, *Conflict in Chechnya and credentials of the delegation of the Russian Federation (resumed debate)*, Brussels, 27 January 2000, at <http://www.assembly.coe.int/Main.asp?link=/Documents/Records/2000/E/0001271500E.htm>, 1 October 2012.

Bush office was too busy with the war in Afghanistan and did not care much about Russia's "internal" affairs. Then, after 9/11, the conflict in Chechnya was immediately legitimized as a war against international terrorism, which could be called a massive and convenient cover up for the Russian Federation's farther movements toward the North Caucasus area at least for a decade.

This article is about the Second War in Chechnya, with the timeframe from 1999 when the conflict broke out till 2004, and describes the anti-terrorist operation in Chechnya and all the violations of human rights which occurred at that time. The research method used here is qualitative, to provide a more concrete case study. While using the constructivist theory of spiral model to explain all the implications of war as they were seen from the Russian and international perspective. We will not mention crimes committed by Chechens[2] due to the fact that internationally Russia was the actor – the super state responsible for starting the war on the outskirts of its territory. Additionally, the scale and intensity of human rights violations committed by the Russians far exceeded those of the Chechen insurgents. In the end, we will try to inquire what would be the outcome of international involvement in the War of Chechnya. ; Through comparing the pre-war situation and post-war reputation of the Russian government domestically and internationally. But the most important issue which is the core of this paper is the state policy and how international society shapes each individual country's response to an issue which is condemned and mocked.

Public order in Chechnya was entirely destroyed during the first war in 1994--1996, but the three years of the independence of Chechnya from September 1996 to September 1999 were wasted due to crime, hostage taking, chaotic violence and general complete lack of the rule of law. In January 1997, Aslan Maskhadov was elected President of Chechnya, and he came to challenge the radical faction led by Shamil Basayev and Hattab – an Islamic extremist organization of Saudi origin. Maskhadov was popular during his presidency, although he wasn't able to exercise full control over the country. The extremists started to organize terrorist training camps. Under the pressure of radical Islamists he imposed Sharia law throughout Chechnya in February 1999. This move increased suspicion of the Russian government towards the president of Chechnya and Maskahdov was then pressured from two sides. The loss of control over the country and radical Islamists' far reaching aspirations created the background for the second war in Chechnya which broke out in August 1999 when forces led by Basayev and Hattab launched raids into Dagestan in order to create the Wahhabist state of Caucasus.[3] Russia made use of this opportunity and launched a full scale military attack on Chechnya by crossing the river Terek in October 1999.

[2] Although crimes committed by Chechens were as brutal and indiscriminate as those committed by the Russian army.

[3] M. Kramer, 'The Perils of Counterinsurgency. Russia's war in Chechnya', *International Security*, Vol. 29, No. 3 (2004/2005), pp. 5-63.

This work is divided into four chapters. The first chapter contains a review of relevant literature and a theoretical framework describing the socialization theory of Risse and Sikkink using the "Spiral Model" and its phases together with other prominent scholars' ideas about relations between the state and international human rights. Second chapter is more about the case itself, the second war in Chechnya and Russian policy toward it represented by various forms and techniques of oppression, the sowing of the seeds of fear and finally a full block of any possible attempts of the international society to interfere in the war. The third chapter is about international human rights advocacy networks comprised of main European governmental and international nongovernmental organizations, describing the Council of Europe and OSCE's role in conflict regulation, and Human Rights Watch and Amnesty International's efforts to bring all crimes committed during the war to light. Finally the fourth chapter is dedicated to the European Human Rights Court describing it as a main legislative tool and most successful actor in the battle with crimes of second war in Chechnya.

Universal Human Rights Norms and their Impact on State Behavior

> *Whenever a theory appears to you as the only possible one, take this as a sign that you have neither understood the theory nor the problem which it was intended to solve.*
> Karl Popper, *Objective Knowledge. An Evolutionary Approach* (1972).

Human rights have always been the primary concern of government officials. Violations of those rights lead to social unrest and loss of votes, therefore every government is trying to improve their human rights record. The Black Sea as an economic and political region which highly dependent on gas and oil transit routes, for its development stands somewhere in the middle between total ignorance of human rights and strict order and enforcement of the rule of law. However, Turkey and Russia are the biggest violators of human rights and so far there has been no improvement regarding the records of those states. Security, foreign policy and human rights are interlinked and connected, as the one largely affects the other. You cannot build your reputation at an international level without respecting international norms and human rights. PKK in Turkey and Chechnya in Russia have been the breaking point for these countries, as these two cases poisoned their human rights record and influenced their international standing.

Universal Human Rights are truly universal if there is a mutual consent between states to defend those tights. In the end, why do we need human rights? The answer is: for individuals to be able to depend on their government it is crucially important to implement international/universal human rights on a national level. Christian Tomuschat in her book "Human Rights, Between Idealism and Realism" discusses the process of implementing those rights at a state level and the tools required for it. "Human rights are a supplementary line of defense in case if

national systems prove to be of no avail" states the author. International Community believes that an entity which possesses territorial jurisdiction automatically has the responsibility and the ability to defend its citizens. The European Union and its system of binding regulations is most certainly effective at a state level but in our case it is irrelevant in the sense that the Russian Federation is not a member of the European Union. However, in 1998 Russia signed the European Convention of Human Rights which is the legal basis of human rights regulations in Europe. There are other international organizations which might affect state behavior, the most important of which is the United Nations, though the author notes that the UN lacks the power to enforce its decisions, only the Security Council can act as a justice defender.[4]

This work will largely refer to the process of socialization which is described by Risse & Sikkink as a process by which international norms are internalized and implemented domestically. The fact that states are the most important actors internationally brings forward the idea of society constructed by the state; this topic is discussed by many authors in international relations and political sciences in general. But for us the most important is the mechanism of how socialization occurs in practice. There are three types of causal mechanisms ensuring the duration of international norms:

1. The process of instrumental adaptation and strategic bargaining
2. The process of moral consciousness-raising, argumentation, dialogue and persuasion
3. The process of institutionalization and habitualization.

From this develops a five-phase "spiral model" of socialization norms which specifies the mechanism and logics of action in each phase. There are five phases in this model: 1) repression and activation of network 2) denial 3) tactical concessions 4) "prescriptive status" 5) rule consistent behavior. In each phase specific characteristics and mechanisms occur. There is a general pattern in the whole process, called the "boomerang effect", which the author describe as a stage where domestic groups in a repressive state bypass their state and directly search out international allies in order to put pressure on their state from the outside. In our case we will concentrate more on the "spiral model" which is more relevant to the case chosen for this work.

The starting point for the process is the presence of repression which ultimately causes the activation of the network. This is the stage when domestic opposition is too weak or oppressed to challenge the government. Transnational Advocacy networks can put the norm-violating state on international agenda leading the situation to faze two only if they succeed in getting sufficient information about the repressions in the "target state".

The second phase, named denial, is characterized by the production and dissemination of information about human right practices in a target state. After that, the transnational networks start lobbying international human rights organiza-

[4] C. Tomuschat, *Implementation at National Level*, Oxford 2005, pp. 97-132.

tions and Western states. The process involves discursive activities in terms of moral persuasion and "shaming". The initial reaction of the offending state is in almost every case "Denial", meaning that its government denies the validity of international human rights norms and opposes the idea that its national practices are subject to international jurisdiction. Thus Risse & Sikkink note that denial from target/norm-violator government already means that the socialization process is in action. However, countries with a large military and economic influx will be more vulnerable to human rights pressures and those not receiving the aid.

The third phase of the spiral model is tactical concessions, when the target state seeks cosmetic changes to pacify international criticism. Or they might take some action in order to ease the situation, for example release the prisoners. This is a solely instrumental or strategic position, trying to lessen international isolation. But the most important effect of the second phase is shifting the focus of activities from transnational to domestic level.

The fourth phase called "prescriptive status" means that actors involved in the process regularly refer to the human rights norm to describe or comment matters. Therefore Risse & Sikkink are sure that the process by which basic ideas gain "prescriptive status" is the decisive moment for their sustained impact on political and social change.[5]

This model is universal and can be tested in any country, thus in this work we will try to implement it in Russian reality while examining all the five processes of the spiral model, discovering failures and successes of the state. By examining Russia's Human Rights record step by step we will draw a complete picture of how the conflict in Chechnya developed in the frames of the spiral model.

Chechnya: The Second War

> *The use or threat of armed force to settle disputes is unacceptable. Based on the generally accepted principles of self determination…*
>
> A. Lebed, A. Maskhadov, S. Kharlamov, S. Abumuslimov,
> The Khasavyurt Russian-Chechen Agreement, 31 August 1996

Conflict in Chechnya and especially its second installment was known as the most antihuman military campaign Russia has started after the dissolution of the Soviet Union. There are more than 160 cases investigated by the European Court of Human Right concerning crimes and human rights violations the Russian government committed against the citizens of Chechnya including: disappearances, extrajudicial executions, indiscriminate bombing and ill treatment. Though the President of Russia was surprised by these facts and stated in his interview with

[5] T. Risse, K. Sikkink, *The Power of Human Rights. International Norms and Domestic Change*, Cambridge 1999, pp. 1-36.

Le Monde in 2004 that: "You speak about the violation of human rights. Whose rights? Who exactly – give me first names, information, family names?" Meanwhile Vladimir Lukin, Russia's Human Rights ombudsman reported that 1700 people were abducted during that year, nearly 4 people every day. This is evidently not sufficient evidence for the President of Russia.

The *Casus Belli* of the Second Chechen War was the invasion of Dagestan on 7 August 1999 by the Chechen-based Islamic International Brigade. The reason was mostly religious – Wahhabi leaders such as Shamil Basayev and Ibn al Khattab were eager to help their counterpart in Dagestan – Bagauddin Magomedov, the head of the Islamic Shura Council to create the Independent Islamic State of Dagestan. After the initial success, on 10 August they declared war against "the traitorous government of Dagestan" and "Russia's occupation units", thus announcing the birth of the Independent Islamic State of Dagestan.[6] Meanwhile, on 9 August Yeltsin appointed Vladimir Putin as the Prime Minister of Russia which meant that from then on Putin was responsible for the operation in Dagestan and, although he was not a military leader, much depended on him.

On 14 August Russia bombed guerilla bases inside Chechnya. The air strikes were carried out in the town of Kenkhi near the Dagestan-Chechnya border where 4 Russian soldiers were killed and 13 wounded in a 7-hour clash. "The goal is to clean the regions now seized by the bandits, liberate the villages and restore the legitimate power", Lieut. Gen. Igor N. Zubov, the Deputy Interior Minister, told the newspaper Kommersant. "It has to be clear that some of the militants may go up to the mountains to continue their terrorist activities".[7] The Announcement of Zubov reveals the plot; this war was planned before and then realized at a convenient moment. Insurgents did go to the mountains and the Second War in Chechnya continued for years. It officially ended on 16 April 2009 but practically it continues until today.

Several prominent authors call the Second Chechen War "Putin's war". This is a slightly creative approach, but the sequence of events proves that the latter gained the presidential elections and popular support from society by commencing the military operation in North Caucasus. "He received carte blanche from the citizens of Russia; they simply closed their eyes and let him do whatever he wanted as long as he saved them from this threat", said Russia's Finance Minister at that time – as Simon Shuster recalls in the *Time* magazine, further adding that this war was seen as dealing with rebellion.[8] Much has been said about Putin's role in the process, but

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[6] E. Souleimanov, 'Chechnya. Wahhabis and the Invasion of Dagestan', *The Middle East Review of International Affairs*, 4 December 2005, pp. 48-71.

[7] M.R. Gordon, 'Widening Caucasus Conflict, Russia Bombs Chechnya', *New York Times*, 15 August 1999, at <http://www.nytimes.com/1999/08/15/world/widening-caucasus-conflict-russia-bombs-chechnya-bases.html>, 29 August 2012.

[8] S. Shuster, 'How the war on Terrorism did Russia a favor', *The Time Magazine*, 19 September 2011, at <http://www.time.com/time/world/article/0,8599,2093529,00.html>, 15 September 2012.

if we will look at these matters from a different angle we can see that, first, he was not the only decision maker at this point so all the responsibility for the decision to conduct war against Islamic insurgents does not rest with him. Such decisions are never taken by one person. That is why naming the Second Chechen war "Putin's war" is not entirely appropriate. However, he definitely used this "opportunity" to raise popular support for himself as the future president of the country.

The Islamist threat did its share to provoke public opinion to support the new war in Chechnya, but anti-Islamist, anti-terrorist and anti-Chechen rhetoric appeared in 3 different forms. It was crucial for preparing domestic and international public opinion for a full-scale war in North Caucasus. On 4 September a house of Russian officers was demolished in Buynaksk when a car bomb exploded next to it. 68 were killed and 150 wounded. This incident was the beginning of a chain of bomb explosions which later happened in Moscow and Volgodonsk and prepared a foolproof motive for starting the Second War in Chechnya. Although no group has admitted responsibility for the attack, Russian government has blamed it on the Islamic militants. Later in 2001, when these events were investigated, 6 people were convicted for the Buinaksk car bombing. The authorities stressed their links with Shamil Basayev and Khattab, sentencing two of them to lifetime imprisonment, two received 9 year jail sentences and two were immediately set free under the current amnesty program for convicts with short sentence.[9]

The decisive reasons for the assault on Chechnya were: firstly, to regain what was lost in the First Chechen war, and secondly to literally deconstruct the Republic of Chechnya through the demoralization of its citizens and after that to enforce the all-mighty portrait of Russia reviving from the ashes of the Soviet Union. When opportunity arose, the foundations had already been built. Ethnical hatred and racism had been kindled in the society, arguments for starting the war had been created and troops deployed to the region. On the first of October, 93,000 ground troops entered Chechnya after a series of air bombardments which had started on 23 September. Putin declared that he no more recognized Maskhadov's government as legitimate in Chechnya and that the only legitimate government in Chechnya was a parliament elected under uncertain conditions and exiled in Moscow after 1996. This was the beginning of a massive outburst of human rights violations and attacks on civilians. On 18 October Federal troops had already reached Grozny where on October 21st they bombed the local market and several other places, killing 118 people and wounding 400. The reason was that there were terrorists in the market and Mr. Putin declared "it's not an ordinary market it's a weapon warehouse".[10] Missiles exploded in the central part of Grozny, one in the

[9] P.E. Tyler, '6 convicted in Russian bombing that killed 68', *New York Times*, 20 March 2001, at <http://www.nytimes.com/2001/03/20/world/6-convicted-in-russia-bombing-that-killed-68.html>, 15 September 2012.

[10] T. Wood, 'Putin's War' in idem, *Chechnya. The Case for Independence*, London 2007, pp. 97-110.

Central market where 61 people were killed, another in the mosque of the village of Kalinin where 41 were killed and yet another in the yard of a maternity home where 13 women and 15 new born children died. There were also casualties from shells at the parking space of the building, reported the "Memorial" human rights organization in Russia.[11]

In June 2000, Akhmad-Hadji Kadyrov, the father of the current leader of Chechnya Ramzan Kadyrov, was appointed as a head of administration with a memorable quote from him that: "freedom is something ordinary man does not need" and indeed his appointment was the first stage of the "normalization" process, which apparently continued for more than 9 years under the tag of an "anti-terrorist operation". High death toll during the military operations pushed the Federal government to begin "chechenization" which was initiated by the referendum held in 2003 declaring Chechnya as a part of Russia and electing Kadyrov as president with the thunderous support of 83% of the population. In other words, from then onward Ramzan Kadyrov would lead the operation with his psychotic brutality. Chechens would fight against Chechens in a civil war-which would constitute the darkest period of Second Chechen War.[12]

Since mid-2000s, Russian forces in Chechnya were conducting standard counterinsurgency operations aiming to maintain control of urban areas, isolating and eliminating guerrillas and bolstering the pro-Russian government headed by Akhmad-Hadji Kadyrov from June 2000 until his assassination in May 2004.

But before that, in 2001, on 11 September, the twin towers in New York were bombed by the Al-Qaida terrorist organization and global war with terrorism was announced by the USA. This indeed was the right moment for President Putin who highly supported his American counterpart in the operation in Iraq while announcing his own war with terrorism, re-baptizing the Second War in Chechnya as a anti-terrorist operation and nothing more, motivated solely by the need to tackle the global terrorist network in which Chechen Islamist Insurgents lead by Shamil Basayev were involved.

Thus the terms of the Khasavyurt agreement were violated. Neither side remembered that they had declared, back in 1996, that the use of armed force to settle disputes was unacceptable between them in the foreseeable future.

[11] A. Cherkassov, O. Orlov, 'The non-selective use of force by the federal troops in the course of the armed conflict in Chechnia in September-October 1999', *Memorial*, 1999, at <http://www.memo.ru/eng/hr/bom.htm#n1>, 25 October 2012.

[12] T. Wood, op. cit., pp. 110-121.

International Actors Involved in the Second War in Chechnya

It was a big mistake to pick on a pregnant human rights activist. The world must hold whoever was responsible to account.

Kenneth Roth-head of the Human Rights Watch about the threat of violence toward Tanya Lokshina, HRW researcher in Moscow
Foreign Policy, October 2012

The attack on Tanya Lokshina is a proof that civil society is oppressed in Russia. In spite of the pressure of various governmental and non-governmental organizations on the Russian government, the situation is deteriorating. Returning to the beginnings of the Second War in Chechnya, we will try to describe what action has been taken to prevent farther human rights violations, while trying to tackle all governmental and nongovernmental organizations' policy toward the conflict and Russia itself. Human Rights Watch, where Loshkina works, have always been active in the matters of Chechnya. HRW reports of war crimes and other human rights abuse in Chechnya started from 1995 but they became actively involved in the process after 1999, when the second war began. Moreover, there were some success stories during the Second Chechen War which this organization is proud of. Those cases include: 2006 August when the European Court of Human Rights ruled that Russia was responsible for the disappearance and killing of a Chechen man in February 2000. HRW documented the case in 2000 and had since been steadily trying to get attention of the authorities; finally they helped the victim's mother to appeal to the ECHR which in July 2006 ruled in her favor.[13] The second important success happened in the summer of 2007 when ECHR found Russia guilty of 11 killings which had taken place in Grozny in February 2000. This had been a part of a sweep operation organized by Russian troops in that area. In these and many other cases we can see the role of the HRW who were helping ordinary civilians, victims of the violence and torture and relatives of execution victims in order to bring justice to Chechnya- for the people who lived there, citizens of Russia who were killed by their government and compatriots.

HRW maintained a permanent research base in Ingushetia when the second war was unleashed in the region in November 1999 and by March 2000 they had already conducted 500 interviews with the witnesses of human rights violations in Chechnya including: mass killings and summary executions, rapes, looting, torture and beatings in filtration camps. Although the majority of the crimes reported by the HRW were committed by the Russians, the organization also noted human rights violations committed by the Chechens. Human Rights Watch recorded three large-scale massacres committed by Russian forces at the beginning of the

[13] HRW, 'Russia. Top Rights Court Holds Russia Responsible for «Disappearance» and Killing', *Human Rights Watch*, 1 August 2006, at <http://www.hrw.org/news/2006/08/01/russia-top-rights-court-holds-russia-responsible-disappearance-and-killing>, 12 October 2012.

war. Those are: the Alkhan-Yurt case, the killings in the Staropromyslovsky district of Grozny and the Novy Aldy incident.[14]

As war was went on, HRW still remained active in the region while there was a clear breakdown of news reports from the region. At the highest point in 2000, 58 news stories from the region were reported, 46 cases in 2001, 47 in 2001 with an abrupt decline until 2009, when the highest number of all time – 75 news stories about Chechnya – was shown, with the lowest point in 2012 with only 15 news items.

The most important governmental actor in the Second Chechen War, starting from the first days of clashes, was the Council of Europe which responded to violations of human rights with a resolution passed on November 1999 by the Parliamentary Assembly of the organization (PACE). Resolution 1201, adopted on 4 November, stated that the Assembly condemns all terrorist acts inside and outside of Chechnya, human rights violations and abductions, therefore requesting the liberation of all the hostages currently detained. Although the resolution addressed both parties, the Council of Europe mostly mentioned the Russian authorities and requested them to introduce a ceasefire. This seems perfectly logical, since Russia was the only party involved in the war and he was also a member of the Council of Europe and thus obliged to fulfill its directions.

Following of the resolution, the Assembly issued recommendation 1444, dated 27 January 2000. This was the first time they mentioned a possible review of Russian membership status in the Council of Europe, stating that:

> The Assembly resolves to monitor closely respect for the requirements set out in paragraph 16 of this recommendation, at the same time emphasizing that failure to meet them will inevitably necessitate, at the Assembly's April 2000 part-session, a review of Russian continued membership of, and participation in, the Assembly's work and in the Council of Europe in general.[15]

The Council of Europe did manage to reach an agreement with Russia, specifically Alvaro Gil-Robles, commissioner for human rights, called on the Russian government to establish human a rights office in Chechnya. President Putin responded to this by appointing Vladimir Kalamanov as Russia's special representative for human rights in Chechnya. Experts of the Council of Europe were also to assist Kalamanov in that field. But E. Gilligan depicts Kalamanov's office as an effort from the Russian government to create a "parallel human rights regime" to counter the influence coming from human rights organizations.[16] In reality it was

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[14] D.T.R.W. Waters, 'Human Rights in Chechnya. A Lost Cause?' in *The Second Chechen War*, ed. A.C. Aldis, Shrivenham 2000, pp. 145-152, at <http://www.da.mod.uk/colleges/arag/document-listings/caucasus/p31>, 1 November 2012.

[15] Parliamentary Assembly (PACE), *The Conflict in chechnya, recomendation 1444*, 2000, at <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta00/EREC1444.htm>, 1 November 2012.

[16] E. Gilligan, 'International Failure' in *Terror in Chechnya. Russia and the Tragedy of Civilians in War*, Princeton 2010, pp. 168-174.

an outcome of international pressure on Russian government. They were receiving cases and identifying human rights violations, whether real of fake.

The mission of the Council of Europe in Chechnya was the first instance of international presence in the region during the Second Chechen War. Their office was located in Znamenskoe and active work started from June 21, 2000. A team assisted Kalamanov in the administration of his office; they set up a registration system for complaints from Chechen citizens about human rights violations. Training local staff and installing an archive system were also included in their tasks. Therefore, in less the one month a result was already visible; twenty-nine detained persons were released in Stavropol thanks to the collaboration of Kalamanov's office and experts from the Council of Europe.

The first three individuals participating in the mission were: Edo Korlija from the Anti Torture Committee, Eva Hubalkova from the European Court of Human Rights and Peter Liskova, former special representative of the Council of Bosnia-Herzogovina. By September, the main office received 4,167 complaints and registered 3,500 of them. The office had been consulted by 8,129 individuals. Applications were mostly related to: searching for missing persons, restriction or prohibition of movement on the territory of the Chechen republic, refusal to pay compensation for pecuniary or non-pecuniary injuries committed between 1994--1996 or after August 1999, assistance to obtain places in IDP camps and other rights of IDPs, poor conditions in IDP camps, impossibility or difficulty for sick people to be provided with proper medical care free of charge, violations by members of armed forces at checkpoints (payment of money in order to pass through, arbitrary detention of people at the checkpoints), detentions of people in cleansing operations by members of armed forces. It was difficult to solve these issues, since there was no civil or criminal court system working within Chechnya and cases raising criminal accusations against the members of military forces were in the hands of military prosecutors and hardly ever terminated before military court.[17]

Under amnesty regulations, but also under pressure from the Office, the Russian authorities released a number of illegally detained people. More than 300 persons were free to return to their families; however, the Council of Europe's involvement in setting up an office in Znamenskoye was instrumental in political and technical terms as well. However, recommendation 1456 which described achievements and failures of the Russian Federation to follow the Council of Europe's recommendation number 1444 notes that despite all of the attainments there were principal issues still to be resolved, such as ceasefire and political dialogue with elected Chechen authorities. Moreover, the Council of Europe reported that up

[17] Council of Europe, *Secretary General's interim report on the presence of Council of Europe's Experts in the office of Russian Presidents Special representative for human rights in Chechnya/ Statistical Data*, Strasburg 2000, at <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=1030267&SecMode=1&DocId=363688&Usage=2>, 1 November 2012.

to 6 April 2000, the Russian Federation had continued the destruction of Grozny, attacks on civilian population, rape and torture, arbitrary arrests and detention of non-combatants and using young-inexperienced conscripts in the military campaign. Therefore the Parliamentary Assembly of the Council of Europe voted to initiate without delay, in accordance with article 8 of the Statute, the procedure for the suspension of the Russian Federation from its rights of representation in the Council of Europe. Restoration of voting rights happened after six months on 26 January 2001.

Soon after Russia was readmitted, effective steps were taken in collaboration with the state Duma. For instance, Joint Working Group on Chechnya held its first meeting on 21 and 22 March of 2001 at the premises of the Duma in Moscow. The Parliamentary Assembly was represented by Lord Judd, Rudolf Binding and five other members of committees. The Duma was represented by Dimitry Rogozin, Valentin Nikitin, Nikolai Kovalev and seven other of its members.[18] A group of seventeen was designed to work on finding a political solution to the conflict, addressing respect for human rights and the humanitarian situation in the region. They held several meetings and the results came immediately, as mentioned in the recommendation 1240 (2001). There was a movement toward the establishment of state institutions especially in civil administration, judicial system and the local police in Chechnya, reduction of checkpoints and withdrawal of some troops from the Chechen Republic, accelerated delivery of identity cards as well as limitations of access of Russian NGO's to Chechnya.[19]

In 2004, due to security issues, the expert mission was moved out of Chechnya permanently. In the same year the Secretary General in his report summed up all the work which the Council of Europe has done in Chechnya. Between 2000 and April 2003, the Office of the Human Rights representative received 45,985 visitors who lodged 9,952 complaints. The majority of all complaints related to missing persons and to social benefits and rights of various kinds. In 2001, the Office forwarded 83 complaints to the military prosecutors (resulting in 4 criminal proceedings). The corresponding figure for 2002 was 115 (resulting in 19 criminal proceedings). Since 2000 the office registered 2,056 complaints concerning disappearances. The highest number was received in 2002: 738 cases, and the lowest in the first year of the war: 390, although it is only slightly lower than the number of complaints between January and August 2003, which is 393.

As of January 2003, the Office has managed to establish the location of 767 missing persons. Of these, 221 were released from pre-trial imprisonment

[18] Council of Europe, *Joint Working Group on Chechnya to hold its first meeting*, Strasburg 2001, at <http://www.assembly.coe.int/ASP/Press/StopPressView.asp?ID=1127>, 2 November 2012.

[19] Council of Europe, *Conflict in the Chechen Republic? Recent Developments*, Strasburg 2001, at <http://www.assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta01/ERES1240.htm>, 2 November 2012.

or from their abductors. 49 were found dead. Since 1999, the Military Prosecutor's Office has investigated 16 criminal cases of abduction allegedly committed by members of the federal forces. In 2002, the Prosecutor's Office of the Chechen Republic initiated 77 criminal proceedings on various charges against members of the Ministry of the Interior. Of these cases, 7 ended up in court as of mid-2003 and 20 have been handed over to the military prosecutors. This data shows that the expert mission turned out to be effective and its support of the human rights office in Chechnya ensured the best possible outcome for every complaint or application. Interestingly enough, the reason of suspension of the expert mission in Chechnya was an accident which occurred on 21 April 2003, when a bomb exploded in Grozny as the convoy of experts passed. Afterwards, an agreement was reached between the Minister of Foreign Affairs of the Russian Federation and the Secretary General of the Council of Europe regarding the new form of consulting the Council of Europe on an ad hoc basis.[20]

The end of the Council of Europe's mission in Chechnya was a signal for the international society that it was not the right time to withdraw from conflicts in Caucasus, therefore later events proved that external powers lost control over the region (if they had ever possessed it) forever. The most formidable tool left at their disposal was the European Court of Human Rights which has been, till nowadays, actively investigating crimes committed in Chechnya during the Second War.

The European Court of Human Rights as a Legislative Tool

The Constitution of the Russian Federation of 12 December 1993 states in article 15(4):

> The Universally recognized norms of international law and international treaties and agreements of the Russian Federation shall be a component part of its legal system. If an international treaty or agreement of the Russian Federations fixes other rules that those envisaged by law, the rule of the international agreement shall be applied.

This means that ECHR can have a binding and transforming power in the Russian Federation. But in reality, due to the uncertain character of general normative statements, conflict may arise between international treaties and the legal order of the contracting state.[21]

The judgments of the ECHR are binding and in most cases require governments to change their legislation, which is why ECHR is a tool for international society to impact and modify Russian behavior in the case of Chechnya.

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[20] W. Schwimmer, *Russian Federation. Council of Europe's response to the situation in the Chechen Republic*, Strasburg 2004, at <https://wcd.coe.int/ViewDoc.jsp?id=108959&Site=COE>, 10 September 2012.

[21] C. Tomuschat, *Implementation at National Level*, Oxford 2008, pp. 97-132.

Under the European Convention of Human Rights, Article 46 on Binding Force and Execution of Judgment:

1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.
2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution.
3. If the Committee of Ministers considers that the supervision of the execution of a final judgment is hindered by a problem of interpretation of the judgment, it may refer the matter to the Court for a ruling on the question of interpretation. A referral decision shall require a majority vote of two thirds of the representatives entitled to sit on the Committee.
4. If the Committee of Ministers considers that a High Contracting Party refuses to abide by a final judgment in a case to which it is a party, it may, after serving formal notice on that Party and by decision adopted by a majority vote of two thirds of the representatives entitled to sit on the Committee, refer to the Court the question whether that Party has failed to fulfill its obligation under paragraph 1.
5. If the Court finds a violation of paragraph 1, it shall refer the case to the Committee of Ministers for consideration of the measures to be taken. If the Court finds no violation of paragraph 1, it shall refer the case to the Committee of Ministers, which shall close its examination of the case.[22]

This means that there are some bureaucratic obstacles in the process of the application of judgments but there have been more 10,000 cases in the history of ECHR's existence when its judgment was fully implemented in a state's legislation.

Statistical data in relation to Russia show a positive tendency. For example, in 2011 21% of cases concerned a right to a fair trial, 17% Protection of Property, 15% ill-treatment, 14% Right to Liberty and Security and 33% were related to other rights. While the judgment in 94% of these cases was violation, so in an absolute majority of cases Russia was condemned for violating the rights indicated in ECHM. Only in 4% of the cases the court ruled No Violation and in 1% Friendly Settlements. Interestingly enough only 2 % of the cases received a verdict in Russia and 98% application were declared inadmissible or expired.[23] However, statistical data for 1999-2004 is dramatic in the sense that in 971 Applications registered in ECHR during 1999, out of which 4 applications referred to the government for observation, none were admitted to proceed farther. The situation was the same in 2000, when 1323 applications were registered by the court, out of which 28 went

[22] Council of Europe, *Convention for Protection of Human Rights and Fundamnetal Freedoms*, 4 November 1950, at <http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm>, 1 October 2012.

[23] ECHR, *Statistics on Judgments by State*, September 2011, at <http://www.echr.coe.int/NR/rdonlyres/E6B7605E-6D3C-4E85-A84D-6DD59C69F212/0/Graphique_violation_en.pdf>, 30 August 2012.

to Russia for observation and zero of them were declared as admissible. Whereas in 2001, the number of applications registered from Russia doubled and reached 2108, out of which 1253 were declared as inadmissible or expired and 21 cases were sent to the government for observation, but in contrast to the previous years, 2 applications were declared as admissible.[24]

There have been obvious changes in the following years, for example in 2002 the number of applications allocated to a decision body reached 3,989 from which 2,222 were inadmissible or expired and finally the number of applications which were actually declared as admissible was 12 – a 500% improvement from the previous year. Generally, the trend is upward, but remarkable achievement was reached in 2004 when out of 5,835 applications 232 were referred to the government and 64 declared as admissible. This number is 4 times higher than in the previous year. And if in 1999 and afterwards till 2001 the section of Judgments was empty in the Annual report of ECHR, in 2002 it showed that there had been 2 judgments in 2003 – 5 and in 2004 – 15 judgments in the higher and lower chamber. From 1999 till 2004 there have been in total 20 judgments in the ECHR, out of which 20 of them were found to contain at least one violation by Russia, there was 1 case with no violations and 1 labeled as other judgments. The most common violation was that of rights to liberty and security: 12 cases; then 8 cases concerning length of procedure; 6 cases referring to a right to fair trial and 5 cases about inhuman or degrading treatment or punishment; prohibition of torture – 4 cases; rights to an effective remedy – 4 cases; protection of property – 4 cases and 4 cases of violating other articles of the convention not listed in the annual report of 2004: 3 cases concerning rights to the respect of private and family life and 1 case related to freedom of assembly and association.[25]

Notwithstanding the fact that local prosecutors conduct initial criminal investigation into civilians' complaints of serious abuses, Russian law-enforcement organs have demonstrated no commitment to investigate these cases effectively. The majority of investigations are suspended after two months for "lack of establishing the identity of perpetrator" states the ECHR while describing the human rights situation in Chechnya. Thus, in June a report of the Memorial Military Prosecutors office launched investigation 177 complaints against Russian servicemen during the period of 1999-2004, of which 153 were closed for lack of evidence, suspended indefinitely or turned over to other courts. Only 9 cases went to trial.[26]

Taking into consideration the fact that Russia signed the European Convention of Human Rights in 1998, the affectability of ECHR is clear in this case. Most

[24] ECHR, *Annual Report 2001*, Strasburg 2002, pp. 76-82, at <http://www.echr.coe.int/Documents/Annual_report_2001_ENG.pdf>, 20 September 2012.

[25] ECHR, *Annual Report 2004*, Strasburg 2005, pp. 113-128, at <http://www.echr.coe.int/Documents/Annual_report_2004_ENG.pdf>, 20 September 2012.

[26] Russian Justice Initiative, *Chechnya and Human Rights*, 2004, at <http://www.srji.org/en/chechnya/impunity>, 1 September 2012.

of the cases decided from 1999 to 2012, the total amount of which is 183, have been lodged in the 1999-2004 period. Those are the most violent and important trials. Strikingly enough, with disappearances as leading violations type with 138 cases, the second most frequent complaint is Extra-Judicial executions – 27 cases, indiscriminate bombing - 12 cases, ill-treatment and torture – 10 cases each and death due to negligence, mines and illegal destruction of property with 1 case each. The first three judgments were passed on 24 February 2005. These are: Khashiyev and Akayeva vs. Russia, Isaeva vs. Russia and Isayeva, Yusupova and Bazaeva vs. Russia. The latest one is the oldest with the date of violation: 29 October 1999, concerning indiscriminate bombing. The representatives were the EHRAC (European Human Rights Advocacy center) and "Memorial" – the Moscow based human rights organization.

Concluding Remarks

Russia due to its political and military characteristics, granting power and confidence of action during international relations, wasn't able to successfully finish all the phases of the "Spiral Model" while on the other it hand implemented the first three phases with major accomplishments, but due to the changing circumstances of domestic political restraints it wasn't able to proceed farther. The process of socialization into the international environment was used by Russia as an instrumental method to manipulate the international opinion and create the image of a norm-abiding state. With the signing of the European Human Rights Convention in 1998 the process of socialization entered its active phase and definitely the major success of transnational advocacy networks comprised of international governmental and non-governmental organizations was the gathering of sufficient information on the repressions in Russia and putting them on the international agenda and causing the state concerned (in our case Russia) to deny all the accusations and become involved in the discourse over human rights.

Russia wasn't able to follow the "Spiral Model" till the last phase and was lost somewhere during the third phase called "tactical concessions". They did compromise in order to legitimize newly elected President Mr. Putin and his "anti-terrorist" operation in Chechnya at an international level, but afterwards the liberal human rights policy was abandoned. The reasons for this development are complex and include Russia's might, power and ability to control political processes domestically as well as internationally.

Thus, after 2004 the human rights situation in Russia began to decrease. Examples are numerous: oppressing domestic opposition, detaining leaders of human rights movements, doubtful deaths of human rights activist/journalist and political leaders in Chechnya. However, matters concerning suicide bombers in Beslan and Dubrovka Theater in Moscow clearly show what the priority for the Russian government was, and it was obviously not its own citizens.

Thomas Aquinas used to say on Just War that: "All that takes the sword shall perish with sword. Therefore all wars are unlawful". The international system is perfect soil to give rise to wars but without perish inflicted on norm-violator.

Abstract

The birth of the human rights is a birth of western civilization, when the individual freedom, freedom of speech and movement got introduced for the wider range of societies and from there derives the (natural) law which is entitled to defend those rights. Russia during its long historical tradition was always stuck in between two attitudes toward human rights regime. At the one hand embracing universal human rights and on the other hand emphasizing cultural relativism and national particularism. The perfect example of this would be conflict in Chechnya and war crimes and human rights violations which Federal Government done toward autonomous region. Thus more than ten years passed after starting the second Chechen war but there is no reconciliation in the horizon. Moreover region is a still "hot spot" and indeed this war became part of everyday reality.

Conflict in Chechnya and especially the second war is known as the cruelest and antihuman military campaign Russia had after dissolution of Soviet Union. There more than 160 cases in European Court of Human Right indicating crimes and violations Russian government committed toward the citizens of Chechnya including: disappearance, extra judicial execution, indiscriminate bombing, ill treatment and many others.

In this paper I will be criticizing Social Constructivist approach with Neorealist attitude. Thomas Risse, Stephen Ropp, and Kathryn Sikkink[27] present a highly influential five-stage *spiral model,* outlining the stages and processes through which human rights norms become socialized into domestic settings. The model suggests that changes in the policies of violating governments are mainly driven by non state transnational actors. These actors form networks that apply normative pressures on governments, mainly through shaming and denunciation. At first, the pressures lead to empty rhetoric and some tactical concessions to the norms. However, with time, the moral power of the norms becomes binding and governments get caught up in their own rhetoric. Universal human rights norms achieve prescriptive status, become internalized, and begin to guide behavior.

Paper answers following questions: Why Second war in Chechnya poisoned Russia's human rights record and affected countries international face and what was the role of human rights organizations in the process of preventing farther deterioration of situation?

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[27] T. Risse, K. Sikkink, op. cit.

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Religion and Human Rights

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Iustitia et Pax (Vatican)

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The Catholic Church in Human Rights Protection

Ever since the Pontifical Council for Justice and Peace began its work, soon after the Second Vatican Council, the promotion and protection of human rights has been an essential component of our mandate. Therefore I am very grateful for the opportunity to explore with you the Catholic Church's teaching on human rights and their protection.

Introduction

In this address, I will point out how Blessed John XXIII and his successors have developed the Church's social doctrine in the area of human rights. There are many parallels between the Catholic Church's position and the evolution of human rights on the world scene since the 1948 Universal Declaration of Human Rights.

Church doctrine coincides with national laws and international covenants on numerous points, especially the foundation in human dignity. Another major point in common is religious freedom.

The Church strongly defends the universal character of fundamental human rights. The Church rejects the relativism that some national regimes and interest groups increasingly apply to rights.

Sadly, we continue to witness deplorable violence against religion in many countries, and it is suffered disproportionately by Christians. The Church urges that religious freedom be treasured and defended by all, whatever their own convictions, because it epitomizes the freedom to live by one's deepest understanding of truth. As Pope Benedict XVI explained, this is consistent with the healthy secularity of the legitimate modern state in which religious and temporal matters are separate. But such freedom is opposed by the aggressive secularism that attacks any beliefs that it does not share, and by some religious fundamentalists with the same tendencies.

I will conclude with some remarks on how religious education helps to construct the social order.

Inherent Dignity of the Human Person

Many people speak of human rights. Very rightly, they refer to their violations. Very rightly, they proclaim that human rights must be protected. Very rightly, they advocate that human rights must be promoted.

Yet what are human rights? So many claims nowadays are named as human rights. How are we to understand them?

In order to have a well-grounded sense of this subject, let us recall the context that led the United Nations to issue the Universal Declaration of Human Rights (UDHR) in 1948.

The Second World War had scarcely ended when the United Nations was founded in 1945. In some areas, wars continued. The drafters of the Universal Declaration were well aware of the countless grave violations of human rights that had been committed in the two World Wars and other conflicts. Member States were in agreement that a blatant disregard and contempt for human rights had resulted in barbarous acts which outraged the conscience of mankind. Member States were in agreement that human rights are applicable to all persons. Otherwise, the lack of respect for human rights would persist, and many people would continue to suffer for decades to come.

For this reason, Member States desired a bold document that governments could agree upon; a document that would proclaim to the world those values that are common to all of humanity. Thus, not long after the birth of the United Nations, Member States issued the *Universal Declaration* "as a common standard of achievement for all peoples and all nations". I draw your attention to the words "common standard of achievement". This text was to enshrine the aspiration to which every individual and every organ of society should subscribe. Inspired by it, they should strive to promote respect for the rights and freedoms it articulates. They should secure the universal and effective recognition and observance of these rights and freedoms by education and by other progressive measures at the national and international levels.

With this aspiration in mind, what is it about? To what should all humankind aspire?

Rather than enumerate rights and freedoms, I invite you to focus on their foundation. This is what the first sentence of the Preamble of the Universal Declaration states: "Whereas recognition of the *inherent dignity* and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world".[1] That is, the ground, the foundation, the substrate of human rights and freedoms is "the inherent dignity of the human person".

The roots of human rights are found in the dignity that belongs to each and every human being. This dignity, inherent in human life and equal in every person, is perceived and understood first of all by reason. It is not found in the hu-

[1] General Assembly Resolution 217 A (III) of 10 December 1948 [emphasis added].

man will or in the reality of the State or in public powers. It is found in the human person himself and in God his Creator. The philosopher Jacques Maritain, who helped to draft the Universal Declaration, put this point succinctly when he wrote:

> the worth of the person, his liberty, his rights arise from the order of naturally sacred things which bear upon them the imprint of the Father of Being and which have in him the goal of their movement. A person possesses absolute dignity because he is in direct relationship with the Absolute, in which alone he can find his complete fulfilment.[2]

This is utterly radical. Your human rights and mine do not depend upon the will of other humans. Human rights arise from our dignity as created in the image and likeness of God. They are a given of human nature. They are not subject to a vote any more than to be human is subject to a vote. Each and every person has inherent dignity and worth because he or she is a human person. Thus you should not be surprised that the Catholic Church regularly affirms the inherent dignity of the person as the foundation of human rights, and the right to life from conception to natural death as the first among all human rights and the condition for all other rights of the person.[3]

Ever since the proclamation of the *Universal Declaration*, attention to the subject of human rights has increased. The more the central message of the true nature of human rights is communicated, the more people are able to embrace these rights and seek and achieve their concrete realization. As Pope Benedict XVI asserted to the General Assembly of the United Nations in 2008, the Church is a vigorous partner in efforts to make human rights a reality: "In a manner that is consistent with her contribution in the ethical and moral sphere and the free activity of her faithful, the Church also works for the realization of these goals through the international activity of the Holy See".[4]

Human Rights in *Pacem in Terris*

The next historic moment is the early 1960s. In 1961, the Berlin Wall went up, followed in 1962 by the Cuban Missile Crisis. In April 1963, Blessed John XXIII promulgated the historic Encyclical *Pacem in terris* on the subject of establishing universal peace in truth, justice, charity and liberty. He was acutely aware of the problems of the day. He was realistic about the dangers that the world confronted and about the obstacles to be overcome. For this reason he provided a blueprint,

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[2] J. Maritain, *The Rights of Man and Natural Law*, Ignatius Press 2011, p. 67.

[3] See: Congregation for the Doctrine of the Faith, Instruction *Donum vitae*, 22 February 1987.

[4] Address of Pope Benedict XVI to the 62nd session of the United Nations General Assembly, 95th Plenary Meeting, New York, 18 April 2008.

so to speak, of how the values common to humanity could be gradually realized in this imperfect world.

Good Pope John affirmed that human rights are founded in the inherent dignity of the human person. Moreover, when considered from the standpoint of divine revelation, this inherent dignity is incomparably increased, for we have been redeemed by Christ and thus made sons and daughters and friends of God and heirs to eternal glory.[5] The Pope then articulated the rights that must be upheld for the establishment of peace in the world. He indicated that any well-regulated and productive association in society demands the acceptance of this fundamental principle: that every individual is truly a person whose nature is endowed with intelligence and free will. Rights and duties flow from this nature. And as such, they are universal and inviolable, and therefore inalienable.

Let me elaborate on this point. Human rights are *universal* in that they apply to all humans without exception of time, place or subject. They are *inviolable* insofar as they are inherent in the human person and in human dignity, and because the proclamation of these rights demands their complete respect by all people everywhere and for all people everywhere. Finally, these rights are *inalienable* insofar as no one can legitimately deprive others of these rights, whoever they may be, since this would do violence to their nature.[6]

After treating the foundation of human rights, John XXIII went on to provide a summary of particular human rights. As I mention these, you will certainly recognize many that are incorporated in national constitutions and legislation. Here is his list of human rights:

1. the right to live;
2. the right to bodily integrity and to the means necessary for the proper development of life, particularly food, clothing, shelter, medical care, rest and, finally, the necessary social services;
3. the consequent right to be looked after in the event of ill health, work-related disability, widowhood, old age or enforced unemployment, or whenever, through no fault of their own, people are deprived of the means of livelihood.

He then went on further and expounded upon those rights that pertain to moral and cultural values:

4. the right to worship God according to one's conscience;
5. the right to freely choose one's state in life;
6. economic rights;
7. the rights of meeting and association;
8. the right to emigrate and immigrate; and
9. political rights.[7]

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[5] *Pacem in terris*, 9-10.

[6] See: Pontifical Council for Justice and Peace, *Compendium of the Social Doctrine of the Church*, Libreria Editrice Vaticana, 2004, paragraph 153.

[7] *Pacem in terris*, 11-27.

Many of these principles are incorporated in existing constitutions and legislation; yet it remains a challenge – just as much today as it did in 1963 – to affirm, protect and uphold these rights "in principle and in fact" in all countries everywhere.

Not only did John XXIII connect human rights to his challenge for the realization of peace in the world. He also affirmed that "along with rights come duties", and that between persons there is a reciprocity of rights and duties. A person's natural right gives rise to a parallel duty in others to recognize and respect that right.[8] In practice, this means that we are not only called to claim our own human rights; we are also called to respect and indeed promote the human rights of others.

Furthermore, it is not enough to speak about human rights; instead what is needed is that we work together for their gradual realization in the world. This brings me to affirm the value of this Conference and of your participation here today. It is action-oriented. Its focus is promotion of human rights in the present international context through education. Yet for it to be effective, such education must be based on the permanent values that are common to all of humanity, and it must be followed by action that results from the conversion of persons, the conversion of hearts. I will return to these matters at the end of my speech.

Universal Nature of Human Rights

Let me turn now to the Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights in 1993. It usefully reinforced the truth of the universal nature of human rights when it affirmed that "The universal nature of these rights and freedoms is beyond question", and that "All human rights are universal, indivisible and interdependent and interrelated".[9]

In his 2008 visit to the General Assembly of the United Nations, Pope Benedict XVI reiterated this truth. He noted how "human rights" has grown as the common language and the ethical substratum of international relations. However, he warned against the ideology of relativism. Relativism removes these rights from their proper context because it implies that rights are not based on the natural law inscribed on our hearts and thus not present in all cultures and civilizations. This relativistic conception restricts the range of application of rights because it permits the meaning and interpretation of rights to vary and their universality to be denied in the name of different cultural, political, social and even religious outlooks.

Quite to the contrary, a great variety of viewpoints must not be allowed to obscure the basic truth: rights are universal, and so too is the human person who is the subject of these rights.[10] The fact that there are unchanging values common to

[8] Ibid., 30.

[9] A/CONF.157/23, OP1 and OP5.

[10] Address of Pope Benedict XVI to the 62nd session of the United Nations General Assembly.

all of humanity means quite simply that human rights are a given. They are common to all persons. They do not depend upon the fashions and passions of societies or on the will of governments.

On the sixtieth anniversary of the Universal Declaration, at the United Nations in Geneva, the Holy See drew attention to another cause for concern: ideologies that attempt to rewrite human rights or create new ones. Perhaps proponents are misled by the fact that fundamental rights can be expressed in different particular manners in different social and cultural contexts. A "healthy realism" will recognize that this variation is compatible with the universal character of the underlying rights, and it will block the misguided proliferation of pretended rights:

> A healthy realism, therefore, is the foundation of human rights, that is, the acknowledgement of what is real and inscribed in the human person and in creation. When a breach is caused between what is claimed and what is real through the search of so-called "new" human rights, a risk emerges to reinterpret the accepted human rights vocabulary to promote *mere desires* and measures that, in turn, become a source of discrimination and injustice and the fruit of self-serving ideologies.[11]

The Church has a serious concern when the ideology of a particular group of individuals can somehow create a new human right. One example is the attempt on the part of some to legitimize the killing of an unborn child through the promotion of so-called "reproductive rights", "reproductive services" and other loaded terms. Another example is the use of the term "gender" to suggest that sex is not biologically grounded as male and female but is simply a social construct or produced by what individuals think or feel they are. This goes with attempts to "legitimize" homosexual behaviour in some manner by suggesting that persons who commit such acts should be "categorized" as a specific "group" for human rights protection. One aspect of this is the suggestion that marriage could somehow be redefined, despite the fact that marriage is, by nature, between one man and one woman for their mutual love and increase of the human family, as affirmed in international law.[12] Such positions distort reality because they attempt to rewrite human nature, which *de natura* cannot be rewritten.

Note that the Church vigorously upholds the rights to life and bodily security of everyone, everyone, regardless of their perceived "sexual differences".[13] The Church sees this as a matter of the most basic rights. At the same time, we regret

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[11] Address of Abp. Silvano M. Tomasi on the occasion of the commemoration of the 60th Anniversary of the Universal Declaration of Human Rights, Geneva, 12 December 2008, 2.

[12] See: Universal Declaration of Human Rights (UDHR), Article 16; International Covenant on Civil and Political Rights (ICCPR), Article 23, and International Covenant on Economic, Social and Cultural Rights (ICESCR), Article 10.

[13] See in 2009, 'The Vatican's legal attaché to the United Nations issued a Dec. 10 statement saying the Holy See continues to oppose «all grave violations» of homosexual persons' human rights', at <http://www.catholicnewsagency.com/news/holy_see_reiterates_opposition_to_violation_of_homosexual_persons_human_rights>, 1 August 2013. See also: <http://www.news.

the discordance between homosexuality as such and what we understand as God-given human nature. Let me remind you of our Lord's reaction when the townspeople wished to stone a woman to death for adultery. He managed to preserve her life and bodily security; and then he said "Go and sin no more" (John 8:1-11).

Source and Synthesis of Human Rights

One hundred years after the landmark social Encyclical *Rerum novarum* of Pope Leo XIII, and almost thirty years after *Pacem in terris*, Blessed John Paul II issued the social Encyclical *Centesimus annus*. It drew attention once again to the fundamental nature of human rights. Here, in the last days of the Cold War, the Pope reflected on both his own life experience and the present world situation. He was personally aware of the many gross violations of human rights that had taken place throughout modern history. He had recently written in his encyclical *Sollicitudo rei socialis* of the duty to promote human solidarity, a concept that has been characteristic of those social movements – such as "Solidarność" – that were founded on the desire for freedom and justice. Now he was to reaffirm those fundamental principles at the heart of human rights.

Here is his list of rights that are connected to religious freedom and thus form a synthesis with it:

1. "the right to life, an integral part of which is the right of the child to develop in the mother's womb from the moment of conception";
2. "the right to live in a united family and in a moral environment conducive to the growth of the child's personality";
3. "the right to develop one's intelligence and freedom in seeking and knowing the truth";
4. "the right to share in the work which makes wise use of the earth's material resources, and to derive from that work the means to support oneself and one's dependents";
5. "the right freely to establish a family, to have and to rear children through the responsible exercise of one's sexuality"; and finally,
6. "In a certain sense, the source and synthesis of these rights is religious freedom, understood as the right to live in the truth of one's faith and in conformity with one's transcendent dignity as a person".[14]

va/en/news/holy-see-addresses-un-human-rights-council-on-gend> and <http://www.zenit.org/rssenglish-32108>, 1 August 2013.

[14] *Centesimus annus*, 47; see also: Address of Pope John Paul II to the 34th General Assembly of the United Nations, 2 October 1979, 13.

Religious Freedom

Instead of a detailed discussion of all these rights, let me touch on just one, namely religious freedom. Pope John Paul II identified it as "the source and the synthesis of all rights".

The Universal Declaration of 1948 already upheld freedom of religion as one of the fundamental human rights inherent in every person. As it states, "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance".[15] Let me repeat: the right to freedom of religion is inseparable from freedom of thought and conscience. It applies to everyone. It includes the freedom to change one's religion or belief. It also includes the freedom to manifest that religion or belief both in private and communally.

Less than two decades later, the Fathers of the Second Vatican Council affirmed these same principles in *Dignitatis humanae*, the Declaration on Religious Liberty. They specified that the right of the individual and of communities to social and civil freedom in religious matters carries with it the right "to be immune from coercion on the part of individuals or of social groups and of any human power, in such wise that no one is to be forced to act in a manner contrary to his own beliefs, whether privately or publicly, whether alone or in association with others, within due limits".[16] In addition, they pointed out that

> It is in accordance with their dignity as persons – that is, beings endowed with reason and free will and therefore privileged to bear personal responsibility – that all men should be at once impelled by nature and also bound by a moral obligation to seek the truth, especially religious truth. They are also bound to adhere to the truth, once it is known, and to order their whole lives in accord with the demands of truth. However, people cannot discharge these obligations consistently with their own nature unless they enjoy immunity from external coercion as well as psychological freedom. Therefore the right to religious freedom has its foundation not in the subjective disposition of the person, but in his very nature.[17]

One year after the promulgation of *Dignitatis humanae*, the UN General Assembly adopted the International Covenant on Civil and Political Rights (ICCPR). Happily, Article 18 of this Covenant restated and expanded upon the principle of religious freedom as contained in the Universal Declaration. The Covenant affirmed that:

1. no one should be subject to coercion that would impair his freedom to have or to adopt a religion or belief of his choice;

[15] UDHR, Article 18.
[16] *Dignitatis humanae*, 2.
[17] Ibid., 2.

2. freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others; and
3. States Parties are called to respect the liberty of parents to ensure the religious and moral education of their children in conformity with their own convictions.[18]

Moreover, the *ICCPR* also affirmed the right of minorities to profess and practice their own religion.[19]

As I recounted earlier, duties accompany rights. Let me now spell out the duties of governments in this area, their solemn responsibility consistent with their purpose which is to promote the common good.[20] All governments are called upon to uphold the right:

1. to religious freedom for all persons; this is both an individual and a collective right, that includes the right for religious communities to govern themselves according to their own norms;
2. to public worship;
3. to teach and witness to their faith publicly, whether by spoken or written word;
4. to hold meetings;
5. to instruct their members in the practice of their faith;
6. to select, educate, appoint, and transfer their own spiritual ministers;
7. to acquire and use funds or properties;
8. to construct buildings for religious purposes; and
9. to establish the educational, cultural, charitable and social organizations they desire.[21]

Particular Present-day Challenges to Religious Freedom

The principle of freedom of religion is enshrined in international human rights law. One of the great tragedies of today is that it is not upheld in all countries and by all governments.

Pope Benedict drew attention to this grave situation in his 2011 Message for the World Day of Peace. He observed that in some areas of the world, to profess one's religion endangers one's life and personal liberty. In other areas there are more subtle and sophisticated forms of prejudice and hostility towards believers and religious symbols.[22] At present, Christians are the religious group which

[18] ICCPR, Article 18, 2-4.

[19] Ibid., Article 27.

[20] See: *Pacem in terris*, 54.

[21] See: ibid., 3-7; also: Statement of Abp. Silvano M. Tomasi at the 20th Session of the Human Rights Council, 3 July 2012.

[22] Pope Benedict XVI, Message for the World Day of Peace, 2011, 1.

suffers persecution in the largest number of countries on account of its faith.[23] They experience daily affronts and often live in fear because of their faith in Christ, their pursuit of truth, and their plea for respect for religious freedom. This situation constitutes a grave violation of human rights and must be confronted on all levels. Governments have a responsibility to their people, whatever their religion, to protect them from violations of their human rights, including their right to freedom of religion.

Moreover, as Pope Benedict XVI pointed out during his Apostolic Journey to Lebanon in September 2012, for the right to religious freedom to be upheld, it must also be preserved free from two opposed trends today that run contrary to freedom of religion. These are extreme and negative forms of secularization, and a violent fundamentalism that claims to be based on religion.

The Holy Father decries the *secularism* that wants to reduce religion to a purely private concern, and that sees personal or family worship as unrelated to daily life, ethics or one's relationships with others. Further, secularism gives the State control over religious expression and denies citizens the right to express their religion openly. By contrast, "secularity"[24] is a positive orientation. It "frees religion from the encumbrance of politics"; it maintains

> the necessary distance, clear distinction and necessary collaboration between the two spheres. […] No society can develop in a healthy way without embodying a spirit of mutual respect between politics and religion […] [while they] cooperate harmoniously in the service of the common good. This kind of healthy secularity ensures that political activity does not manipulate religion, while the practice of religion remains free from a politics of self-interest which at times is barely compatible with, if not downright contradictory to, religious belief.[25]

The other problem is extreme forms of fundamentalism. The Holy Father explains how this phenomenon arises from "economic and political instability, a readiness on the part of some to manipulate others, and a defective understanding of religion. [It] afflicts all religious communities and denies their long-standing tradition of co-existence. It wants to gain power, at times violently, over individual consciences, and over religion itself, for political reasons".[26] It follows "a logic opposed to divine logic, in other words, not by teaching and practicing love and respect for freedom but rather by intolerance and violence".[27] This is not religion but

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[23] 'Rising Tide of Restrictions on Religion', 20 September 2012, at <http://www.pewforum.org/Government/Rising-Tide-of-Restrictions-on-Religion-findings.aspx>, 1 August 2013. See also: <http://www.theweeklynumber.com/1/post/2012/10/5-religious-groups-experience-4-year-high-in-harassment.html>, 1 August 2013.

[24] The French notion of *laicité*.

[25] See: Pope Benedict XVI, Post-Synodal Apostolic Exhortation *Ecclesia in medio oriente*, 29.

[26] Ibid., 30.

[27] Idem, *Homily* opening II Synod for Africa, 4 October 2009.

a falsification of religion, for religion in its essence seeks reconciliation and the establishment of God's peace throughout the world. Religions are therefore called to cleanse themselves from such temptations and to illumine and purify consciences. All persons are called to respect both the otherness in others and, within that otherness, the essence we truly have in common as the image of God. We are all called to treat the other as an image of God. We may all then reach towards dialogue, reconciliation and peace.

As an aside, let us note Poland's long history of religious tolerance, which has served and continues to reinforce social cohesion, integration and solidarity and has contributed to a healthy relationship between Church and State. Two signal moments in this history were the Statute of Kalisz of 1264 and the Warsaw Confederation of 1573. Article 53 of the present-day Constitution of the Republic of Poland shows how the principles of religious freedom gradually became enshrined in its civil legislation. We must constantly recall these ideals, and we must accept the judgment of history and our own consciences when actions fall short, as would sorrowfully be acknowledged with respect to past anti-Semitism in this beautiful country, and to the anti-religious policies of the Communist period.

Religious Education for Building the Social Order

What kind of change is needed for human rights to be better protected and upheld in all parts of the world? "Religious education" is of inestimable value in this regard. Pope Benedict has called it the "highway" that leads new generations to see others as their brothers and sisters – as brothers and sisters with whom they are called to work and to journey – as brothers and sisters who know that they are members of the one human family, from which no one is to be excluded.[28]

Allow me to provide a powerful expression of this one human family. In September 2010 it was my honour to represent the Holy See at the Plenary Session of the United Nations General Assembly. The topic was poverty and development. I pointed out that development is seriously undermined by irresponsible governments, global processes and major institutions when their policies and actions fail to uphold the inherent and equal dignity, the individuality, and the transcendence of every human being. The methods of some anti-poverty campaigns tended to target the poor in ways that suggest that the solution to global poverty is to eliminate the poor. Furthermore, material poverty has partners – relational, emotional, and spiritual poverty.

So we reminded the General Assembly that the human person must be at the centre in our quest for development. To combat global poverty requires justice and solidarity in the form of investments in the resourcefulness of the poor and, far from eliminating them, making them protagonists in their emergence out of

[28] Message for the World Day of Peace, 2011, 4.

poverty. The poor need education to be transformed from dependency to resourcefulness. If everyone's political, religious and economic rights and freedoms are respected, the paradigm will shift from mere poverty management to wealth creation; from viewing the poor not as a burden but as part of the solution.

Now, how are we to promote justice and solidarity among peoples? Let me say again with Pope Benedict, religious education is a "highway" to achieve this goal. And such education finds its source in the family, the first school for the social, cultural, moral and spiritual formation and growth of children. Children should always be able to see in their father and mother the first witnesses of a life directed to the pursuit of truth and the love of God. Parents must always be free to transmit to their children, responsibly and without constraints, their heritage of faith, values and culture. The family, which international law has affirmed as the first cell of human society,[29] remains the primary training ground for harmonious relations at every level of coexistence: human, national and international. For this reason it is the "highway" to a strong and fraternal social fabric, in which young people can be prepared to assume their proper responsibilities in life, in a free society, and in a spirit of understanding and peace.[30]

For human rights education to be effectively provided, the fundamental nature of human rights must be respected. What is more, it demands that we commit ourselves anew to promoting these values that are common to all people and do not depend upon time or location. Our forefathers have provided us with wisdom for building up our communities and societies. For this reason we ought not to squander the legacy that we have inherited.

Finally, we should not only recognize that religious freedom is the source and synthesis of all human rights. We should also recall what genuine religious belief contributes. Genuine religious belief points us beyond present practicalities towards the transcendent; and it reminds us of the possibility and the imperative of moral conversion of all persons, of the duty to live peaceably with our neighbour, of the importance of living a life of integrity. In the apt words of Jürgen Habermas, "Among the modern societies, only those that are able to introduce into the secular domain the essential contents of their religious traditions which point beyond the merely human realm will also be able to rescue the substance of the human".[31] Properly understood, religious belief brings enlightenment; it purifies our hearts and inspires noble and generous action to the benefit of the entire human family; and it motivates us to cultivate the practice of virtue and to reach out towards one another in love.[32] May God bless our Conference with all the compassion, creativ-

[29] See e.g.: UDHR, Article 16; ICCPR, Article 23, and ICESCR, Article 10.

[30] Ibid., 4.

[31] J. Habermas, *An Awareness of What is Missing. Faith and Reason in a Post-Secular Age*, Cambridge 2010.

[32] See: Address of Pope Benedict XVI, St. Mary's University College, Twickenham, 17 September 2010.

ity and courage needed to make human rights truly available, in practice, to all the inhabitants of our world.

Abstract

There are many parallels between the development of the Catholic Church's social doctrine in the area of human rights by Pope John XXIII and his successors, and the evolution of human rights on the world scene since the 1948 Universal Declaration of Human Rights. Church doctrine coincides with national laws and international covenants on numerous points, especially the ultimate foundation of all rights in human dignity. Another major point in common is religious freedom. Sadly, deplorable violence against religion occurs in many countries, and it is suffered disproportionately by Christians. The Church urges that religious freedom be treasured and defended by all, whatever their own convictions, because it epitomizes the freedom to live by one's deepest understanding of truth. As Pope Benedict XVI explained, this is consistent with the healthy secularity of the legitimate modern state in which religious and temporal matters are separate but mutually respectful. Such freedom is opposed by the aggressive secularism that attacks any beliefs that it does not share, and by some religious fundamentalists with similar tendencies of intolerance. The Church strongly defends the universal character of fundamental human rights and rejects the relativism that some national regimes and interest groups increasingly apply to these and other rights. We must all promote religious education that helps to construct a healthy social order.

Peter Turkson

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Religion in Human Rights Education or Human Rights Education by Religious Bodies?

Introduction

Few areas of social and political life attract such intense concern and passionate attention as the religious education of each successive rising generation. This education is vital for the children themselves as they develop toward maturity and seek to understand the belief systems they have inherited, as well as the belief systems of others who share their immediate physical environment. How children come to view their own and others' religious traditions is a learned behaviour, the province of education.

Religious education is also a matter of deep concern for parents (and those fulfilling parental roles), regardless of the religious (or non-religious) worldview that they may hold, because it can have such a deep impact on those they care about most. For children born to families belonging to religious minorities, the preparation of children to face an insecure and even hostile world is an essential ingredient of parental duties. For these and a variety of additional reasons, religious education is inevitably a major issue for religious and political communities. The way that teaching of and teaching about religion is handled in any particular society often triggers some of the most heated short-term political controversies. Human Rights Education (HRE) is less contentious but only in circumstances in which religion either is omitted or repackaged in less conspicuous wrapping, such as conscience or belief.

Because all education is so closely linked to the shaping of individual identity, character, conscientious and religious beliefs, this domain is subject to some of modern society's most fundamental constitutional and human rights norms. These include the rights of children to education and to freedom of religion or belief (consistent with "the evolving capacities of the

child");[1] and the rights of parents and legal guardians "to provide direction to the child in the exercise of [this] right";[2] and to "ensure the religious and moral education of their children in conformity with their own convictions".[3] Rights of minority groups are also often at issue. At the same time, constitutions typically give states substantial authority to establish and administer educational systems, but of all education domains, curricular matters are the most jealously guarded by the state. In turn, national and sub-national educational systems fit within and reflect a range of types of religion-state structures that contemplate varying degrees of institutional identification with or separation of religious and state institutions.[4]

But of all secular institutions, it is the United Nations that gives Freedom of Religion or Belief a clear and prominent place in its catalogue of rights, as Article 18 in its profoundly significant Universal Declaration of Human Rights.

Given the wide range of religions that they inherently must accommodate and protect, global institutions of necessity must incorporate broadly tolerant and inclusive norms. While many doubt that today the Universal Declaration would receive sufficient support for affirmation among the present-day larger and more inclusive roster of UN membership, it succeeded quite handily in 1948. And Article 18 defines Freedom of Religion or Belief as an inalienable and fundamental right equal to all others and inherent in every person by virtue of membership in the human family. But of what practical value is a right if a person does not know she or he has it? And why would they not know – because they are not taught it. In the case of freedom of religion or belief, in particular, they do not know about it because there isn't much religion in most human rights education.

States have not considered it difficult to allow their citizens the freedom to think. The difficulties start when we come to the right to express one's conviction, or the right to organize as a community in order to promote a religion or belief, or the right to act in accordance with one's conscience in cases where domestic legal systems seem to require uniform behaviour irrespective of the different convictions of individuals. The real problem concerning freedom of religion does not concern the nucleus of the right itself (the freedom of an inner state of mind), but issues that also relate to other human rights. In this sense, freedom of religion gives clear evidence that human rights cannot be protected separately from each other but are realized only as a totality.

[1] Convention on the Rights of the Child, Art. 14, adopted and opened for signature by the United Nations General Assembly Resolution 44/25 on 20 November 1989.

[2] Ibid.

[3] International Covenant on Civil and Political Rights, Art. 18(4), adopted and opened for Signature by United Nations General Assembly Resolution 200A (XXI) on 16 December 1966.

[4] For an overview of the range of such structures, see: W.C. Durham, Jr., B.G. Scharffs, *Law and Religion. National, International and Comparative Perspectives*, New York 2010, pp. 114-122; J. Martínez-Torrón, W.C. Durham, Jr., 'Religion and the Secular State' in K.B. Brown, D.V. Snyder (eds.), *General Reports of the XVIIIth Congress of the International Academy of Comparative Law/Rapports Généraux du XVIIIème Congrès de l'Académie Internationale de Droit Comparé*, 2012, pp. 8-16, 10.1007/978-94-007-2354-2.

The details of this article militate against any presumption of a national or state-sponsored religion as Special Rapporteur Heiner Bielefeldt concluded in his report of December 2011 to the United Nations.

> Indeed, it seems difficult, if not impossible, to conceive of an application of the concept of an official "State religion" that in practice does not have adverse effects on religious minorities, thus discriminating against their members.[5]

The result of the application of the doctrine of Freedom of Religion or Belief is a total freedom for members of both majority and minority religious groups, as well as the growing group of individuals who, when asked to state their religion preference, reply "none". The right to change one's belief also figures prominently in the most recent report of the Special Rapporteur:

> Many States impose tight legislative or administrative restrictions on communicative outreach activities. Many such restrictions are conceptualized and implemented in a flagrantly discriminatory manner, for instance, in the interest of further strengthening the position of the official religion or dominant religion of the country while further marginalizing the situation of minorities.[6]

There are a few countries, typically in settings where there are strong constraints on religion in general, such as Cuba or China, where religious education of any type is either forbidden or effectively barred because of the nature of restrictions controlling the establishment of religious schools and on recognition of religions other than those thought to be historical and of no threat to the state. High levels of restriction on religious education are also found where there is a particularly strong prevailing religion, or where there are intense fears of religious radicalism and extremism.[7] In some cases, state regulations regarding curriculum are so pervasive that all school curricula look alike and it is difficult to discern the difference as a practical matter between state and private schools.[8] In some systems, there are governmental attempts at rigorous regulation of the curriculum and administration of religious schools, but state regulation is not always effective at the local school level.[9]

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[5] Report of the Special Rapporteur on Freedom of Religion or Belief, Heiner Bielefeldt, Human Rights Council, Nineteenth session, December 11, 2011, A/HRC/19/60, p. 18.

[6] Report of the Special Rapporteur on Freedom of Religion or Belief, Heiner Bielefeldt, General Assembly, Sixty-seventh session, 13 August 2012, A/67/303, p. 21.

[7] For example, China and Cuba.

[8] For example, Kazakhstan, Malaysia.

[9] For example, Pakistan and Turkey.

The Role of Religions in Human Rights Education

The *role* of religions in human rights education is a very different topic than is the *place* of religion in human rights education. And, frankly speaking, it is currently the more politically correct perspective. So it is, for example, that when one turns to a featured article in a recent SGI Quarterly magazine,[10] one finds what is essentially a call for the world's major religions to do more effective work in human rights education. In this context, we find mentioned all types of injustices, such as "oppression", "marginalization", and "disempowerment", but no mention of freedom of religion. We find in this article a call for unity of faiths around the topic of human rights education but no acknowledgement that many people of faith struggle to exist at all, to worship freely and to live free of persecution and oppression. Both perspectives are, of course, perfectly acceptable and essential. Nevertheless, one does not need to spend significant amounts of time inside the *Palais des Nations* to realize where the energy and focus reside and what is acceptable and what is not.

Allow me a brief personal illustration. About eighteen months ago when I was becoming acquainted with the United Nations of Geneva, I attended a reception for newcomers where I was introduced to the ambassador of a large and important state delegation. He inquired about the nature of my interests or mandate. I told him it was Freedom of Religion or Belief, being careful to use the official human rights language of the United Nations. A deeply furrowed brow led me to believe he had not understood – perhaps my American English was to blame. I rephrased, "You know, Article 18 – Freedom of Religion or Belief". "Oh yes", he then acknowledged, "Now I understand. You will be working with matters related to freedom of conscience". Naively and certainly not yet grasping the arcane diplomatic art form of politically correct language, I replied, "Yes, although our particular concern is with freedom of organized religion – you know freedom to assemble, construct houses of worship, to print and distribute religious literature, proselyte – that sort of thing – as well as freedom to have no belief". Now puzzlement turned to mild disdain, the furrowed brow deepened, and with that the ambassador excused himself to find another newcomer to greet.

Stepping back from the difficult practical realities of designing and implementing human rights education inclusive of religion, it is clear that religion lies at the intersection of three institutions: the family, religion and the state. It cannot avoid being affected by the process of secularization, and social processes aimed at countering secularization. Indeed, it is a focal point of "culture war" pressures on these issues. At the same time, education and human rights education play a critical role in the ongoing continuation, modification and restructuring of each society in successive generations. Religion has an interest in human rights education because it is vital to the continuation of religious traditions over time. States

[10] 'Human Rights Education Today', *SGI Quarterly*, October 2011, p. 12.

have differing interests in human rights education, in part for short-term reasons involved with garnering political support within society, but also for larger reasons including the cultivation of an ethical citizenry. Human rights education is inevitably affected by state policies that may aim at integration and assimilation of religious minorities, or cultivating respect for diversity and multiculturalism. Families' interest in human rights education, as it pertains to religion, incorporates an extensive range of broadly shared hopes and aspirations for their children. Families who are religious minorities and whose children are educated by the state understandably must hope that their children will be not merely be tolerated but accepted and treated by teachers and peers with respect and dignity.

The reality is that there are no modern societies that are completely homogeneous religiously. The ease of travel, the pull of economic opportunity across borders, population shifts due to war, and varying birth rates, as well as other factors, have all combined to create a world in which every country has substantial religious diversity, including a growing percentage of the population that lacks religious belief or is religiously indifferent. There may be one or several religions that constitute the belief system(s) of the overwhelming majority of the population, but still there is likely to be a large number of distinct religious beliefs in the country.

What Does this Mean for Human Rights Education?

Education systems cannot avoid taking religious differences into account. What this means for human rights education is that if public schools engage in teaching religion, all religious traditions must be taught. It means that in teaching about religion, accurate, sympathetic and respectful language must be used. It means that in designing human rights education, freedom of religion or belief must receive measured attention. Inevitably, religious differences will lead to tensions, and the broader social tensions are as likely to arise in educational contexts as elsewhere. Thus, for example, there are tensions between those who adhere to traditional Islamic practices, such as wearing the various forms of Islamic head coverings, and those who adhere to more contemporary belief systems. It is not surprising that such issues relating to clothing can come to be seen as symbols of religious devotion or, alternatively, as symbols of religious oppression. It is equally unsurprising that these issues find their way into court cases in country after country. A stream of lawsuits such as Dahlab v. Switzerland, Şahin v. Turkey, Dogru v. France, and countless others, are representative. Similarly, there are tensions between religious believers and those without religious belief, which take the form of disputes over the place of religious symbols in public space. The controversy over the display of crucifixes in Italian schools in Lautsi v. Italy is typical of numerous cases on this front.

The reality of religious difference is here to stay. The underlying tensions are profound and real, and we ignore them at our peril. States can seek to deal with

such differences either by repressing them or by finding effective ways to accommodate them. As the European Court stated in Serif v. Greece, in a line that has been quoted in numerous decisions since, although it is true

> […] that tension is created in situations where a religious or any other community becomes divided […] this is one of the unavoidable consequences of pluralism. The role of the authorities in such circumstances is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other […].[11]

School education in general, human rights education and religious education all play important roles in forming a culture of tolerance. There are many ways that countries around the world have wrestled with the issue of promoting tolerance and, more importantly, mutual respect among those holding diverse religious and secular beliefs. While some states continue to see religious pluralism as a threat to stability, the road to peaceful and abundant societies requires finding effective ways to respect divergent beliefs. By providing a broader and deeper understanding of the way this is accomplished in different educational systems, human rights education can make a significant contribution to building sensitive, accepting and respectful societies.

The dichotomy implied in the title of my paper is not meant to suggest that one or the other alternative enjoys a position of moral superiority relative to the other. Rather I had hoped to draw attention to the growing problem of persecution and violence caused by intolerance. At the same time, of course, human rights educators within religious bodies need to join with increasing vigour and more generous budgets the whole of the human rights movement.

Abstract

States have not considered it difficult to allow their citizens the freedom to think. The difficulties start when we come to the right to express one's conviction, or the right to organize as a community in order to promote a religion or belief, or the right to act in accordance with one's conscience in cases where domestic legal systems seem to require uniform behaviour irrespective of the different convictions of individuals. The real problem concerning freedom of religion does not concern the nucleus of the right itself (the freedom of an inner state of mind), but issues that also relate to other human rights. In this sense, freedom of religion gives clear evidence that human rights cannot be protected separately from each other but are realized only as a totality.

Of all secular institutions, it is the United Nations that gives Freedom of Religion or Belief a clear and prominent place in its catalogue of rights, as Article 18 in its profoundly significant Universal Declaration of Human Rights. Given the wide range of religions that they inherently must accommodate and protect, global institutions such as the U.N. of

[11] Serif v. Greece, ECtHR, App. No. 38178/97, 14 December 1999, § 53.

necessity must incorporate broadly tolerant and inclusive norms. While many doubt that today the Universal Declaration would receive sufficient support for affirmation among the present-day larger and more inclusive roster of UN membership, it succeeded quite handily in 1948. And Article 18 defines Freedom of Religion or Belief as an inalienable and fundamental right equal to all others and inherent in every person by virtue of membership in the human family. But of what practical value is a right if a person does not know she or he has it? And why would they not know – because they are not taught it. In the case of freedom of religion or belief, in particular, they do not know about it because there isn't much religion in most human rights education. This paper draws attention to the growing problem of persecution and violence caused by intolerance of religion and the urgent need of human rights educators within religious bodies to join with increasing vigour and more generous budgets the whole of the human rights movement.

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Teaching Human Rights

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The State's Obligation to Educate its Population in Core Human Rights Standards

There is no doubt that states should respect the views of their people. Nonetheless, there are circumstances in which governments of states delay the advancing of human rights in the name of respecting public opinion. A good example is death penalty. Some still invoke public opinion to maintain the punishment in law or practice. But what is public opinion and how do we measure it?

Firstly, there is not one universally recognized definition for public opinion. Some view it as the distribution of individual opinion within a population, while most empirical researchers use the term to identify the majority opinion on varied issues and in this sense majority view is used as its operational definition.[1] Connecting to the content of the term, Sir Robert Peel, former Prime Minister of England, described public opinion as "great compound of folly, weakness, prejudice, wrong feeling, right feeling, obstinacy and newspaper paragraphs".[2] Others still believe that public opinion only includes well-informed opinion and views of those who are interested in the given topic, excluding thoughts like "off top of one's head".[3] Instead of being concrete, the concept of public opinion is also invoked to point at a collective soul, national mind, or spirit of the age which imposes order upon random opinion.[4]

Secondly, there is more than one method to detect public opinion besides public opinion polls. Other measurements such as constitutional reviews and referenda

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[1] H.M. Kepplinger, 'Effects of the News Media on Public Opinion' in W. Donsbach, M.W. Traugott (eds.), *The Sage Handbook of Public Opinion Research*, Los Angeles–London 2008, p. 192; V. Price, 'The Public and Public Opinion in Political Theories' in W. Donsbach, M.W. Traugott (eds.), *The Sage…*, p. 12.

[2] W. Lippmann, *Public Opinion*, New Brunswick 2004, p. 197.

[3] H.M. Kepplinger, 'Effects…', p. 192.

[4] W. Lippmann, *Public Opinion*, p. 197.

can greatly reflect public opinion. Ireland put the death penalty to a referendum in 2001 and defeated it there. The national courts' findings, juries' opinions, the news media and the movement of international law and treaties from different aspects can all show the dynamic of public opinion.[5] Sometimes, election results reveal a better idea of how people think about an issue. For instance, the death penalty was ended in France during the term of François Mitterrand's presidency while public opinion polls were in favour of the penalty. Nevertheless, François Mitterrand identified expressively his abolition preference throughout his campaign and got re-elected despite his allegedly unpopular decision.[6] So, maybe the death penalty overall is not rated by the public as that important compared to other issues. In fact it is possible for the people to continue their support for a government even after it has taken an unpopular decision of abolishing the death penalty.

Confronting the complex subject of public opinion, this article argues that states have an obligation in international law to educate their population and even change public opinion with a view to protecting and promoting a number of core human rights. Starting from the equality issue, anti-discrimination based on race and gender, this principle can be found in international law and states' practice. It may be extended to the rights of people with disabilities, and the protection of the rights of the child on the issue of corporal punishment. It is not intended to strengthen states' power, disregard public will and change public opinion on every issue. This article raises the question whether states have an obligation to educate public opinion on the death penalty issue when they invoke public opinion to delay the abolition of the penalty.

Arguments of the article are drawn from an analysis of the major treaties and related Declarations, the material generated by those treaties such as periodic reports, concluding observations and general recommendations, and the newly established mechanism – the Universal Periodic Review (UPR). The UPR was created by the UN General Assembly in 2006 and started its first session in 2008.[7] In the unique mechanism, every UN member state, whether big or small, bound by certain conventions or not, would have to answer how they fulfil their human rights obligations and commitments, and respond to questions relating to human rights.

[5] A discussion on ways to measure public opinion on the death penalty can be found: W. Schabas, 'Public Opinion and the Death Penalty' in P. Hodgkinson, W. Schabas (eds.), *Capital Punishment. Strategies for Abolition*, Cambridge 2004, pp. 313-325.

[6] M. Forst, 'The Abolition of the Death Penalty in France in Council of Europe, *The Death Penalty. Abolition in Europe*, Strasbourg 1999, p. 113; R. Hood, C. Hoyle, *The Death Penalty. A Worldwide Perspective*, Oxford 2008, p. 353.

[7] UN Doc. A/RES/60/251.

1. The State Obligation to Educate Public Opinion on Racial Equality

1.1. The Development of the Principle

The United Nations has been dealing with racism since its first session. In its 1960s' resolutions on manifestations of racial, religious and national hatred, the United Nations encouraged all States to make sustained efforts to educate public opinion. The view was reiterated by the General Assembly,[8] the Economic and Social Council[9] and the Commission on Human Rights.[10] The Committee on Information from Non-Self-Governing Territories argued that when it came to racial discrimination and prejudice, "it was the duty of the Governments concerned to guide public opinion".[11] In these resolutions, states were called upon to take legislative and other appropriate measures,[12] including education and all media of information to actively combat prejudices and intolerance.[13] The function of education was particularly emphasized so as to "transform the attitudes of people",[14] "educate public opinion"[15] or "enlighten the public".[16] In the preparation of the text, India bravely proposed that public opinion is an important subject of education.[17] This position was adopted by UN Bodies including the General Assembly, the Economic and Social Council and the Commission on Human Rights, as mentioned in the beginning of the paragraph.

The general principle established in the historic resolutions is developed in more detail in the Convention on the Elimination of All Forms of Racial Discrimination (referred as the Convention hereinafter). First, states are bound to take an independent stance in given circumstances: They have to encourage certain views and movements, and discourage or condemn some others regardless of the popularity they enjoyed in society. This obligation can be found in articles 2 and 4 of the Convention.

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[8] UNGA Res 1779 (XVII), 7 December 1962, recommendation 1.

[9] ECOSOC Res 826 B (XXXII), 27 July 1961, UN Doc. E/3555, recommendation 1.

[10] UNCHR Res 6 (XVI), 16 March 1960, UN Doc. E/3335, para 200; UN Doc. E/3456, para 124, and Chapter XIII, draft resolution II, recommendation 1.

[11] UN Doc. E/CN.4/Sub.2/213/Rev.1 (1962), p. 71.

[12] UN Doc. E/3456, para 124, and Chapter XIII, draft resolution II, recommendation 2; ECOSOC Res 826 B (XXXII), 27 July 1961, UN Doc. E/3555, recommendation 2; UNGA Res 1779 (XVII), recommendation 2.

[13] UN Doc. E/3456, para 124, and Chapter XIII, draft resolution II, recommendation 3; ECOSOC Res 826 B (XXXII), 27 July 1961, UN Doc. E/3555, recommendation 3; UNGA Res 1779 (XVII), recommendation 3.

[14] UN Doc. E/CN.4/815, 9 February 1961, para 176; UN Doc. E/3335 (1960), para 183.

[15] UN Doc. E/3456, para 139, and Chapter XIII, draft resolution III.

[16] UN Doc. E/3456, para 111.

[17] India's proposal can be found at UN Doc. E/3335, para 183; UN Doc. E/CN.4/L.593, recommendation 1.

1. Article 2
1. States Parties condemn racial discrimination […] and promoting understanding among all races, and to this end: […]
(e) Each State Party undertakes to encourage, where appropriate, integrationist multiracial organizations and movements and other means of eliminating barriers between races, and to discourage anything which tends to strengthen racial division.
2. Article 4

States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, […] with due regard to the principles embodied in the Universal Declaration of Human Rights and the Rights expressly set forth in article 5 of this Convention […].

Second, States are legally bound to take actions in the fields of teaching, education, culture and information, with a view to eliminating racial discrimination and promoting human rights values and principles, in conformity with article 7 of the Convention. They are also bound to utilize all appropriate means including law to fight racial discrimination, pursuant to articles 2 (1) (d) and 4 of the Convention. In the articles, states shall use law to denote what expression and propaganda will not be tolerated by them. This is a strong signal to guide public opinion. The relevant text is provided below:

3. Article 2 (1) (d)

Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization;

4. Article 4

States Parties…

a. Shall declare an offence punishable by all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination…;
b. Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination…;

The above mentioned three articles, 2 (1) (d), 4 and 7, are deemed as the cornerstone of the Convention. Article 2 (1) (d) is viewed as the most important and far-reaching of all substantive provisions of the Convention, which can play a decisive role in the fight against racial discrimination.[18] Articles 4 and 7 are also seen as pillars on which the Convention rests,[19] despite the fact that a number of states have made reservations.

[18] E. Schwelb, 'The International Convention on the Elimination of All Forms of Racial Discrimination', *International and Comparative Law Quarterly*, Vol. 15, No. 4 (1966), p. 1017, http://dx.doi.org/10.1093/iclqaj/15.4.996; N. Lérner, *The U.N. Convention on the Elimination of All Forms of Racial Discrimination*, Alphen aan den Rijn 1980, p. 38.

[19] UN Doc. CERD/2.

Besides the Convention, the education of public opinion on racial equality was also urged by the Durban Declaration and Programme of Action and accepted by many states in the process of Universal Periodic Review. The Durban Declaration and Programme of Action was adopted at the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance in 2001. The document highlights the key role of politicians and political parties in the process of combating racial discrimination and promoting core human rights values.[20] It declares that failure to combat racial discrimination and related intolerance by public authorities and politicians is a factor that encourages the perpetuation of all these prejudices. At the Conference, ombudspersons and national human rights institutions were selected as best practices for being efficient in sensitising public opinion and having important educational functions.[21] In the Universal Periodic Review process, many states have accepted suggestions to educate public opinion on racial discrimination and reported their progress, treating it as a customary norm.

1.2. The State Obligation in "Teaching, Education, Culture and Information"

States have obligations to take up educational measures, which in practice have a great impact on public opinion. They are required to act in the fields of "teaching, education, culture and information", to combat racial prejudices and promote human rights values and principles, according to article 7 of the Convention on the Elimination of All Forms of Racial Discrimination. Educational measures are also encouraged by article 6 of the UNESCO Declaration on Race and Racial Prejudice. Related texts are as follows:

1. Article 7 of the Convention on the Elimination of All Forms of Racial Discrimination

States Parties undertake to adopt immediate and effective measures, particularly in the fields of teaching, education, culture and information, with a view to combating prejudices which lead to racial discrimination and to promote understanding, tolerance and friendship among nations and racial or ethnical groups, as well as to propagating the purposes and principles of the Charter of the United Nations, the Universal Declaration of Human Rights, the United Nations Declaration on the Elimination of All Forms of Racial Discrimination, and this Convention.

2. Article 6 f the UNESCO Declaration on Race and Racial Prejudice

[…]

So far as its competence extends and in accordance with its constitutional principles and procedures, the State should take all appropriate steps, inter alias by legislation, particularly in the spheres of education, culture and communication,

[20] Paragraph 115 of the Programme of Action.

[21] UN Doc. A/CONF.189/PC.3/5, para 180; UN Doc. A/CONF.189/PC.1/8, para 82.

to prevent, prohibit and eradicate racism, racist propaganda, racial segregation and apartheid and to encourage the dissemination of knowledge and the findings of appropriate research in natural and social sciences on the causes and prevention of racial prejudice and racist attitudes, with due regard to the principles embodied in the Universal Declaration of Human Rights and in the International Covenant on Civil and Political Rights.

3. Since laws proscribing racial discrimination are not in themselves sufficient, it is also incumbent on States to supplement them […] by broadly based education and research programmes designed to combat racial prejudice and racial discrimination and by programmes of positive political, social, educational and cultural measures calculated to promote genuine mutual respect among groups. […]

Many states and the Committee on the Elimination of Racial Discrimination (CERD) in implementation have stressed the importance of educating public opinion. The Committee used the education of public opinion as a benchmark to evaluate states' performance under article 7. It expressed satisfaction for states' effort to inform or enlighten public opinion,[22] recommended a fuller programme to states in order to further educate public opinion,[23] and impelled them to modify the attitude of their population in order to avoid negative attitudes, stereotypes and prejudices against certain ethnic groups.[24] In response, some have reported their progress in educating their population. The states include Finland,[25] Portugal,[26] Czech Republic,[27] Italy[28] and Sweden.[29] They have carried out awareness-raising and communication campaigns, and have worked with the education system and the mass media, in pursuit of a positive change in public opinion, towards tolerance and racial equality.

The four areas in which states are obliged to act are given detailed guidance by international law. First, teaching should not be confined in schools. It should target a variety of audience, such as law enforcement officials, magistrates, prosecutors, public figures, institutions, out-of-school people,[30] young people outside the classroom,[31] and "teachers and other opinion leaders on eliminating prejudice and fostering tolerance".[32] CERD's general recommendation No. 13 especially ad-

[22] UN Doc. A/34/18, para 371; UN Doc. A/32/18, para 98.

[23] UN Doc. A/36/18, para 480.

[24] UN Doc. A/HRC/WG.6/13/FIN/2, para 15; UN Doc. A/HRC/WG.6/10/MOZ/2, para 26; UN Doc. CERD/C/MOZ/CO/12, para 22; UN Doc. A/35/18, para 229; UN Doc. A/36/18, para 207; UN Doc. A/HRC/WG.6/2/CHE/2, para 12; UN Doc. CERD/C/60/CO/14, para 9.

[25] UN Doc. CERD/C/FIN/20-22, para 95.

[26] UN Doc. A/HRC/WG.6/6/PRT/1, para 82.

[27] UN Doc. CCPR/C/CZE/CO/2/Add.1, para 33.

[28] UN Doc. CERD/C/ITA/15, para 315.

[29] UN Doc. A/CONF.189/PC.1/8, para 65.

[30] UN Doc. E/CN.4/Sub.2/1998/4, para 46.

[31] UN Doc. A/48/18, para 435.

[32] UN Doc. E/CN.4/Sub.2/1998/4, para 32.

dresses the education of law enforcement officials or persons that hold power over individuals.[33] This view was shared by the World Conference against Racism, Racial Discrimination, Xenophobia and Related intolerance in 2001.[34] As to human rights education, states are recommended to establish a national focal point for human rights education and put into effect an action-oriented national plan for education with a particular emphasis on the provisions of article 7.[35]

Concerning states' obligation in the areas of culture and information, they are strongly encouraged to develop and implement specific programmes and long-term strategies.[36] Culture was added in article 7 in a later stage of the drafting of the Convention, compared to the other three fields. The insertion of it demonstrated understanding that people's attitudes can be impacted by such activities as theatre performances, shows, concerts, cultural events, sports competitions, films and the like.[37] More importantly, it illustrated that culture is an evolving phenomenon and states can stimulate its development. This point was backed by the Committee in its guidelines.[38] Last but not least, state obligation in the field of information is often interpreted as an obligation of states to encourage public and private information services, in particular the mass media to take account of article 7.[39] At this point, some states did not agree. Italy and Norway, for instance, deemed that they cannot impose any restriction on the media or press.[40]

1.3. Acceptance in the Universal Periodic Review

The significance of the Universal Periodic Review has been highly regarded by governments, researchers and practitioners. By 2012, the UPR mechanism has finished reviewing human rights records of all UN member states for its first cycle. It has started the second round. In the UPR process, many states accepted their responsibility to educate, regarding it as a customary norm. Some contended that a change of social attitude is necessary.[41] Some supported recommendations on

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[33] UN Doc. E/CN.4/Sub.2/1998/4, para 171.

[34] UN Doc. A/CONF.189/PC.3/5, para 183.

[35] UN Doc. E/CN.4/Sub.2/1998/4, para 171.

[36] UN Doc. E/CN.4/Sub.2/1998/4, para 176.

[37] S. Farrior, 'The Neglected Pillar. The «Teaching Tolerance» Provision of the International Convention on the Elimination of All Forms of Racial Discrimination', *ILSA Journal of International & Comparative Law*, Vol. 5 (1998-1999), p. 297.

[38] UN Doc. CERD/C/70/Rev.3, pp. 6-7.

[39] UN Doc. CERD/C/ISL/CO/19-20, para 177; UN Doc. A/36/18, paras 80 and 162; S. Farrior, 'The Neglected Pillar…', p. 298.

[40] UN Doc. A/C.3/33/SR.21, p. 11; UN Doc. A/33/18, para 186.

[41] These states include Finland, Germany, Italy, the Netherlands, etc. UN Doc. A/HRC/8/24, para 25; UN Doc. A/HRC/WG.6/4/DEU/1, para 30; UN Doc. A/HRC/14/4, para 15; UN Doc. A/HRC/WG.6/13/NLD/1, para 74.

human rights education and trainings,[42] agreed to act in the fields of culture and beliefs,[43] and promised to target racial prejudice, stereotypes, xenophobia and hostile attitudes among the general public.[44] Quite a few shared their experience in mobilizing public opinion.[45] For instance, the Czech Republic appointed a crime prevention assistant in each municipal police force, tasking them to help change society's negative attitude toward socially excluded people.[46] Finland has set up seven regional Advisory Boards for Ethnic Relations by 2012, with one function, *inter alia*, to assist in building a favourable attitude.[47]

2. The State Obligation on Women's Equality

International law clearly urges states to tackle a few aspects of public opinion when it comes to women's rights. The first is the patriarchal attitudes and stereotypes of women. The Committee of the Elimination of Discrimination against Women has concluded that these attitudes and stereotypes are a root cause for women's disadvantaged position in many areas including political life, labour market, education, etc., and are impediments to the implementation of the Convention on the Elimination of All forms of Discrimination against Women (hereinafter referred as the Convention).[48] A second area, in which states are encouraged to

[42] UN Doc. A/HRC/18/3, para 100, recommendation 27; UN Doc. A/HRC/13/11/Add.1, p. 3; UN Doc. A/HRC/14/16, para 90, recommendation 30; UN Doc. A/HRC/14/16/Add.1, para 11; UN Doc. A/HRC/13/14, para 89, recommendation 9; UN Doc. A/HRC/16/9, para 80, recommendation 84; UN Doc. A/HRC/16/9/Add.1, p. 2; UN Doc. A/HRC/14/4, para 84, recommendation 30; UN Doc. A/HRC/14/4/Add.1, p. 2; UN Doc. A/HRC/19/15, para 88, recommendation 22.

[43] UN A/HRC/WG.6/7/ITA/1, para 79; UN Doc. A/HRC/WG.6/2/CHE/1, para 39.

[44] UN Doc. A/HRC/18/3, para 100, recommendation 7, 31 and 33; UN Doc. A/HRC/13/11, para 101, recommendation 17; UN Doc. A/HRC/16/13, para 97, recommendation 27; UN Doc. A/HRC/18/4, para 106, recommendation 71; UN Doc. A/HRC/18/4/Add.1, p. 7; UN Doc. A/HRC/19/15, para 88, recommendation 21; UN Doc. A/HRC/15/11, para 95, recommendation 29; UN Doc. A/HRC/15/13, para 101, recommendation 1.

[45] UN Doc. A/HRC/WG.6/14/CZE/1, paras 10 and 17; UN Doc. A/HRC/18/4/Add.1, p. 6; UN Doc. CERD/C/FIN/20-22, para 98; UN Doc. A/HRC/WG.6/13/FIN/2, para 19; UN Doc. CERD/C/FIN/CO/19, para 15; UN Doc. A/HRC/WG.6/4/DEU/1, paras 30 and 36; UN Doc. A/HRC/8/31, para 11; UN Doc. A/HRC/8/49/Add.1, para 45; UN Doc. A/HRC/12/17/Add.1, para 19; UN Doc. A/HRC/WG.6/7/SVN/1, para 66; UN Doc. A/HRC/WG.6/14/CHE/1, para 65.

[46] UN Doc. A/HRC/WG.6/14/CZE/1, para 17.

[47] UN Doc. A/HRC/WG.6/13/FIN/1, para 69.

[48] UN Doc. CEDAW/C/ARM/CO/4/Rev.1, para 20; UN Doc. A/HRC/WG.6/3/BRB/2, para 13; UN Doc. A/59/38, paras 167, 201, 245, 309, 339, Annexe IV, paras 146, 292, 332; UN Doc. A/55/38, Part Two, para 53; UN Doc. A/HRC/WG.6/4/CHN/2, para 12; UN Doc. CEDAW/C/CHN/CO/6, paras 5, 17; UN Doc. A/HRC/WG.6/6/CYP/2, para 15; UN Doc. CEDAW/C/CYP/CO/5, para 17; UN Doc. A/HRC/WG.6/1/MAR/2, para 11; UN Doc. CEDAW/C/MAR/CO/4, para 18.

work on, is the permissive attitudes towards certain violations of women's rights. The violations include female genital mutilation, marital rape, honour killings, physical chastisement of female family members, sexual and psychological abuse of women, moletry (a practice involving bride price, forced and early marriage), Wahaya (young women and girls sold into sexual and domestic slavery) and the stigmatization of widows and women victims of rape and other sexual abuse.[49] Also, international law strongly recommends states to promote the principle of gender equality and a positive image of women, no matter if it is popular or not.

It is worth noting what the representative of Sweden said during the preparation of the Declaration on the Elimination of Discrimination against Women: "The fight to end discrimination against women was […] primarily a psychological one".[50] But do we have a legal basis to hold states accountable?

2.1. Legal Basis

There are two important instruments dealing with gender equality, the Declaration on the Elimination of Discrimination against Women (hereinafter referred as the Declaration) and the Convention on the Elimination of All forms of Discrimination against Women. The two instruments have similar provisions and enshrine, in many cases, the same principles, as one purpose of the Convention is to give normative force to the provisions of the Declaration. The principle of educating public opinion is embodied in article 3 of the Declaration and article 5 of the Convention.

Article 3 of the Declaration states clearly:

> All appropriate measures shall be taken to educate public opinion and to direct national aspirations towards the eradication of prejudice and the abolition of customary and all other practices which are based on the idea of the inferiority of women.[51]

In developing the principle, Article 5 of the Convention obliges states to tackle prejudices and practices based on the idea of the inferiority and stereotyped roles of women, and to modify the social and cultural patterns of conduct of men and women:

States Parties shall take all appropriate measures:

1. To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women…

[49] UN Doc. A/Res/67/146

[50] UN Doc. A/C.3/SR.1442, para 46.

[51] UNGA Res 2263 (XXII), UN Doc. A/6880, p. 35.

The discussion of the state obligation to educate public opinion on gender equality can be traced back in the late 1940s when the Sub-Commission on the Status of Women proposed a policy to stimulate world public opinion in favour of raising the status of women, and in this regard expected full collaboration and support from states.[52] The proposed policy was:

> That world public opinion be stimulated in favour of raising the status of women as an instrument to further human rights and peace. […] [T]he Sub-Commission on the Status of Women expects the full collaboration and support of the governments of all the United Nations in their endeavours to raise the status of women throughout the world.[53]

The policy was adopted by the Sub-Commission and the Commission on Human Rights.[54]

Besides the principle of educating public opinion, international law also draws out specific approaches for states to engage with public opinion. The United Nations began to discuss and issue resolutions on means of influencing public opinion in the 1940s.[55] The Declaration on the Elimination of Discrimination against Women prescribes "all appropriate measures" for states to educate public opinion in article 3. During the drafting of the Convention, there was an attempt to single out the role of the media but with no success.[56] However, the Convention announces states' obligations to ensure that "public institutions", which incorporate public broadcasting corporations, do not engage in any act or practice of discrimination against women, under article 2 (d). The Convention also mentions states' role in education. They have to make sure that family education includes a proper understanding of the roles of women and men in maternity and child-gearing, pursuant to article 5 (b).

2.2. Debates on the Principle

These provisions always generate heated debates, whether in the phase of drafting or implementation. Controversy started from the preparation of article 3 of the Declaration that "[a]ll appropriate measures shall be taken to educate public opinion". Some states supported the principle. For example, Sweden opined that "[i]t was public opinion which was most to blame for the persistence of prejudice

[52] The Sub-Commission on the Status of Women only existed for four months. It was quickly replaced by the Commission on the Status of Women, in June 1946. UN Doc. E/90, para 6; UN Doc. E/84, para 6.

[53] UN Doc. E/HR/18 and Rev.1, p. 5; E/38/Rev.1, pp. 18-19.

[54] UN Doc. E/HR/25, Draft, recommendation 2, 3, p. 6.

[55] UN Doc. A/972, para 246; UN Doc. E/615, Chapter XI, paras 37-38; UN Doc. E/615, para 37; UN Doc. A/625, para 149; UN Doc. A/972, para 246.

[56] UN Doc. E/CN.6/606, p. 4.

and discrimination" and therefore "[t]he battle had to be fought at the level of public opinion, the habits and ways of thinking which decisively influenced ways of life".[57] The representative of the Netherlands also said "all legislative measures would remain ineffective unless backed by enlightened public opinion".[58] Some entertained serious doubts. India, for instance, argued that legislation should not be too much farther ahead than public opinion. It stated that "[a]ny social change should be brought about by a change in public opinion before being established by law",[59] and that "although the ultimate aim was clear, public opinion and the sentiment of various sectors of the population had to be respected and the climate prepared for changes".[60]

Following the pattern of the Declaration, nearly ten states and institutions submitted draft conventions specifying states' obligation in educating public opinion, including the Soviet Union.[61] This suggestion was flatly objected to by states led by Mexico and the US.[62] In the negotiations, states are divided into two blocs, the Socialist bloc and the West. As a result, the term "to educate public opinion" was not adopted. Nonetheless, the idea is mostly reflected in article 5 of the Convention, which confirms the target of prejudices and sex role stereotyping, and reassured the modification of the social and cultural patterns of conduct of men and women to this end.

Objections to article 5 were also raised even after the Convention went into implementation.

Czech Republic, made a realistic point that although the education of the public is necessary, states have difficulty to carry it out, due to the negative experience before 1989 when the Communist regime promoted "correct" ideas. In its combined fourth and fifth periodic report, Czech Republic contended the following:

> [An] important factor which limits official authority's influence on public opinion is that some quarters of society are very critical about any Government effort to "educate" the public – it is therefore difficult to find appropriate educational resources for the general public. This fact can be explained by the profoundly negative experience that the older generations, who remember the Communist regime before 1989, have of the promotion of "correct" ideas from that era.[63]

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[57] UN Doc. A/C.3/SR.1442, para 46.

[58] UN Doc. A/C.3/SR.1442, para 12.

[59] UN Doc. A/C.3/SR.1443, para 31.

[60] UN Doc. E/AC.7/SR.540, p. 10.

[61] These states and institutions include the All-African Women's Conference, Benin, Canada, Indonesia, Pakistan, the Philippines, the Soviet Union, the Working Group of the Commission, United Kingdom, etc. UN Doc. E/CN.6/AC.1/L.6, p. 3; UN Doc. E/CN.6/606, p. 2; UN Doc. E/CN.6/573, para 96; Annex 1, p. 2; UN Doc. E/CN.6/AC.1/L.2, p. 4; UN Doc. E/CN.6/AC.1/L.4, p. 2; UN Doc. E/CN.6/AC.1/L.4/Corr.1; UN Doc. E/CN.6/591, pp. 84, 92, 101, 112; UN Doc. E/CN.6/589, Annex III.

[62] Opposing states include Belgium, Colombia, France, India, Mexico, Sweden, the United Kingdom and the United States. UN Doc. E/CN.6/SR.636, paras 2, 5, 7, 10, 13, 18-20.

[63] UN Doc. CEDAW/C/CZE/Q/5/Add.1, paras 69-70.

Two observations can be drawn from the remarks. First, despite the negative experience back in the totalitarian era, states like Czech Republic did not deny the necessity and legitimacy of educating the public on women's equality. The crux of the matter is how to implement the education.

2.3. Interpretation of the Obligation

On varied issues with relation to women's rights such as the abolition of female genital mutilation and girls' education, states like Sweden[64] and Ethiopia[65] affirmed the legitimacy to educate public opinion and have taken actions. Australia even began to change public attitudes towards violence against women in the late 1980s.[66] It carried out nationwide actions, targeting places including aboriginal, islander and rural communities. Some, for instance Kyrgyzstan, work closely with the media in order to eliminate gender role stereotyping.[67] In the same regard, educational measures were also carried out. States even participated in international conferences to exchange their best practices in achieving a positive change in public opinion. One example is the European Conference on New Ways to overcome Gender Stereotypes, held in Prague in 2009.

Prior to the most recent General Assembly resolution, the Committee on the Elimination of Discrimination against Women, made the same appeal in general recommendation No. 14 that "politicians, professionals, religious and community leaders at all levels, including the media and the arts, […] co-operate in influencing attitudes towards the eradication of female circumcision". It further recommended states to make the following conceptions socially and morally unacceptable: female genital mutilation,[68] violence against women including marital rape, physical chastisement of women family members, all forms of sexual abuse of women,[69] honour killings,[70] the stigmatization of widows or other negative widowhood practices,[71] traditional attitudes that constitute obstacles to girls' education,[72] women being responsible for child-rearing and housework whereas man being

[64] UN Doc. CRC/C/125/Add.1, para 417.

[65] UN Doc. CRC/C/SR.1164, para 59.

[66] UN Doc. A/C.3/44/SR.22, para 40.

[67] UN Doc. A/59/38, para 167.

[68] UN Doc. A/59/38, para 252.

[69] UN Doc. A/59/38, paras 79, 199; UN Doc. A/55/38, Part Two, para 54; UN Doc. A/HRC/WG.6/4/CMR/2, para 19; UN Doc. E/C.12/1/Add. 40, paras 16, 33; UN Doc. A/HRC/WG.6/4/CUB/2, para 17; UN Doc. CEDAW/C/CUB/CO/6, para 18; UN Doc. A/HRC/WG.6/12/THA/2, para 13; UN Doc. CEDAW/C/THA/CO/5, para 24.

[70] UN Doc. A/55/38, para 179.

[71] UN Doc. A/59/38, paras 207, 252.

[72] UN Doc. A/59/38, paras 194, 304; UN Doc. A/HRC/WG.6/2/BEN/2, para 26; UN Doc. A/HRC/WG.6/10/MMR/2, para 54; UN Doc. CEDAW/C/MMR/CO/3, para 35.

natural leaders in the work place,[73] levirate, inheritance, early and forced marriage, as well as polygamy.[74] Similar views were held by the Committee on the Rights of the Child[75] and the Human Rights Committee.[76]

To promote women's status in political and public life, the Committee on the Elimination of Discrimination against Women in general recommendation No. 23 recommends states to change attitudes that discriminate against or are disadvantageous for women. It also made suggestions to individual states, urging them to take action on the discriminatory attitudes. Specific approaches include closely working with the media,[77] to promote a cultural change in society with regard to the roles of women and men.[78]

To draw a short conclusion on public opinion and women's equality, the principle of educating public opinion is enshrined in article 3 of the Declaration. In completing the principle into the Convention, it becomes a legal obligation to target prejudices and sex role stereotyping as in article 5 (a) of the Convention. The legal obligation has achieved universal acceptance, with only a handful of states

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[73] UN Doc. A/59/38, paras 309, 339.

[74] Recommendations were made to Bangladesh, Cameroon, Gabon, Gambia, Kyrgyzstan, Nepal, South Africa, Turkey, etc. UN Doc. A/59/38, paras 168, 207, 252, Annexe IV, para 147; UN Doc. A/55/38, Part Two, para 54; UN Doc. A/HRC/WG.6/2/GAB/2, para 13; UN Doc. CEDAW/C/GAB/CC/2-5, para 31; UN Doc. A/HRC/WG.6/7/GMB/2, para 15; UN Doc. A/HRC/WG.6/13/ZAF/2, para 17; UN Doc. CEDAW/C/ZAF/CO/4, para 21(a); UN Doc. A/60/38, Part One, para 368.

[75] UN Doc. CRC/C/125/Add.1, para 417; UN Doc. CRC/C/15/Add.205, para 28; UN Doc. A/HRC/WG.6/2/GHA/2, para 18; UN Doc. A/HRC/WG.6/10/NER/2, para 13; UN Doc. CRC/C/NER/CO/2, para 60; UN Doc. A/HRC/WG.6/4/SEN/2, para 18; UN Doc. CRC/C/SEN/CO/2, para 51.

[76] UN Doc. A/HRC/WG.6/5/CAF/2, para 28; UN Doc. CCPR/C/CAF/CO/2, para 11; UN Doc. CCPR/C/MDG/CO/3, para 8; UN Doc. A/HRC/WG.6/12/TZA/2, para 19; UN Doc. CCPR/C/TZA/CO/4, para 9; UN Doc. CCPR/C/MKD/CO/2, para 9.

[77] The Committee made the suggestion to: Armenia, Barbados, Belarus, Bhutan, Denmark, Dominican Republic, Equatorial Guinea, Iceland, Japan, Kyrgyzstan, Latvia, Lithuania, Luxembourg, Madagascar, Maldives, Morocco, Nepal, Portugal, Saint Lucia, Spain, Sri Lanka, Suriname, Tanzania, Turkey, Uruguay, Vanuatu, etc. UN Doc. CEDAW/C/ARM/CO/4/Rev.1, para 21; UN Doc. A/HRC/WG.6/3/BRB/2, para 13; UN Doc. A/57/38 (Part I), paras 289, 330; UN Doc. A/57/38 (Part II), paras 48, 334; UN Doc. A/59/38, paras 116, 168, 207, 293 and 340, Annexe IV, paras 54, 147, 293 and 333; UN Doc. A/HRC/WG.6/14/JPN/2, para 18; UN Doc. CEDAW/C/JPN/CO/6, para 30; UN Doc. A/HRC/WG.6/12/ISL/2, para 21; UN Doc. A/63/38, para 21; UN Doc. CEDAW/C/LUX/CO/5, para 16; UN Doc. A/HRC/WG.6/9/MDV/2/Rev.1, para 16; UN Doc. CEDAW/C/MDV/CO/3, para 18; UN Doc. CEDAW/C/TZA/CO.6, para 22; UN Doc. A/HRC/WG.6/11/SUR/2, para 13; UN Doc. CEDAW/C/SUR/CO/3, para 18; UN Doc. A/60/38, Part One, para 368; UN Doc. CEDAW/C/MAR/CO/4, para 19; UN Doc. CEDAW/C/URY/CO/7, para 21; UN Doc. CEDAW/C/LTU/CO/4, para 15; UN Doc. A/HRC/WG.6/5/VUT/2, para 15; UN Doc. CEDAW/C/VUT/CO/3, para 23; UN Doc. A/HRC/WG.6/7/MDG/2, para 20; UN Doc. CEDAW/C/MDG/CO/5, para 17; UN Doc. CEDAW/C/LCA/CO/6, para 18.

[78] UN Doc. CEDAW/C/VNM/CO/6, para 13.

that have made reservations and declarations. There is also considerable evidence of state compliance with it.

To draw a short conclusion on public opinion and women's equality, the principle of educating public opinion is enshrined in article 3 of the Declaration. In developing the principle, a legal obligation has been set up in article 5 (a) of the Convention that states should target prejudices and sex role stereotyping. The legal obligation has achieved universal acceptance, with only a handful of states that have made reservations and declarations. The obligation is also supported by considerable evidence of state compliance.

3. Public Opinion on Other Human Rights Issues Such as the Death Penalty

3.1. Public Opinion on Subjects Other than Race and Gender Equality

As with discrimination based on race and gender, which often thrive on ignorant attitudes and views of the public, the same can be said of capital punishment. In the Furman v. Georgia case, Justice Thurgood Marshall articulated that 'the great mass of citizens would conclude… that the death penalty is immoral and therefore unconstitutional', if they are fully enlightened about the death penalty issue.[79] This is the famous Marshall hypothesis that public support for the death penalty is subject to persuasion. There comes the next question. Can states take part in the persuasion? Are they under to some extent an obligation to fully inform the public, through measures such as awareness raising, information disseminating and other programmes? Of course on the death penalty issue, there is not explicit obligation in international law to change public attitudes, similar to the race and gender equality issue as demonstrated before. But the question is whether this obligation flows inevitably from the commitment of the UN to abolish capital punishment, and the claim that human rights law requires this.

It should be noted that international law urges states to change public attitudes on a number of subjects other than racial and gender equality. The first one is the rights of persons with disabilities. According to article 8 of the Convention on the Rights of Persons with Disabilities, states have an obligation to foster respect for the rights and dignity of persons with disabilities, to combat stereotypes, prejudices and harmful practices relating to persons with disabilities and to promote awareness of the capabilities and contributions of persons with disabilities. Measures to this end include encouraging the media to portray persons with disabilities in a manner that is consistent with the purpose of the Convention and fostering an attitude of respect for the rights of persons with disabilities at all levels of the education system, etc.

[79] Furman v. Georgia, 408 U.S. 238 (1972).

A second example is corporal punishments of children. Unlike the ICERD, CEDAW, and the Disability Convention, the Convention on the Rights of the Child (CRC) does not expressly mention the state to change attitudes. Yet the Committee on the Rights of the Child developed it. The Committee consistently requested states to change people's attitudes towards the punishment, through general comment No. 8 and concluding observations made to individual states.[80] In the Universal Periodic Review, states accepted recommendations in this regard.[81] Hence the state obligation on the corporal punishments of Children has been recognized in the absence of an explicit treaty provision.

Taking the argument further, historic UN studies and resolutions even talked about states' such obligation on the issue of discrimination in education, religious rights and practices, political rights, etc. Some regional treaties also provide support. For instance, article 25 of the African Charter on Human and People's Rights provides states with an obligation to promote human rights through teaching, education and publication. Also, quite a few national human rights institutions are mandated to inform or guide public opinion on questions with relation to human rights, as in the case of Australia,[82] Argentina,[83] Fiji,[84] Ghana,[85] Germany,[86] Italy,[87] Mauritania,[88] and Qatar.[89] Some others for instance the British institution, have the

[80] UN Doc. A/HRC/WG.6/5/BLZ/2, para 15; UN Doc. CRC/C/15/Add.252, para 41; UN Doc. A/HRC/WG.6/6/BTN/2, para 25; UN Doc. CRC/C/BTN/CO/2, para 38; UN Doc. A/HRC/WG.6/6/CYP/2, para 24; UN Doc. CRC/C/15/Add.205, paras 45-46; UN Doc. A/HRC/WG.6/1/CZE/2, para 24; UN Doc. CRC/C/15/Add.201, paras 39, 41; UN Doc. A/HRC/WG.6/10/OMN/2, para 33; UN Doc. CRC/C/OMN/CO/2, paras 33–34; UN Doc. A/HRC/WG.6/11/PLW/2, para 35; UN Doc. CRC/C/15/Add.149, paras 44-45; UN Doc. A/HRC/WG.6/10/PRY/2, para 34; UN Doc. CRC/C/PRY/CO/3, para 38; UN Doc. A/HRC/WG.6/11/SGP/2, para 22; UN Doc. CRC/C/SGP/CO/2-3, paras 39-40.

[81] UN Doc. A/HRC/10/73/Add.1, para 23; UN Doc. A/HRC/19/9, para 107, recommendation 41; UN Doc. A/HRC/19/9/Add.1, para 53.

[82] UN Doc. A/HRC/WG.6/10/Aus/1, para 24.

[83] Argentina National Institute to Combat Discrimination, Xenophobia and Racism (INADI) is endowed with the mandate to inform public opinion about discriminatory, xenophobic or racist attitudes or conduct on the part of public bodies or private persons. UN Doc. CERD/C/476/Add.2, para 92.

[84] UN Doc. A/HRC/WG.6/7/FJI/1, para 24.

[85] The Commission on Human Rights of Ghana has the duty to educate the public on human rights and freedoms. UN Doc. A/HRC/WG.6/2/GHA/1, para 19.

[86] Germany considered the German Institute for Human Rights contributes substantially to the process of shaping public opinion on all issues relevant to the question of human rights. UN Doc. A/HRC/WG.6/4/EDU/1, para 15.

[87] UN Doc. CERD/C/ITA/15, para 315.

[88] The National Commission for Human Rights of Mauritania is responsible for raising awareness of human rights and of the combat against all forms of discrimination and violations of human dignity, in particular racial discrimination, slavery like practices and discrimination against women, by sensitizing the public through information, communication and education and by using the media in all its forms. UN Doc. A/HRC/WG.6/9/MRT/1, para 37.

capacity to recommend their governments to do so.[90] Although many of these institutions do not have a long history, the discussion of tasking them with the work of guiding public opinion entered into UN resolutions in the 1960s.[91]

3.2. Public Opinion and the Death Penalty

On the death penalty issue, a number of sates and jurisdictions invoke public opinion to maintain the penalty, in law or practice. Some have the penalty in law and practice, including Barbados,[92] Belarus,[93] Botswana,[94] China,[95] Japan,[96] Malaysia,[97] North Korea,[98] Saint Kitts and Nevis,[99] Singapore,[100] Taiwan[101] and the US.[102] Some have scraped the penalty from ordinary crimes (abolitionist in ordinary crimes) or have stopped imposing the death sentence (de facto abolitionist). However, they still retain the death penalty in law, arguing that this is the will of their public. The states include Cameroon,[103] Guyana,[104] Jamaica,[105] Kazakhstan,[106] Kenya,[107] Madagascar,[108] Mali,[109] Russia,[110] Saint Lucia,[111] South

[89] Qatar reported its plan to establish the National Human Rights Committee with a function to educate public opinion in 2001. The Committee was set up in 2002. UN Doc. CERD/C/360/Add.1, para 73; UN Doc. A/HRC/WG.6/7/QAT/1, p. 12.

[90] The Equality and Human Rights Commission, the Great Britain's National Human Rights Institution motivated by European Convention on Human Rights, recommend their governments to educate public opinion on the subject of prison system. UN Doc. A/HRC/13/NI/4, Annex, UK Government UPR Mid-Term Report: Report from the Equality and Human Rights Commission, Recommendation 1, para 6.

[91] ECOSOC Res 772 (XXX), 25 July 1960, UN Doc. E/Res/772 (XXX), p. 14.

[92] UN Doc. A/HRC/10/73/Add.1, para 12.

[93] UN Doc. A/HRC/15/16, para 53; UN Doc. A/HRC/15/16/Add.1, paras 2, 46, 47.

[94] UN Doc. A/HRC/10/69, para 9.

[95] 'Wen Addressees Press Conference on Key Issues', *China Daily*, 15 March 2005, at <http://www.chinadaily.com.cn/english/doc/2005-03/15/content_424842.htm>, 12 December 2012.

[96] UN Doc. A/HRC/8/44, para 9.

[97] UN Doc. A/HRC/11/30, para 55.

[98] UN Doc. A/HRC/13/13, para 88.

[99] UN Doc. A/HRC/17/12, paras 9, 36.

[100] UN Doc. A/HRC/18/11, para 87.

[101] *Taipei Times*, 2 January 2006.

[102] UN Doc. E/2005/3/Add.1, para 17.

[103] UN Doc. A/HRC/11/21, para 38.

[104] UN Doc. A/HRC/15/14, para 18; UN Doc. A/HRC/15/14/Add.1, paras 31-32.

[105] UN Doc. A/HRC/16/14, para 37.

[106] UN Doc. A/HRC/WG.6/7/KAZ/1, para 36.

[107] UN Doc. A/HRC/15/8, paras 49, 104.

[108] UN Doc. A/HRC/14/13/Add.1, para 18.

[109] UN Doc. A/HRC/WG.6/2/MLI/1, para 118.

[110] UN Doc. A/HRC/11/19/Add.1/Rev.1, p. 2.

[111] UN Doc. A/HRC/17/6, para 38.

Korea,[112] Tanzania,[113] and Zambia.[114] If public opinion is the true reason to keep the death penalty, do states have an obligation to mobilize it?

Apparently international law suggests that the abolition of the death penalty is the direction. Article 6 (6) of the International Covenant on the Civil and Political Rights (ICCPR) states "[n]othing in the article shall be invoked to delay or to prevent the abolition of capital punishment". This direction is recognized by most states that invoke public opinion argument, either by ratification of the Covenant or by signature (like China). Towards the direction, not a single state in the Universal Periodic Review or other occasions negates the possibility of abolishing it in the future. Towards the direction, international law provides further encouragement. Three important human rights treaties have protocols aimed at the abolition of the death penalty, namely the International Covenant on Civil and Political Rights, the American Convention on Human Rights and the European Convention on Human Rights. The UN General Assembly by 2012 has successfully adopted four resolutions, calling upon states that maintain the death penalty to establish a moratorium. The resolutions are 62/149 of 2007, 63/168 of 2008, 65/206 of 2010 and 67/176 of 2012.

To respond to the direction, is there anything states can do in order to create a favourable public opinion of abolition? From one perspective, states certainly have a duty to progress the right to life. Upon CCPR general comment No. 6 and the preamble of the Second Optional Protocol to the International Covenant on Civil and Political Rights, all the measures aiming at abolishing capital punishment should be considered as progress in the enjoyment of the right to life. Thus to design measures with a view to stimulate public opinion in favour of abolition can be constructed as a way to progress the right to life. Under more specific guidelines for the right to life, states are requested to raise awareness, target negative attitudes and prejudice, and to inform public opinion through educational programs, information and the mass media.[115] From another perspective, to prohibit inhuman or degrading treatment, states are similarly encouraged to disseminate relevant information among the population at large, pursuant to article 10 of the Convention against Torture and Cruel, Inhuman or Degrading treatment, CCPR general comment No. 20 and the guidelines on article 40 of the Covenant.[116] Adequate information can greatly influence people's choice of whether they want the death penalty or not.[117] Through the dissemination of relevant information and the

[112] UN Doc. A/HRC/8/40, para 7.

[113] UN Doc. A/HRC/19/4, para 23.

[114] UN Doc. A/HRC/8/43/Add.1, p. 2; UN Doc. A/HRC/843, para 5.

[115] UN Doc. HRI/GEN/2/Rev. 6, Chapter I, para 43.

[116] UN Doc. CCPR/C/2009/1, para 50.

[117] A discussion on information and the change of public opinion can be found in: J.K. Cochran, M.B. Chamlin, 'Can information change public opinion? Another test of the Marshall hypotheses', *Journal of Criminal Justice*, Vol. 33, No. 6 (2005), pp. 573-584, http://dx.doi.org/10.1016/j.jcrimjus.2005.08.006.

creation of a proper space for public discussion, states surely can engage in public discussion and contribute to the mobilization of public opinion towards abolition.

4. Conclusions

When public opinion hinders the protection and promotion of racial and gender equality, states have a duty to educate public opinion. Sometimes, states use public opinion as a reason to explain why the abolition of the death penalty is not moving forward. If this is truly a reason, a number of provisions suggest that states have an obligation to actively engage with public discussion, thereby exerting an impact on public opinion. From this perspective, public opinion may not be a legitimate reason to hold back the legal reform and states may not have an excuse to act like there is nothing they can do about it, other than bowing down in obedience to public opinion.

Abstract

States sometimes act in the name of respecting public opinion, but in fact delay the progress of human rights. A good example is death penalty, where a number of states invoke public opinion as a justification or excuse to maintain such a measure. However, under international law, states have an obligation to educate their population when it comes to core human rights, such as racial and gender equality. The obligation is stated in a number of international instruments. In the Universal Periodic Review process, states accepted suggestion on the education of public opinion and have taken actions. With regard to death penalty, international law suggests that the abolition of capital punishment is the direction. To embrace the direction and move public opinion towards it, states can, according to a number of provisions, actively engage with public discussion and exerting an impact. From this perspective, an expression of public opinion may not be a legitimate reason to hold back the legal reform, and states may not have an excuse to act like there is nothing they can do about it, other than bowing down in obedience to public opinion.

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Teaching Human Rights

Bringing Alternative Conceptions into Play

This paper is rooted in the constructivist premise that learners come to every learning setting with a broad range of pre-existing ideas and conceptions about the world around them. These are a result of each individual's effort to actively make sense of the world. Research has shown that a learner's prior knowledge can differ substantially from the ideas being taught, and often confounds an educator's best efforts to deliver ideas intelligibly.[1] The interaction between two epistemologically and conceptually divergent "world views" – those of the teacher and those of the student – may result in communication barriers and thus in a diverse set of unintended learner outcomes.

The social science education discourse does acknowledge the importance of prior knowledge; there is widespread agreement among civic educators that one must be "aware of students' previous knowledge and ways of thinking and feeling"[2] in order to teach effective. However, little has been done to help educators facilitating that awareness. Most of the research on prior knowledge in civic education consists of large-scale surveys or attitudinal research that does not provide any insight into the knowledge structure that informs an individual's mind-set. There is, however, some qualitative work in the field of human rights education.[3]

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[1] J. Roschelle, 'Learning in interactive environments. Prior knowledge and new experience' in J.H. Falk, L.D. Dierking (eds.), *Public Institutions for Personal Learning. Establishing a Research Agenda*, Washington 1995, pp. 37-51.

[2] P. Brett et al. (eds.), *How all teachers can support citizenship and human rights education: a framework for the development of competences*, Strasbourg Cedex 2009, p. 36.

[3] R.C. Wade, 'Conceptual change in elementary social studies. A case study of fourth graders' understanding of human rights', *Theory and Research in Social Education*, Vol. 22, No. 1 (1994), pp. 74-95, at <http://dx.doi.org/10.1080/00933104.1994.10505716>; S.R. Simmonds, 'Embracing diverse narratives from a postmodern Human Rights Education curriculum' in C. Roux (ed.), *Safe Spaces. Human Rights Education in Diverse Contexts*, Rotterdam 2012, pp. 225-242.

Theoretical Background

For the purposes of this study, prior knowledge is defined as a pattern of understanding that is plausible to the learner when attempting to make sense of the world.[4] It comprises logical conclusions drawn from limited data. While this definition is consistent with others in the literature,[5] there are many forms of prior knowledge, and definitions are fluid and often controversial. Reflecting the dynamic and unsettled nature of the field, some scholars emphasize the developmental aspects of students' understanding, employing terms such as "naïve ideas", "preconceptions", and "developing understanding" while others underscore chronological aspects by referring to terms such as "intermediate understandings", or "prior concepts". Similarly, terms such as "everyday ideas", "classroom conceptions", and "background knowledge" point to contextual aspects of learners' understanding.[6] All of these terms semantically acknowledge students' conceptions as natural, contextually valid intermediates of the learning process. In contrast, the originally dominant term "misconception" underscores the cognitive transformation that is required in order to achieve an "accurate" understanding of the subject at hand. Its use has been criticized for contradicting constructivist views of knowledge and for implying that such ideas are nothing more than obstacles to the learning process.[7] Prior knowledge has its origin in a diverse set of personal experiences including direct observation and perception, peer culture and language as well as in instructional materials. Its acquisition depends, in a large part, on the social role of the learner, such as experiences connected with race, class, gender and political, cultural and ethnic affiliations[8]. Therefore, alternative conceptions can vary substantially within a classroom.

The concept of prior knowledge forces a theoretical shift to viewing learning as a "conceptual change". The conceptual change approach refers to a set of techniques that share a common goal: helping learners exchange their naïve understanding for a deeper one. Classroom studies designed to promote conceptual change usually provide opportunities for students to make their ideas explicit, and then to challenge and extend these ideas using a combination of different strategies, such as peer discussion, or the use of "bridging analogies" or reputational texts, which directly explain common (mis)understandings and why these understandings are incomplete.[9]

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[4] D. Lange, 'Bürgerbewusstsein. Sinnbilder und Sinnbildungen in der Politischen Bildung', *Gesellschaft – Wirtschaft – Politik (GWP)*, Vol. 57, No. 3 (2008), pp. 431-439.

[5] See for example: J. Roschelle, 'Learning…'.

[6] M. Schneider, 'Knowledge Integration' in N.M. Seel (ed.), *Encyclopedia of the Sciences of Learning*, New York 2012.

[7] D. Lange, 'Bürgerbewusstsein…'

[8] J.D. Bransford, *How people learn. Brain, mind, experience, and school*, Washington D.C. 2000.

[9] For overview see: M. Schneider, X. Vamavakoussi, W. v. Dooren, 'Conceptual Change' in N.M. Seel (ed.), *Encyclopedia of the Sciences of Learning*, New York 2012.

The conceptual change approach is closely related to the constructivist approach to learning, which has become dominant in recent decades and underlies much of the current research on civic and citizenship education. Constructivism sees learning as a cognitive activity in which students actively construct knowledge by interpreting new information in light of prior knowledge and existing beliefs. Learning is not considered a simple replacement of one theory with another. Students "construct new knowledge" by integrating new concepts and propositions with prior knowledge. The challenge for the educator is to identify the concepts and ideas the learner already knows and that are relevant to the subject matter to be learned, and then design instruction to facilitate the integration of more sophisticated concepts into the existing knowledge framework. However, it is important to note that the purpose of human rights education should not be to force students to surrender their natural conceptions to the teacher's conceptions, but rather to help students to challenge one idea with another and develop appropriate strategies for having alternative conceptions compete with one another for acceptance. Rather than changing students prior knowledge, the goal is to extend, shape and contextualize it.

Empirical Findings

A general problem in social and civic education in particular is that there is not yet much known about students' understanding of key ideas related to the social and political world. The field of social education has been slow to develop a body of research knowledge in this area, particularly when compared to math and science.[10] There is, however, some work in the field.[11]

Much of what has been published fall under the heading of the "knowledge of" human rights. In such studies, declarative knowledge is assessed by quantitative methodologies. For example, the 2009 large-scale International Civic and Citizenship Education Study (ICCS) required students to answer a multiple-choice question on the fundamental purpose of the United Nations Universal Declaration of Human Rights.[12] With regards to such findings, it is important to note that

[10] A.S. Hughes, A. Sears, 'Macro and micro level aspects of a programme of citizenship education research', *Canadian and International Education*, Vol. 25 (1996), pp. 17-30.

[11] See for example: J.E. Brophy, J. Alleman, *Children's Thinking About Cultural Universals*, Mahwah 2006; A. Becher, *Die Zeit des Holocaust in Vorstellungen von Grundschulkindern. Eine empirische Untersuchung im Kontext von Holocaust Education*, Oldenburg 2009; A. Lutter, *Integration im Bürgerbewusstsein von SchülerInnen*, Wiesbaden 2011; C. Peck, A. Sears, S. Donaldson, 'Unreached and unreachable? Curriculum standards and children's understanding of ethnic diversity in Canada', *Curriculum Inquiry*, Vol. 38 (2008), pp. 63-92, http://dx.doi.org/10.1111/j.1467-873X.2007.00398.x; J. Torney-Purta, 'Cognitive representations of the political system in adolescents. The continuum from pre-novice to expert', *New Directions for Child Development*, Vol. 56 (1992), pp. 11-25.

[12] W. Schulz et al. (eds.), *ICCS 2009 International Report. Civic Knowledge, Attitudes, and Engagement among Lower-Secondary School Students in 38 Countries*, Amsterdam 2010.

the fact that students can recite the definition or the purpose of a concept is not a reliable test of comprehension. Students tend to repeat information but are not able to apply them to real cases. Research in the field of science education show that if the task is a procedural calculation, students can often get the right answer independent of their prior knowledge. However, if the task requires students to make a prediction, give a qualitative explanation or otherwise express their understanding, prior knowledge interferes.[13] There are also studies focusing on public attitudes towards human rights.[14] Their main limitation is that most focus solely on attitudes towards human rights without investigating the knowledge structures that inform the individual's mind-set. To illustrate, a representative study on human rights in Germany (2003)[15] revealed that 75.8% of people consider human rights to be very important. This was assessed with the question "How important do you find the realization of human rights for every human being worldwide?" Responses were given on a 5-point rating scale ranging from 1 (very unimportant) to 5 (very important). It can be expected that the degree of importance assigned to human rights by participants is based on different understandings, some of which may be fragmentary or impacted by social desirability.

A Research Project on Students' Conceptions of Human Rights

In light of current evidence that prior knowledge is a major factor influencing learning, it is striking that there are hardly any ideographic studies in which student's ideas are investigated in personal, in-depth detail. An on-going German research project focusing on grade nine students' understanding of human rights seeks to address that gap. The purpose of the study is to provide those involved in human rights education with information that can help them to identify and work more effectively with the prior knowledge of their audiences. The assumption is that if the knowledge, beliefs and attitudes that students bring into the classroom are addressed and used as a starting point for new instruction, learning can be significantly enhanced.

To this end, the study aims to contribute to building a body of work on how students understand key ideas and processes related to human rights. Prior knowledge is often implicit, meaning that neither students nor teachers are fully aware of the ideas that guide their assumptions. The thinking process of students is not usu-

[13] W. Schulz, H. Sibberns (eds.), *IEA Civic Education Study. Technical Report*, Amsterdam 2004.

[14] For overview see: S. McFarland, M. Mathews, 'Who cares about human rights?' *Political Psychology*, Vol. 26, No. 3 (2005), pp. 365-385, http://dx.doi.org/10.1111/j.1467-9221.2005.00422.x.

[15] J. Stellmacher, G. Sommer, E. Brähler, 'The cognitive representation of human rights. Knowledge, importance, and commitment', *Peace and Conflict, Journal of Peace Psychology*, Vol. 11, No. 3 (2005), pp. 267-292.

ally straightforwardly expressed in the classroom. Accordingly, a working knowledge of research findings on alternative conceptions of human rights might well be considered fundamental to the professional preparation of educators in this field.

A second objective is to elaborate on the challenges for educational practices posed by students' alternative conceptions of human rights. To that end, the ways of reasoning uncovered are related to leading and influential theories of human rights. The goal is not to identify detailed similarities and differences between students' thinking and experts' theories, but to find the major points of agreement and divergence. How and to what extent are human rights theories addressed or accommodated in students' thinking? In what way does student thinking naturally provide an avenue for the introduction of the theorization of key categories of human rights? Such avenues could relate to the establishment of conceptual relationships, content sequencing or the use of terminology. Dembour's (2010) four-way categorization of human rights schools is employed.[16]

A third objective of the study is to contribute to a broader critical theory on the underpinnings of human rights education. It appears that many involved in the field of human rights education express commitment to international declarations but do not look beyond them nor engage in discussion or critique, or seek to foster a deeper understanding. However, the appearance of international consensus fostered by documents such as the United Nations Declaration on Human Rights Education and Training (2011)[17] or the Council of Europe Charter on Education for Democratic Citizenship and Human Rights Education (2010)[18] conceals considerable theoretical diversity and is achieved only at the cost of ambiguity and the formulation of merely lofty goals. Until now, there has been little debate in literature about empirical and theoretical frameworks for human rights education. This study contributes to such a debate.

The main question guiding the study is: What are student's conceptions of human rights? The study employs a qualitative approach as a means of avoiding any a priori or singular constraints on the findings. A total of 340 ninth grade students from 16 secondary schools in a metropolitan area in Lower Saxony, Germany, took part in the study. The average age of the students was fifteen years. A total of 340 open-ended questionnaires were completed in 2012. The questionnaire consisted of 6 items, structured to cover three areas identified as crucial domains of disagreement and debate, namely a) the definition of human rights, b) the support for human rights, and c) the importance assigned to human rights. The open-ended questionnaire was constructed on the basis of a review of literature on both human

[16] M.B. Dembour, 'What are human rights? Four schools of thought', *Human Rights Quarterly*, Vol. 32, No. 1 (2010), pp. 1-20.

[17] United Nations, *Declaration on Human Rights Education and Training, General Assembly Resolution 66/137*, New York 2012.

[18] Council of Europe, *Charter on Education for Democratic Citizenship and human rights Education. Recommendation CM/Rec(2010)7*, Strasbourg 2010.

rights and educational frameworks in the field of human rights education. The items encouraged meaningful answers based on the subjects' knowledge and perception and allowed for the discovery of information that was important to participants but may not have previously been considered pertinent by the researcher. Subsequent, semi-structured interviews will be conducted with a number of students expected to express a wide range of different views on human rights.

How human rights are varyingly construed among the participants? Preliminary findings based on the questionnaire analysis suggest a finite range of understandings. Four "categories of definition" or understandings in regard to the definition of human rights were identified. Each category represents a qualitatively different way in which the notion of human rights has been understood.

The first account – "the regulatory framework" account – sees human rights simply as a framework helping to keep order. Under this perspective, human rights do not directly set out substantively how things should be; human rights rather provide a framework for running the polity fairly.

In the second account – the "behavioral guidelines" account – human rights are seen as guidelines for proper human behavior. Consequently, respecting human rights is based upon people being compassionate, caring and considerate of others in addition to not infringing on other people's rights.

In the third account – the "rights and entitlement" account – human rights are seen as both positive and negative rights. Under this view, human rights are for supporting people and people's inherent dignity by providing essential goods or services.

The fourth account – the "equal treatment" account – sees human rights as rules of respect and toleration of others that are necessary if people are to live together in a community. The principles of non-discrimination, equality and equal opportunities enshrined in the Universal Declaration of Human Rights are key.

The accounts are best taken as a summary of separate understandings that complement each other. It is important to note that the accounts come from the participants. They are not drawn from theory. Each individual conception ought to be thought of as contextually valid and rational, and having its own practical reality.

It remains open to analysis in what ways the four concepts discussed above relate to students' ideas of whether and how one should support human rights, and their distinct ways of assigning importance to human rights. Also, further investigation is required to elaborate on the accounts in more detail, and to relate the findings to previous studies on lay people's conceptions of human rights.[19]

[19] R. Stainton Rogers, C. Kitzinger, 'A decalogue of human rights. What happens when you let the people speak', *Social Science Information*, Vol. 34, No. 1 (1995), pp. 87-106, at <http://dx.doi.org/10.1177/053901895034001005>; P. Stenner, 'Subjective dimensions of human rights. What do ordinary people understand by human rights', *The International Journal*

Variations of Experts' Understanding

The early findings discussed above provide some preliminary insights into the prior knowledge students in the ninth grade have with respect to describing human rights. Finding out this prior knowledge provides a starting point, a place to begin. But where does instruction go from there? What is the intended learning outcome, the "accurate" conception that educators, through the use of conceptual change strategies, hope learners to ultimately embrace? In practice, there is no consensus on what an accurate understanding of human rights is.

In fact, research points to a remarkable diversity of positions among both human rights experts and laypeople. Based on a comprehensive review of academic literature, Dembour (2010)[20] developed a typology of four distinct schools of thought that recur on a regular basis among human rights experts: the "natural scholars" conceive of human rights as given, "deliberative scholars" as agreed upon, "protest scholars" as fought for, and "discourse scholars" as talked about. The strong differentiation between the different schools also offers useful insight into how the learning objectives in human rights education may be differently interpreted.

The multiplicity of human rights understandings among experts anticipates a multiplicity of understandings among laypeople. The results of a Q methodology study by Stainton Rogers and Kitzinger (1995) support the notion of the existence of a finite range of distinct, clearly distinguishable constructions regarding human rights among laypeople.[21] The study explores whether the human rights discourse reflect any level at all of agreement about its subject, human rights. The data provides clear proof: ten fundamentally separate understandings of human rights were evidenced and profiled among British laypeople with no common bedrock found. As Stainton Rogers and Kitzinger note, research on human rights (and one might add: human rights education) should

> […] avoid assessing allegiance to human rights in terms of just one of these understandings, to do so is an act of ideological fiat which adds nothing to social scientific understandings of human rights and inhibits the considerable potential for symbiotic dialogue.[22]

The study by Stainton Rogers and Kitzinger (1995) has been replicated by Stenner (2009).[23] In two Q methodological studies, he confirms the earlier findings by identifying a finite range of distinct, clearly distinguishable constructions

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of Human Rights, Vol. 15, No. 8 (2011), pp. 1215-1233, at <http://dx.doi.org/10.1080/13642987.2010.511997>.

[20] M.B. Dembour, 'What are Human…'

[21] R. Stainton Rogers, C. Kitzinger, 'A decalogue…'

[22] Ibid., p. 104.

[23] P. Stenner, 'Subjective dimensions…'

regarding human rights among laypeople. Stenner points to a remarkable degree of overlap between his classification of understandings and that of both Stainton Rogers and Kitzinger and Dembour.

The Agenda of Human Rights Education

Given that there is a lack of agreement on what human rights are, the assertion that the learning objectives in human rights education differ should not be particularly surprising. The possibility for various interpretations of what constitutes human rights, and their implications for educational objectives, is recognized as a major challenge in human rights education discourse.[24] Over the past two decades, various models and schemes have been advanced for categorizing the various types of human rights education approaches. While most scholars would agree that "the mutability and adaptability of human rights education are its strengths", and "the diversity in the human rights discourse is a positive source which human rights education should be concerned with, to build on and use it is as a strength", [25] human rights education needs to be careful not to fall victim to a 'conceptual imprisonment'. Keet provides the example that the "practice of human rights has elements of exercising power over people such as the exclusionary practices that mainstream some forms of human rights understanding whilst rejecting others."[26]

It would seem ironic to suggest that a single conception of human rights education could be applied within an approach that argues for tolerance of alternative conceptions and diversity. The studies reviewed in this paper provide a strong argument that human rights education should acknowledge the existence of a multiplicity of idiosyncratic human rights conceptions and proceed from there –in terms of both instructional design and the refinement of learning objectives. Human rights charters don't claim eternal truths, but have a sharp political nature. Accordingly, human rights educators, in their attempt to extend the prior knowledge of students, should avoid presenting human rights as prescriptive, monolithic truths but rather point to the nature of human rights as dynamic and constantly evolving. Recognizing that human rights have always been built by their own critique, addressing the dilemmas that are perceived by learners is a significant step for human rights critique toward becoming a productive politico-pedagogical form.

[24] A. Keet, 'Discourse, Betrayal, Critique. The Renewal of Human Rights Education', in C. Roux (ed.), *Safe Spaces: HRE in Diverse Contexts*, Rotterdam/Boston/Taipei 2012, pp. 7-28, p. 17.

[25] M. Bajaj, 'Human Rights Education. Ideology, Location, and Approaches', *Human Rights Quarterly*, Vol. 33 (2011), pp. 481-508.

[26] A. Keet, 'Discourse…', p. 17.

Conclusion

As one educator sums it up, "the major strength I see [in the alternative conception movement] is that we are giving students the opportunity to tell us what they think, rather than impose on them our view of the world."[27] To bring learners towards an effective and democratically-shared idea of human rights, individual conceptions should elicited and discussed in class and contribute to decision-making in the teaching-learning process. All points of view, even those not consistent, complete or deductively sound, should be allowed to be represented in the classroom, allowing each learner to benefit from debate about their meanings and implications, and to stimulate the reconsideration of existing views. Learners can succeed in achieving conceptual change as long as appropriate care is taken in acknowledging students' ideas, embedding them in appropriate socially discourse and providing ample support for the cognitive struggle that will occur.

On top of the challenges in uncovering and addressing students' conceptions, the difficulty is compounded by the fact that there is no agreed position on what the learning objectives are in human rights education. The appearance of international consensus fostered by the formulation of documents such as the Council of Europe Charter on Education for Democratic Citizenship and Human Rights Education (2010) and the United Nations Declaration on Human Rights Education and Training (2011) conceals considerable theoretical diversity. As Baxi (1997) states,

> "Human rights" is one phrase, but it encompasses diverse realities and these invite many conflicted narratives. Human rights education must fully acknowledge and understand the many worlds of meaning in the practice of human rights.[28]

Individual conception of human rights ought not to be thought of as lacking social reality and efficacy. Whether the concept is valid from a theoretical point of view is not important for the purpose of helping to guide individual thinking and commitment. Research on students' prior knowledge of human rights is crucial as the views learners hold may affect what they are prepared to contribute as active citizens, now and perhaps in the future.

Needless to say, further empirical research is required to corroborate findings on alternative conceptions of human rights. Research should incorporate not only the alternative conceptions of learners, but also of teachers and researchers. The Council of Europe Charter suggests the sharing of results of research with other member states and stakeholders where appropriate. In fact, in science education,

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[27] J.H. Wandersee, J.J. Mintzes, J.D. Novak, 'Research on alternative conceptions in science' in D.L. Gabel (ed.), *Handbook of Research on Alternative Conceptions in Science*, New York 1994, p. 178.

[28] U. Baxi, 'Concepts of Human Rights' in U. Baxi, K. Mann (eds.), *Human Rights Learning. A People's Report*, New York 2006, p. 17.

the alternative conceptions program has benefited from substantial international cooperation and communication, with important contributions by researchers from nearly every continent and from a host of countries. Alternative conception research in the field of human rights education might therefore expect substantial benefit from studies in different national and cultural contexts. However, their effectiveness in enhancing the classroom learning of students will be limited if the implications for teaching and learning are not adopted by teachers. It is therefore important to translate these ideas into practical lessons and activities that teachers can use in their classrooms.

Abstract

This paper makes the case that investigating students' prior knowledge on the topic of human rights has the potential to significantly improve instructional practice. It discusses the role of students' alternative conceptions in the broader context of human rights education discourse. The paper also looks at the lack of agreement on what an "accurate" conception of human rights is, and its implication for human rights education. In light of current evidence that prior knowledge is a major factor influencing learning, it is striking that there is almost no research on how young people perceive key concepts and processes related to the notion of human rights. This paper briefly reports on an ongoing German research project that seeks to address that gap by investigating grade nine students' understanding of human rights. It represents a shift from past research, which has focused solely on *attitudes towards* or *knowledge of* human rights without investigating the views that informs an individual's mind-set.

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Can Taiwan Be an Example of Successful Promotion of Human Rights in Asia?

Preface

In 1996, Taiwan had completed a number of missions. It held its first presidential election and was ranked as a free country by Freedom House. In 2000, Taiwan had peacefully completed its first party turnover. Despite plenty of internal problems, this accomplishment made Taiwan the first democracy in Chinese society. Can Taiwan be an example of successful promotion of Human Rights in Asia, particularly in China and Hong Kong?

The first part of this paper will present a brief history of Taiwan and how Taiwan transformed from an authoritarian state to a democracy. The second part will deal with how this kind of democratic achievement set an example for Chinese societies as a counter example to the Asian values and Confucianism. The third part will present some evidence and examples on how Taiwan's democracy has influenced other nations in Asia. The fourth part will deal with the limitations of Taiwan's role because of her international status.

From Authoritarianism to Democracy

Taiwan was ceded to Japan by the Chinese government after China lost the Sino-Japanese war of 1895. Taiwan was under Japanese rule for the following 51 years until Japan was beaten in World War II in 1945. After World War II, Taiwan was restored to the Republic of China. While the Taiwanese rejoiced on their return to the fatherland, the local Taiwanese soon found out that the new "Taiwan Provincial Governor's Office" was no different from the Japanese governor-general system, which combined administrative, legislative, judicial and military power in one body. The new Chinese government ruled as if they were carrying on Japanese

colonial rule.[1] The situation was even worse, the mainlanders monopolized all the power and positions, and favored their friends and relatives, putting amateurs in specialist positions, and instead of taking over responsibility for Taiwan, they plundered it. Officialdom became rife with corruption, and the Taiwanese people were deeply disappointed with the performance of the new government.[2]

Under the rule of Governor General Chen Yi, camphor, matches, alcohol, tobacco, and measuring instruments were all monopolized by the Alcohol and Tobacco Monopoly Bureau. Apart from this, there were still many everyday necessities which were strictly dominated by bodies other than the Alcohol and Tobacco Monopoly Bureau, including communications, transport, warehouses, agricultural products, fisheries and pasturage, iron and steel, electricity, cement, mechanized manufacturing, petroleum, engineering, paper mills, printing, textile industries, bricks and tiles, oil, electrical equipment, chemicals, salt industry – every last one of these was under external control.[3] Since the controlled economy was accompanied by a culture of corruption, the results were disastrous. Moreover, the civil war between the KMT and the CCP in China created rice shortages and sky-high inflation, putting people through great hardships in their everyday life.

After a year and a half of devastation and plunder, dissatisfaction culminated in the eruption of the 2-28 Incident. On the evening of February 27, 1947, an agent from the Alcohol and Tobacco Monopoly Bureau struck and injured a woman illegally peddling tobacco on Yenping Road in Taipei City, and this led to another member of the public being shot and killed. On February 28, the citizens of Taipei protested to the relevant organizations. Instead of response, they met with machine-gun fire from the Governor's Office. Once conflict had broken out, it was hard to contain, and it spread across the island, as people rose up in every place and rioted all across Taiwan.

At the request of Governor General Chen Yi, Chiang Kai-shek sent troops to Taiwan immediately. On March 8, KMT troops arrived in Taiwan, and began the quelling of the protest which turned into a massacre, and continued as what became known as "country sweeping", an island-wide program of arrest and slaughter. The elite of Taiwanese society was sacrificed almost in its entirety, and there were heavy civilian casualties, with a death toll somewhere between 10,000 to 20,000.

In 1949, Chiang Kai-shek's Nationalist Government lost the civil war with the communists and retreated to Taiwan. On May 19, 1949, the government declared martial Law; it was not repealed until July 17, 1987. During the period of martial law, personal rights, freedom of speech, freedom of the press, freedom of secret communication as well as freedom of assembly, association, and movement were all severely undermined. From 1949-1970, the people of Taiwan had experienced

[1] Hsiao-feng Li, Chen-Lung Lin, *Taiwan History*, Taipei 2003, pp. 238-239.
[2] Ibid., pp. 240-242.
[3] Ibid., 247-249.

a period of the so call "white Terror". During the period, many people were put in jail or sentenced to death because of their political opinions.

In 1971 Taiwan was forced to leave the United Nations because of China. It was a devastating diplomatic setback for Chiang Kai-shek's government. In order to establish the regime's legitimacy, Chiang Kai-shek's government introduced a limited electoral opening in 1972. However, the numbers of open seats was small. Senior legislators still occupied the majority of seats in the Legislative Yuan. But the gradual opening of the national representative bodies gave the chance for anti-KMT independent candidates to participate in national elections.

After the death of Chiang Kai-shek in 1975, according to the Constitution, Vice President Yen Chia-kan briefly took over from 1975 to 1978, but the actual power was in the hands of the Premier of the Executive Yuan, Chiang Ching-kuo, who was a son of Chang Kai-shek. During the presidency of Chiang Ching-kuo from 1978 to 1988, Taiwan's political system began to undergo gradual liberalization.

As Taiwan's socioeconomic development had already made the island ripe for a democratic opening, Dangwai[4] candidates used the electoral process to foster popular aspirations for democratic reform and political freedom. Emboldened by their electoral success in the 1977 provincial assembly and country magistrate elections, the Dangwai coalition steadily moved closer to becoming a quasi-party and in 1986 finally founded the Democratic Progressive Party (DPP). The establishment of the DPP was in open defiance of martial law. Chiang Ching-kuo decided to tolerate the formation of the DPP and not to take any action to crackdown on the party.

Several months later, Chiang Ching-kuo made a move to lift the martial law and many other longtime political bans, and the opposition Democratic Progressive Party was allowed to participate openly in politics. After Chiang Ching-kuo died in 1988, Vice President Lee Teng-hui succeeded him as the first Taiwan-born president and chair of the KMT. During Lee's presidency, many reforms were launched, including the popular election of all legislators in 1992 and the push for the direct election of the president. In 1996, despite China's missile tests, Lee became the first Taiwan president elected by popular vote. Taiwan was rated as "free" country by Freedom House in 1996.

In 2000, Democratic Progressive Party candidate Chen Shui-bian, a pro-independence candidate, was elected president, marking the first peaceful democratic transition of power to an opposition party in Taiwan's history. Chen was re-elected in 2004. In 2008, the KMT candidate Ma Ying-jeou was elected as president, heading the second party turnover. Taiwan passed through what Huntington has called "two turnover test".[5]

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[4] Dangwai is a loose coalition formed of anti-KMT independent candidates (literally outside the party).

[5] S.P. Huntington, *The Third Wave Democratization in the Late Twentieth Century*, Norman 1991, p. 267.

Taiwan's Democracy as a Counter Example for Confucianism and Asian Values

There is a great deal of debate on whether Asian values or Confucian ideology inhibit a country's acceptance of liberal democratic values. The main components of Confucianism included family loyalty, social hierarchies and social harmony. Some scholars contend that China could not possibly break away from authoritarianism in its political development because Chinese society traditionally values authority, is strongly group-oriented, lacks individualism, and does not respect human rights. On the other hand, some scholars argue that the Confucian tradition is flexible, and it can be used as a basis for democracy and human rights.[6]

Former Singapore Prime Minister Lee Kuan Yew has extolled "Asian values" (a proxy for a particular form of Confucianism) for promoting economic development and political stability, but also for limiting the kind of "excessive" liberties available in the West.[7] In his interview on Foreign Affairs, Lee Kuan Yew implied that the Western style of democracy and human rights is not applicable to East Asia. On the other hand, Kim Dae Jung, former president of South Korea, argued that Asia still had its rich heritage of democracy-oriented philosophies and traditions.[8] Moreover, in his view, there are many Asian countries that have made great strides towards democracy. President Lee Teng-hui of Taiwan also pointed out that "following the hearts of the people" was an ancient Chinese philosophy, which could serve as a succinct statement of the essence of modern democracy.[9]

Clearly, most theories based on Chinese history and traditional culture cannot adequately explain Taiwan's political development over the last twenty-five years. Taiwan has evolved into a vibrant, multiparty democracy. It has achieved its important goals. It can serve as a model for other Confucian-oriented societies in the region that have not yet fully democratized. Taiwan is a counter example to the argument that a Confucian society can never produce a liberal democracy. Taiwan's experiences also demonstrate that it is possible for a hegemonic party to engineer a peaceful and gradual transition away from one-party authoritarianism on the basis of a successful record of economic modernization.[10]

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[6] See: J. Chan, 'A Confucian perspective on human rights' in J.R. Bauer, D.A. Bell (eds.), *The East Asian Challenge for Human Rights*, Cambridge 1999, pp. 212-237; M. Freeman, 'Human rights. Asia and the West' in J.T.H. Tang (ed.), *Human Rights and International Relations in the Asian Pacific Region*, London 1995, pp. 13-24; W.T. de Bary, *Asian Values and Human Rights. A Confucian Communitarian Perspective*, Cambridge 2000.

[7] Kuan Yew Lee, 'Culture is destiny. A conversation with Lee Kuan Yew', *Foreign Affairs*, Vol. 73, No. 2 (1994), pp. 109-126.

[8] Dae Jung Kim, 'Is culture destiny? The myth of Asia's anti-democratic values', *Foreign Affairs*, Vol. 73, No. 6 (1994), pp. 189-194.

[9] Teng-hui Lee, 'Chinese culture and political renewal', *Journal of Democracy*, Vol. 6, No. 4 (1995), pp. 3-8.

[10] Yun-han Chu, 'China and East Asian democracy. The Taiwan factor', *Journal of Democracy*, Vol. 23, No. 1 (2012), p. 51.

Taiwan's Influence on Mainland China and Hong Kong

Yun-han Chu in his paper published in the *Journal of Democracy*, argues that being the first and the only democracy in a culturally Chinese society, Taiwan demonstrates the compatibility of democracy and Chinese culture.[11] Despite the unbalanced power between the two sides, as economic exchange and social contacts increase, Taiwan's influence on the PRC continues to grow. It is also the geographic proximity and cultural affinity between the two Chinese societies which make Taiwan a plausible social and political model for the PRC.

There are many occasions which display these types of influence. By 2003, China had overtaken the United States as Taiwan's most important trading partner. In 2010, Taiwanese travelers made more than six million visits to China, and there are close to a million Taiwanese expatriates living and working in the PRC. Taiwanese companies and businessmen have invested more than US$150 billion in China. Table 1 shows Taiwan's investment in China from 1992 to 2011. In 2011 alone, the amount of investment was more than 14 billion U.S. dollars.

Table 1: Taiwan investment in China, 1992-2011 Unit: 100 million US dollars

1992	**1993**	**1994**	**1995**	**1996**	**1997**	**1998**	**1999**	**2000**	**2001**
2.47	11.4	9.6	10.9	12.3	16.2	15.2	12.53	26.1	27.8
2002	**2003**	**2004**	**2005**	**2006**	**2007**	**2008**	**2009**	**2010**	**2011**
67.2	77.0	69.4	60.1	76.4	99.7	106.9	71.4	146.2	143.8

Data sources: 'Cross-straits Economic Statistics Monthly, Taiwan Investment in China', Mainland Affairs Council, 2012, at <http://www.mac.gov.tw/lp.asp?CtNode=5720&CtUnit=3996&BaseDSD=7&mp=1>, 15 November 2012.

Moreover, Taiwan's mass media have become an important instrument in spreading news about Taiwan's democratic experience. When the Chinese visit Taiwan, they often stay up late, glued to the television, watching political talk shows amazed by the way they criticize the government in public. On the evening of Taiwan's 2008 presidential election, an estimated 200 million Chinese watched the ballot counting via satellite TV or the internet. During the 2012 presidential elections, many Chinese watched the presidential candidates' debates over the internet. The Chinese have reacted positively to the presidential debate, and lamented that a similar spectacle would not be shown in China.[12]

Taiwanese NGOs working on a broad range of social issues – from environmental to consumer rights – have developed extensive networks with like-minded

[11] Ibid., pp. 42-56.

[12] 'Chinese Netizens Praise Taiwanese Presidential Debate', *Want China Times*, 5 December 2011, at <http://www.wantchinatimes.com/news-subclass-cnt.aspx?id=20111205000052&cid=1101&MainCatID=0>, 10 November 2012.

organizations throughout China. For example, Taiwan's Chinese Association for Human Rights has set up a constant discourse platform with the China Society for Human Rights Studies. Representatives from Taiwan's Chinese Association for Human Rights participate in the Beijing Human Rights Forum every year.

In the environmental area, the Taiwan Environmental Information Center exchanges visits with China's environmental NGOs annually. In 2012, Chinese environmental protection NGOS visited the NC-6 Mailiao Biochemical Plant to better understand the problem of pollution.[13] They also visited the Changhau Environment Protection Union in order to learn how they successfully organized the people to protest against the Kuo-kung Biochemical Plan. Finally, they were brought to the southern part of Taiwan to see how the local environmental protection groups monitor garbage patches in the ocean. The pollution caused by biochemical plants, such as the PX Chemical Plant in the city of Ningbo, has caused many problems and many protests in China. Through those constant exchanges, they have shared information and experiences, and intend to support each other's capabilities and techniques to protect the environment.

Cross-strait exchanges and cooperation between academics and professionals have also increased in recent years in many fields, including finance and banking, public administration, management science, local governance, and survey research. Moreover, as more and more students visit Taiwan for study, they will be exposed to a diversity of opinions and experience real freedom of expression. The acceleration of the flow of exchanges will deepen social ties between the two sides.

Taiwan has also become a critical source of know-how for developing a modern law-bound state, which is considered a prerequisite for liberal constitutionalism. PRC experts and bureaucrats have carefully scrutinized every aspect of Taiwan's legal system. Because Taiwan's legal system is based on German code law rather than on Anglo-Saxon common law, it has had greater influence than Hong Kong on the revamping of China's legal system.[14]

Moreover, since 2008, through the arrangement of the China Human Rights Lawyer Concern Group, the Taipei Bar Association has had constant exchanges with human rights lawyers from China and Hong Kong. They are both concerned about the rights of the underprivileged as many lawyers and legal activists in China have been subjected to tremendous political pressure and unfair treatment by the authorities. Taiwan also joined the action to urge the Chinese government to free Dr. Liu Xiaobo, the recipient of the Nobel Peace Prize in 2010. More importantly, Chinese and Hong Kong lawyers are eager to know how civil society has developed and how citizens protested in Taiwan during the period of authoritarian rule.

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[13] Tzu-ching Lin, 'The China environmental activist come to the working holiday in Taiwan, and visit the Sixth Naphtha Cracker, Mailiao at night', *Taiwan Environmental Information Center*, 2012, at <http://e-info.org.tw/node/81703>, 16 November 2012.

[14] Yun-han Chu, 'China and East…', p. 44.

The New School for Democracy was officially established in Taiwan on June 1, 2011 by Chinese, Hong Kong and foreign academics who will give talks on democracy via the Internet with the hope of shattering the "one-party rule" in China.[15] It is a joint effort of the civil society in Taiwan, Hong Kong and China in order to promote democratic development in Chinese societies and create a communications platform for the Chinese worldwide. The school has offices in both Taiwan and Hong Kong. Members of the school include a number of well-known individuals, including Tiananmen Square student leaders Wang Dan and Wang Juntao, head of the Contemporary China Research Center at the City University of Hong Kong Joseph Cheng, editor-in-chief of the New York-based Beijing Spring magazine Hu Ping, Taiwan Legislator Lin Chia-lung, Hong Kong Democratic Party Chairman Albert Ho and National Chengchi University sociology professor Ku Chung-hwa.[16] Though China's government has blocked the School's website, there are some people bypassing Internet censorship (called Fanqiang in Chinese) to access the information provided by the New School.

In addition to close relations with Hong Kong on the issues of Chinese human rights lawyers and the establishment of the new school, the Pro-democracy camp in Hong Kong has much to learn from Taiwan's democracy, despite its dismal performance in the September Legislative Council elections. In fact, each year during the election periods, Hong Kong's Pro-democracy camp will send observer groups to learn from Taiwan. Moreover, the Pro-democracy camp has long requested universal suffrage for the chief executive election; therefore, Taiwan's popular election for the presidency is very important for Hong Kong. During the 2012 presidential election, Hong Kong travel agencies use the name "Electoral Tour to Taiwan" as a way of encouraging tourists to visit Taiwan.

The blind Chinese activist Chen Guangcheng gave his first speech after arriving in America, saying he is optimistic about reform in China, and called Taiwan's democracy a model for the communist state to emulate. "Completely copying western democracy would be difficult", but he says China needs a form of eastern democracy. Taiwan was among the models that China must follow.[17]

Taiwan's influence on Southeast Asia is hard to detect. However, Taiwan's NGOs have been fairly successful in establishing ties with other organizations within the Southeast Asian region. Its civil society model is robust and vibrant with organizations involved in various causes ranging from human rights to the death penalty. Many NGOs all over the Southeast Asian region have also been known to liaise

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[15] Yung-yao Su, 'Democracy school opens in Taiwan', *Taipei Times*, 1 June 2011, at <http://www.taipeitimes.com/News/taiwan/print/2011/06/01/2003504683>, 11 November 2012.

[16] Ibid., p. 3.

[17] 'Chen Guangcheng calls Taiwan's democracy a model for China to follow", *Formosa News*, 1 June 2012, at <http://englishnews.ftv.com.tw/read.aspx?sno=F734C03F2085721EC79A86F6346ED916>, 10 November 2012.

with their Taiwanese counterparts. Given the many years of experience behind Taiwanese organizations, they can actually serve as an important model for other such organizations across the region.

Taiwan's NGOs such as Citizen Watch for Congress also joined ANFREL (Asian Network for Free Elections), which is Asia's first regional network of civil society organizations. It strives to promote and support democratization at national and regional levels in Asia. They conduct election observation missions in Asian countries and share opinions about how to promote transparent and credible elections. Though there are still some flaws which needed to be fixed, Taiwan's relatively free and competitive elections and high voter turnout still provides a viable model for other countries in the region.

Limitations of Taiwan's Role

Taiwan as model of democracy could have played an even more aggressive role; however, Ma's government has refrained from taking an explicit role in improving human rights conditions and fostering democracy in China. Before his presidency, Ma voiced a great deal of concern about the political developments in mainland China. In every Six-Four, Ma has written an article in memory of Six-four. He personally met Chinese dissident Wang Dan, and said that only democratization could redress the victims of the Tiananmen Square Incident.[18]

After his inauguration as president, he refused to meet Wang Dan, and his attitude on Chinese human rights issues softened. He even admired China for having made a great deal of changes in improving human rights conditions. The Federation of Business and Professional Women planned to invite the Dalai Lama to Taiwan, however, the government decided to bar the Dalai Lama's visit on 22 November.[19] They feared that his arrival would strain the improving relationships between China and Taiwan.

Jerome Cohen is a respected law professor who had spent decades observing Taiwan and China. On December 18, 2010, he met Ma Ying-jeou, his former student at Harvard University in the 1970s, and said to President Ma that "the Taiwanese government should not avoid talking with China about human rights issues".[20]

Moreover, many experts and scholars worry that improvements in cross-strait ties may raise the problem of potential direct or indirect influence of the Chinese

[18] Shih-jung Liu, 'The 6.4 memorial is depressed in Taipei', *United News*, 5 June 2000, p. 13.

[19] 'Outcry in Taiwan over rejection of Dalai Lama visit', *Sino Daily*, 11 November 2012, at <http://www.sinodaily.com/reports/Outcry_in_Taiwan_over_rejection_of_Dalai_Lama_visit_999.html>, 23 November 2012.

[20] 'Taiwan should do more for China's Human Rights. Scholars', *Focus Taiwan News Channel*, 18 December 2010, at <http://focustaiwan.tw/ShowNews/WebNews_Detail.aspx?Type=aALL&ID=201012180018>, 10 November 2012.

government on free expression in Taiwan. Though Taiwan still has what is considered one of the freest media environments in Asia, the ranking has declined four years in a row. China could be playing a role in Taiwan's decline in the ranking. There are concerns that media owners and some journalists have been whitewashing news about China to protect their financial interests in China. The owner of the China Times Group, the parent of Want Daily, Tsai Eng-meng, is a businessman with significant commercial interests in mainland China. Since Tsai became the owner of the China Times, the newspaper started to soften it criticism of China's government.[21] In his interview for the Washington Post, Tasi even said that the reports of the Tiananmen Square massacre were not true.[22] The communist party's own propaganda apparatus made the same argument at the time, Tasi's statement was suspected to echo China's propaganda.

In addition, many critics and scholars believed that the China factor was an important factor in determining Taiwan's 2012 presidential election. At the last minute the big entrepreneurs came out to give their support to the current president so as to defend their economic interests in China. Hon Hai chairman Terry Gou, Yulon Motor chairman Kenneth Yen, honorary Vice Chairman of the United Microelectronics Corporation (UMC) Shuan Ming-chi and Delta Electronics chairman and founder Bruce Cheng have all taken Ma's side in the election. More surprisingly, those entrepreneurs who have been reluctant to express their stance in the past, such as Formosa Plastics CEO Wang Wen-yuan and HTC CEO Wang Xue-hong came out to reveal their preferences to support pro-China president Ma this time.

The China factor, in influencing the 2012 presidential elections, is also supported by many academic papers. Using TEDS (Taiwan Election and Democratization Surveys) data, Tang examined both the identity factor and economic interests in the China factor; she found that the latter had more influence in the election.[23] In the other paper, Tung found that 6% of respondents who were dissatisfied with the performance of the Ma administration still voted for him because of cross-straits relations.[24] They worried that a vote for the DPP would cause damage

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[21] 'Taiwan. Freedom of the Press 2011', *Freedom House*, 2011, at <http://www.freedomhouse.org/report/freedom-press/2011/taiwan>, 10 November 2012.

[22] A. Guggubsm, 'Tycoon prods Taiwan closer to China', *The Washington Post*, 21 January 2012, at <http://articles.washingtonpost.com/2012-01-21/world/35440268_1_president-ma-top-negotiator-jimmy-lai>, 20 November 2012.

[23] Yan-zhen Tang, 'Does China Factor Determine Taiwan Presidential Election? An Empirical Analysis of 2012 Taiwan Presidential Election', Proceeding of a Conference on The Maturing of Taiwan Democracy: Findings and Insights from the 2012 TEDS Survey, 3-4 November 2012, Taipei.

[24] Chen-yuan Tung, 'Reviews on development of the cross-strait relations under the first term of Ma Ying-heou presidency and policy suggestions', paper delivered at Conference on Institutionalization of the Peaceful Development of Cross-Straits Relations, 22-23 September 2012, Taipei.

to Taiwan's economy. Those 6% made Ma the winner of the presidential election. The China factor can only grow bigger in the future.

Taiwan's international status also limits its role in influencing other Asian nations. Since 1971, when Taiwan was forced to leave the United Nations; the government has been excluded from many kinds of international organizations. China claimed that Taiwan is part of China, preventing Taiwan's government from joining any international organizations. Taiwan's international status has been entirely eclipsed by the rise of China. Any country which has established formal diplomatic relations with China is forced to end diplomatic relations with Taiwan.

Abstract

This paper starts from the brief history of the democratic transition process of Taiwan. For the past twenty years, the country has peacefully passed the two turnover test, providing relative political freedom and civil liberties for the society. Being the first democratic nation in Chinese society, Taiwan serves as a counter example for those who claim that Eastern values tend to focus on the good of society rather than on the rights of the individual, and therefore are not suitable for democracy.

Through frequent contacts and exchanges between different groups of citizens, Taiwan has gradually become the model to follow. Taiwan's viable NGOs also provide many experiences for other countries to share. Taiwan's free elections have attracted many visitors to observe and learn.

However, Ma's administration has refrained from playing a more positive role in dealing with human rights issues in China. In order to promote their economic interests in China, big entrepreneurs were forced to support pro-China President Ma a few days before the election. Despite all those difficulties, Taiwan has shrewdly positioned itself as a viable alternative when compared with the system of governance in China. In that sense, Taiwan will continue to remain a "thorn" in the side of China as the former presents itself as the democratic alternative alongside its less than democratic neighbour.

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Human Rights Education in the Basque Country (Spain)

A Model for Divided Societies?

Introduction: Politically Motivated Violence in Modern Basque Country

The Basque society is indeed a divided society. From medieval times Basque people enjoyed some degree of political autonomy with a set of own private law but also of public law. There was a kind of autonomous institutional framework respected by the Kingdom of Spain. However, due to different civil Wars during XIX century (1833-1840; 1846-1849; 1872-1876) Basque Regions were subject to an attempt of assimilation within Spain: i.e. the basis of Basque identity so far was at risk through the abolition of a great deal of its own juridical status. At the same time industrial revolution and its inherent socio-economic changes attracted increasing migration movements to the Basque Region from other parts of Spain. Here there is the birth of the so called Basque problem that paved the way to the creation and development of different political identities related either to (higher degree of) autonomy-independence for the Basque region or to a greater deal of identification-integration with/in Spain. As a reflection of this emerging trend new political parties were founded, mainly the Basque Nationalist Party (PNV/EAJ) which is today the greatest and the ruling one in the Basque region.

During the XX century the situation did not improve. The civil war of Spain (1936-1939) ended up with the victory of Franco Regime that exercised a cruel repression against Basque culture, prohibiting its own language, sending thousands of Basques to exile, killing dissidents, using systematic torture against the civilian population and, in short, committing all kind of violations of human rights inherent to a totalitarian regime but, in the case of the Basque Region, with an added ethnic and political motivation. In this context of brutal repression born ETA (Basque Country and Freedom) as resistance movement in the last part of the Dictatorship with an overwhelming support of the Basque and even of the

Spanish people. At the very beginning of its armed activity ETA could be regarded as freedom fighters against a dictatorship. However, with the time, especially after the birth of the Democracy in Spain in 1978, the violence of ETA evolved progressively until a fair labelling of its activity had nothing to do with its origin: ETA became a terrorist group with a decreasing support of the population. In the 90's, for example, not more than 10-15 per cent of the political corpus was ready to support its activity.

Decreasing support of the people, increasing criticism of civil organised society against terrorism, review of the strategy by the political arm of ETA (the political party called BATASUNA), pressure of the police forces, exceptional laws and judicial enforcement with prohibition of political parties and draconian criminal intervention were some of the key factors for the end of ETA. The terrorist group declared a ceasefire in November 2011 that seems to be so far the definitive one.

After decades of politically motivated violence the results are dramatic: only for the period of time from 1960 to 2011 more than 800 hundred people have been killed by ETA and more than 2600 have been severe wounded. But the complete picture of the violence cannot leave aside violations of Human Rights committed by the State or State-like actor after the Democracy and before it: counterterrorism abuses were added to the not interrupted repression since the civil war of Spain onwards. According to some reliable figures based upon data provided by Human Rights Organisations only for the afore mentioned period of time there are more than 200 people killed and more than 1000 wounded waiting for investigation, reparation and justice by Spanish authorities who have been denying their existence throughout decades.[1]

Under the light of this state of affairs, the Basque Government launched in 2006 the initiative for a Basque Plan for Peace and Human Rights. The goal was to make room for a common understanding within the society towards the culture of human rights. The aim was to prevent terrorism and all kind of direct or indirect support toward violations of Human Rights committed by the State. For that purpose there was available a solid reference point in the international trend that had begun after the United Nations Human Rights Conference in Vienna 1993. Precisely, one of the main strategies linked with the Action Plan approved in that

[1] For an overview of the whole picture related to politically motivated violence in the Basque region from 1968 onwards see the reliable report of the pro human rights Non Governmental Organization ARGITUZ, *Mapa (incompleto) de conculcaciones del derecho a la vida y a la integridad física y psíquica en relación a la violencia de motivación política*, at <http://www.argituz.org/documentos/inf/mapacastfinal.pdf>, 27 December 2012; see also: ARGITUZ, 'El largo camino hacia una Política Pública de Víctimas incluyente y respetuosa con todas las víctimas. Informe de Valoración de las Políticas Públicas de Víctimas de la Violencia de Motivación Política en el País Vasco-Euskal Herria, Octubre 2011', at <http://www.argituz.org/documentos/inf/EVALUACIONPOLITVICTARGITUZfinal.pdf>, 27 December 2012. See also mainly focused on violations of human rights committed by the State: J. L a n d a, *Victims of Human Rights Violations Derived from Politically Motivated Violence*, Vitoria-Gasteiz 2009, *passim*.

Conference consisted of demanding of the States to approve a Human Rights Plan and a Human Rights Education Plan as one of its most important parts.[2]

Therefore, the Basque Government took firmed steps to join this international trend by approving first of all a Basque Plan for Peace and Reconciliation[3] that envisaged to engage the public fabric of the Basque Institutions in the promotion of the culture of international Human Rights (1), the support of victims of terrorism (2), the support of victims of Franco Dictatorship (3), the defence of civil and political rights with special view to fight against torture and ill-treatment in prisons (4) and, as last field of action, the plan contained a full range of initiatives for promoting Human Rights Education with the commitment of approving a Plan: a Basque Plan for Peace and Human Rights Education.[4]

1. Education for Peace and Human Rights: Reasons for Launching a First Basque Plan

On 26th December 2007 the Basque Government Council approved the Basque Plan for Peace Education and Human Rights (2008-2011).[5] This plan definitively established a stable, coordinated, systematic and permanent framework to extend the culture of Human Rights and peace throughout Basque society at all levels. The period for designing and progressively writing the Plan lasted approximately fourteen months which is what the United Nations High Commissioner's Office for Human Rights estimates to be the right time frame for this type of process.[6]

However, looking further back, the Plan was the natural result of work that reflects increasing social efforts and initiatives on this subject. Basque society, particularly its framework of NGOs and its own institutions, has been exponentially multiplying initiatives in favour of a peace and human rights culture. Coinciding with international raising awareness in terms of promoting education on Human Rights (UN World Conference on Human Rights, Vienna 1993), the Basque Country (Euskadi) also woke up to this issue at the end of the 1980s. However social dynamics encounter a specific difficulty: the almost impossibility that the

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[2] F. Weber, 'Ein Nationaler Aktionsplan für Menschenrechte in Deutschland' in S. Frech, M. Haspel (eds.), *Menschenrechte*, Wocheschau 2005, p. 255.

[3] Gobierno Vasco, *Paz y Convivencia (Aprobado en Consejo de Gobierno el 2 de mayo de 2006)*, Vitoria-Gasteiz 2007, *passim*.

[4] Ibid., pp. 73-74.

[5] Basque Government, *Basque Education Plan for Peace and Human Rights 2008-2011*, Vitoria-Gasteiz 2008.

[6] Office of the United Nations High Commissioner for Human Rights, *Professional Training Series No. 10 Handbook on National Human Rights Plans of Action*, New York–Geneva 2002, p. 49. See also: Office of the United Nations High Commissioner for Human Rights, *Guidelines for national plans of action for human rights education A/52/469/Add.1*, 20 October 1997, pp. 8-11.

political parties in Euskadi could agree on a document centred on human rights. All of them invoked human rights, but from there partisan views imposed a fight which drains the area for initiatives such as the case of the specific educational strategy on values regarding peace and human rights. For this reason, the fact that we actually have a Plan today is really great news. However, what does Basque society actually gain from this Plan?

It gains organisation and consequently efficacy. To date, there had been sufficient awareness of the need to educate for peace and reinforce the human rights culture but this awareness, with the best will in the world, led to dispersion. There were too many initiatives lacking coordination, too much duplicity, without really setting our sights on results. This referred to social and institutional initiatives. Probably in the initial phases of any policy, the most important part is just starting but the second essential step involves planning where we are going, organising the whole country for effective coordination and equipping ourselves with stable diagnosis and evaluation tools to retain control of our steps and measure our progress. The Plan gives us this necessary infrastructure: specific bodies are created to promote and carry out the actions, evaluate them, discuss them, improve them… and also to be aware of the map of actions and have the right information so efforts can be maximised.

Gains are made in social participation and institutional coordination. For the first time, the three levels of the Basque Administration – Basque Government, the three local Governments and the Town Councils – got down to working together in unison. Each part has its own autonomy and its specificities but worked together. There was also the background approach of forging an alliance with civil society. In terms of public responsibility, Peace Education and Human Rights is an undeniable task for the institutions and, particularly, for the Basque Government. However specifying the policy both in terms of design and contents and carrying it out must receive sufficient participation along the way from educational agents and social organisations. A good sign of this alliance is the fact that a Forum of Human Rights and Peace Education Associations was set up in March 2007, on a Government initiative, bringing together around 30 NGOs from the Basque Country who work day in day out in our districts, villages and cities. This Forum, still open and autonomous to this day,[7] has worked side by side with the Government to design the Plan and is doubtlessly playing an important role in carrying it out.

Gains are also made in the international presence of this policy for human rights and peace education. The Plan responds rigorously and scrupulously to the Plan model promoted by the United Nations High Commissioner for Human Rights and UNESCO and the European Council.[8] And this has led to it being included as a best practice in the consolidated Compendium that these institutions

[7] Information about the Forum is available at <http://www.ddhhypaz.org>, 30 December 2012.

[8] Office of the High Commissioner for Human Rights, *Guidelines*…, pp. 1-20.

are promoting.[9] This is good because, for the first time, this policy has included its definitions and principles; its organisation and management proposals; their criteria for evaluation and diagnosis. In this way, we are going to be able to make ourselves visible in international waters concerning Peace Education and Human Rights which will make it easier for us to incorporate best practices from other countries and also make our own small contribution. But above all – and this is our great hope – we wish to lay solid foundations so that this can move out of partisan territory in the mid and long term. There is little left to invent in the field of systematic work on human rights. To set the right course, we just have to set sail on major international routes where the concepts and principles are defined. This is precisely what we aim to do with the Plan: get to work as instructed by international organisations trusting that their authority and experience will help us to make progress so that this might be a land for everyone. We will do this by cultivating initiatives in our work traditions and according to our specificities.

For the first time, after almost 30 years of self-government, we have a Plan with these characteristics which brings together a set of more than 90 action programmes (70 from the Basque Government). Training and skills programmes; new intervention programmes via cinema or theatre; promoting agreements, subsidies and also specific programmes on the social-political reality of the Basque Country from the viewpoint of human rights. All this will be done with an overall budget of almost six and a half million Euros including the culture of the diagnosis and assessment to make this matter into a serious policy, where we know which way to go and how fast it is progressing.

But before analysing the most important contents of the Plan it will be worth presenting the preparatory stage that was brought about for paving the way for this course of action.

2. Background and Preparatory Actions for the Plan

Actions will be listed below which were used to launch and prepare the Basque Education Plan for Human Rights and Peace. These are actions which, in synthesis, already outline the official and social institutional framework which boosts and supports this issue today.

[9] Council of Europe et al., *Human Rights Education in the School Systems of Europe, Central Asia and North America. A Compendium of Good Practice*, Warsaw 2009, pp. 17-18.

2.1. Interdepartmental Committee for Peace Education and Human Rights

The starting point and official kick-off for the Plan was the creation of the Interdepartmental Commission for Human Rights and Peace Education (Government Council Agreement dated 17th October 2006). This commission received the formal commitment to draw up the Plan and it has worked as the coordinator and enabling centre for the institutional and social network of agents. It has been given the task of informing and collecting contributions from agents (Town Councils, Local Governments, Basque Parliament Humans Rights Commission, Official Human Rights Organisations such as Ararteko or Emakunde, Basque Radio and Television Broadcaster (EITB), the associations forum, the economic agents, churches, the youth people's associative sector, universities[10] and Human Rights institutes, international organisations such as the UN High Commissioner for Human Rights, UNESCO, European Council, etc.).

2.2. Diagnosis

The period for designing and progressively writing up the Plan lasted around fourteen months. The plan started by drawing up a complete updated diagnosis of the situation of Human Rights and Peace education in the Basque Country. The diagnosis has made participation possible from key sectors in promoting human rights and peace education (institutions, school agents, associations and nongovernmental organisations) who were able to contribute what they had done and what was being done and also their strategic view and future priorities.

2.3. Associations Forum

In parallel to writing the Plan, the Office for Human Rights of the Basque Government promoted the creation of an Associations Forum for Human Rights and Peace Education. The Forum was set up in March 2007 so that it could participate straight away in the process of producing the Plan making contributions and it is currently made up of more than thirty associations.

[10] The importance of the role of Universities, specially legal clinics, is higlighted by M. Mahdi-Meghdadi, A. Erfani-Nasab, 'The role of legal clinics of law schools in human rights education. Mofid University legal clinic experience', *Procedia Social and Behavioral Sciences*, No. 15 (2011), pp. 3014-3017.

2.4. Participation from Other Agents

During the months when the Plan was being produced, in addition to political negotiation with the different Basque Parliament groups, drafts were exchanged and contributions received from the Forum of Associations for Human Rights and Peace education (grouping together around 30 NGOs from Euskadi), Amnesty International, Escola per la Pau (UNESCO lectureship in Barcelona) or the United Nations High Commissioner for Human Rights. It should be highlighted that the Plan has also been submitted to the (non prescriptive) ruling from the Euskadi Schools Council and which was debated in detail in an International Conference (Arantzazu, July 2006) on peace education organised by an Institute from the University of Columbia (New York) involving more than 60 specialists.

2.5. Public Media (EITB)

Prior to approving the Plan – although now included in it – a Collaboration agreement was signed with the Basque public media (EITB). This agreement (Permanent collaboration agreement between the public entity Euskal Irrati Telebista and the Department of Justice, Employment and Social Security dated 2nd May 2007) aims to create the structure and basis for operating principles making it possible, in the most effective and sustainable way over time, to meet the social responsibility quota that corresponds to the media regarding Human Rights and Peace Education. In matters relating to human rights, because they are the basis of any serious injustice so that education in this field is the basis for the specific development and taking root of any more specific education (citizenship education, democratic values, for development, anti-racist, peace). But also, specifically, in matters relating to peace education because the presence in Basque society, for too long, of violence as a supposed form of resolving conflicts requires a specific approach which takes note of reality to redouble its efforts where they are most required.

The Agreement creates a decision body – the Council for Education in Human Rights and Media – and a technical secretariat which are in charge of planning and deciding, annually, on the specific actions to be run and their assessment. The first Plan of Action was approved in December 2007 and assessed in December 2008.

2.6. Resources Centre – Human Rights Website

The centre emerged from the need to institutionalise a peace and human rights culture knowledge space around everything which is generated (ideas, analysis, developments, implementations) within the framework of associations and institutions in the Basque Country giving better and greater use of existing resources.

The aim, therefore, was to design a reference space where different sensitivities can meet, founded on human rights and peace culture. That makes it possible to circulate and raise awareness on the constitutional values of human rights, to implicate institutions, associations and citizens in general; provide resources to ascertain (observing, analysing and evaluating) the past, present and future of human rights and peace in the Basque Country; and which can be used for reflection.

The Basque Plan for Peace Education and Human Rights committed to creating a Centre for Resources, Assessment, Technical Assistance and Information which must become the central technical body of the whole institutional framework. This Centre began to shape itself to a progressive constitution strategy back in 2006. In the first phase, it was primordially commissioned to promote and support creating the associations' forum through the Technical Secretariat and to start preparing the resources map. It has also been running preparatory actions such as designing, implementing, feeding and maintaining a website (www.bakegune.net) as a human rights portal including complete information on both the institutional and social spectrum. It is a tool which aims to be used as a reference point offering our community information without closing doors to initiatives from beyond our borders.

This website also fulfils the function of a communication mechanism and link with the Forum of Associations for Peace Education and Human Rights and in the future with members of the Basque Plan Consulting Council.

Finally, the resources centre is working on a consolidated "information highway" system which permits the flow of online resources and building a documentation centre among all the agents which can be used as a technical basis for the functions of consultancy, assessment and future planning.

3. Basque Education Plan for Peace and Human Rights (2008-2011)

The Plan structure responds, on the one hand, to its configuration as a Plan of Action and on the other hand, to its necessary pedagogic nature making it accessible to a wide range of sectors which must become involved in its implementation.

3.1. First Part of the Plan: Descriptive Part

The first part (called the *Descriptive Part*)[11] presents the context which is used as an institutional, social and standard-related reference framework for this Plan. This first part gives the key aspects which help us to understand the justification of this type of Plan. This thereby locates this Plan within the context of the docu-

[11] Basque Government, *Basque Education Plan…*, p. 23 ff.

ments and obligations for promoting the culture of peace and human rights which emanates from the United Nations (High Commissioner for Human Rights), UNESCO or the European Council **(international context**). This explains its junction with context of state policies (**state context**). As a third line of contextual approach the background of the institutional work is developed, particularly from the Basque Government, in boosting the culture of peace whilst explaining the political commitments underlying the plan: that means, complying with the Plan for Peace and Cohabitation in its final strategy, the victims agreements from the Parliament and the demands from the UN High Commission on the matter.

However the first part also includes a summary of the results of a diagnosis[12] which was being carried out by the Human Rights Board throughout 2007 on the state of peace and human rights education (in formal, non formal and informal education) in the Basque Country. The updated diagnosis of our (institutional and social) capabilities and our evolution is essential to seriously, and with knowledge of our cause, determine our target for the next four years. The Plan therefore appear justified in its structure and targets from the preceding work and as a result of the demands from this work reflected in the diagnosis.

3.2. Second Part of the Plan: Substantive Part

A second part (*Substantive Part*)[13] describes the basic political options shaping the document. The primordial objective is definitely specified, along with the governing principles and the strategic lines.

The objective of the plan is to promote Human Rights and Peace Education in Basque society, optimising existing resources and generating necessary synergies among the different strategic sectors. It also involves drawing up a programme for systematic, coordinated, permanent and sustainable action to inform, train, promote and diffuse the human rights and peace culture. In the midterm, information and training aim to change attitudes in many sectors of the population.

By means of this general objective, we hope to achieve:

1. A Basque society which is aware of Human Rights and the situation of others in their immediate environment, which promotes their knowledge, defence, exercising and promotion when faced with situations where these rights are infringed.
2. Public administrations which lead public policies on duly coordinated Human Rights and Peace education, and which guarantee the correct use of the existing resources, generating the necessary resources and programmes.

[12] Ibid., p. 40 ff.
[13] Ibid., p. 63 ff.

3. A social-educational fabric which is active in dissemination and promotion of Human Rights and training society in the field of education for Peace and Human Rights.
4. Media, particularly publicly owned media, especially active in broadcasting and active pedagogy of human rights and peace.
5. The Governing Principles of the Basque Plan for Human Rights and Peace Education are divided into general, substantives and organisational principles. The general principles are suggested by international organisations for this type of plan. The substantive principles inform on the Plan's later strategic lines, whilst the organisational principles focus on their implementation.

So, to achieve the central objective, the following substantive governing principles are necessary and sufficient:

1. Dignity Principle.
2. Public Responsibility Principle.
3. Social Participation Principles.

Having presented the objective and governing principles, the Plan presents four basic strategic lines each one with their corresponding general and specific objectives. At the same time, these four strategic lines will be used later on to provide a backbone for the actions in the operative part of this Plan:

1. Social Awareness-Raising General objective: Disseminate the values of a Peace and Human Rights culture in Basque society.
2. Social Training General objective: Train Basque society in the field of Human Rights and Peace Education.
3. Institutional Training (Empowerment) General objective: Strengthen the work of the institutions and organisations in the field of Human Rights and Peace Education.
4. Coordination (Promotion) General objective: Leading policies on Human Rights and Peace Education in the Basque Country.

3.3. Third Part of the Plan: Operative Part

Finally, at a level of greater specification, a third operative part[14] establishes the different sector-based intervention programmes from the institutional field (six sector-based programmes from the Basque Government, three programmes from each of the Local Governments and a sector-based programme from Town Councils –EUDEL–).

The programmes identify the protagonists in charge and provide details on a set of actions which will have to be developed to progressively put down roots for a more widespread and intense culture of peace and human rights. It identifies

[14] Ibid., p. 77 ff.

a total of almost 90 actions or programmes of which almost 70 correspond to the Basque Government.

The following stand out among these initiatives:

1. Developing multiple training programmes for members of NGOs, political assignation positions, prison officers, police, young community mediator leaders, teaching staff, etc.
2. Subsidy programmes for associations, municipalities and schools and for projects specifically aimed at young people.
3. Grants programmes.
4. Programme of educational intervention in matters relating to human rights and for peace through the cinema.
5. Programme of educational intervention in matters relating to human rights and for peace through the theatre.
6. Programme of educational intervention in matters relating to human rights and for peace through EITB and particularly BETIZU.
7. Programme of educational intervention in matters relating to human rights and for peace which particularly affect the intercultural perspective.
8. Pilot projects in matters relating to human rights and victims of terrorism (didactic units).
9. Boosting informative publications lines comprising basic texts on human rights and peace.
10. Promoting university studies on human rights and victims.
11. Sessions on best practices for education for Peace and Human Rights among municipalities and associations.
12. International seminars.
13. Boosting Agreements with international organisations for human rights and peace.
14. Developing awareness raising campaigns.
15. However, maybe the star project is the development and consolidation of the **Centre for Resources, Assessment, Technical Assistance and Information** on peace education and human rights.

This third part also determines an **organic structure** which is specified, on the one hand, in the Interdepartmental Commission for Human Rights and Peace education (Basque Government) and, on the other hand, in the new **Consulting Council for Human Rights and Peace Education**. This will be the structure in charge of assuring that the Plan is carried out correctly for a critical period of four years (2008-2011).

The Plan, in final terms, also alludes to the criteria and people in charge of monitoring and evaluating the Plan and the budgetary base to make this feasible: a total of almost **6.5 million Euros** of which almost **5.6 million** correspond to the Basque Government and 850,000 Euros to Local Government.

4. The Basque Plan for Peace Education and Human Rights: First Evaluation

The Basque Plan for Peace Education and Human Rights 2008-2011 was approved by the Government Council on 26th December 2007. As the Plan itself determines, it will be obligatory one year from its definitive approval to produce a first impact assessment, looking above all to identify needs for adjustment, correction, complementing or broadening actions in all sector fields. This should give, after running the Plan for one year, an accurate completion timescale and a much more detailed budgetary adjustment.[15]

The Basque Government Interdepartmental Commission on Human Rights and Peace education was responsible for approving the assessments – both complete and partial – at the request of the Office for Human Rights and this Committee met on 20th November 2008 and approved the evaluation document ratified by the Government Council Agreement of 10th February.

The most significant conclusions of the assessment were as follows:

A) The Plan is in progress and its speed of completion is much faster than what would be essential to assure that it is duly finished completely within the four year period that it covers. The data speaks volumes: out of 92 actions planned, 63 have already been implemented (68.5%). In addition to being implemented many of them have been completed (34 out of 92; 37% of the Plan has been completed). So we can rest assured that the first promotion of the Plan has begun securely with guarantees of completing all the programmes by the time it finishes in 2011.

The data already given on the actions started appear graphically in:

– Line 1: social awareness raising
- itinerant exhibitions;
- translation and dissemination of basic texts on human rights and peace;
- intervention programmes using cinema or theatre;
- forums and international seminars on human rights;
- support for publication and research on the topic;
- topic-based websites;
- special campaign for 60th anniversary of Human Rights…

– Lines 2 and 3: social and institutional training
- development of educational leisure programmes on Human Rights;
- drawing up didactic guides for teaching staff and students on training courses for free time instructors and management staff;
- development of the Programme to participate in the Basque Parliament («Debate with us»);

[15] Ibid., pp. 21-22.

- development of the La Peña pilot project An educating district (Zamákola project);[16]
- development of a specific programme on peace education particularly looking at the reality of the Basque Country on the basis of the pilot projects completed in the 2006-2007 academic year (A society which builds peace) and in the 2007-2008 academic year (Taking steps towards peace);[17]
- postgraduate programmes on victims and human rights;
- civil servant training programmes;
- Ertzantza (police) training programmes;
- subsidy lines for project for schools and teaching staff;
- subsidy lines for project for town councils;
- drawing up a permanent collaboration Agreement with the Forum of Associations for Human Rights and Peace education in the Basque Country;
- producing a Memorandum of Understanding with the United Nations High Commissioner's Office for Human Rights.

– Line 4: coordination and promotion

- creation of the Centre for Resources, Consultancy, Technical Assistance and Information;
- creation of a Centre for Resources, Consultancy, Technical Assistance and Information from the Plan which will fulfil the consultancy function in terms of municipal policies concerning Peace Education and Human Rights;
- creation of a topic-based website as a centralised informative instrument on the real situation of Peace Education and Human Rights in the Basque Country;
- promotion and planning for the media sector (EITB): evaluation 2008 and planning 2009.

B) All the strategic lines (awareness raising, social training, institutional training and promotion) and the programmes also present a coherent and uniform degree of implementation which is reflected by the fact that at least 50% of the actions in each line have been started and are in progress.

C) It is important to highlight the homogeneity and implication of the institutional agents in charge of the Plan. This first year of completion has demonstrated interest from all the administrations – and particularly the Local Governments – to work in the Basque Country for Peace Education and Human Rights. As highlighted in the conclusions from the assessment, 75% of the actions are run in jointly between different agents and administrations and, therefore, involve the whole institutional fabric and its coordination, lacking previous experience in this respect, is revealing itself to be one of the most relevant potentials for the immediate future.

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[16] CEP Zamakola-Juan Delmes LHI (Bilbao), *Bizi gaitezen elkarrekin. Proyecto escolar de educación para la convivencia*, Vitoria-Gasteiz 2009.

[17] M. Garaigordobil, *Evaluación del programa "Dando pasos hacia la paz – Bakerako urratsak"*, Vitoria-Gasteiz 2009.

D) Another positive point from the assessment is to have managed to make another firm step towards a better adjusted time scale and budgetary forecasts. After this assessment, practically all the actions in the plan have an accurate completion timescale and the budgetary forecasts have also been adjusted for each individual case according to the type of actions which permit this type of calculation.

As a summary: the assessment demonstrates that the Plan was in progress and running at a good pace, with homogeneity in all its lines and action programmes and with the whole institutional and social fabric involved responsibly working for Peace Education and Human Rights in the Basque Country. On a more technical level, after the assessment we had an accurate completion timescale, a much more individualised budgetary forecast and a more purified and operative model for planning and collecting information which will assure the final assessment of this Plan.

Last but not least it is important to underline again that the Basque Plan was included as a *Good Practice* at international level within a Compendium published by the Council of Europe, OSCE, ODIHR, UNESCO and OHCHR.[18]

5. Further Developments and Final Remark

By 2009 the first Basque Plan for Peace and Human Rights Education had been set completely in motion after having succeeded in pushing ahead more than 60 per cent of the total action programs during one year and a half. A global assessment of the Plan for that period of time had been completed with very good results. Moreover according to international and independent assessment from human rights official organizations the plan had been considered as a good practice in the field.

However, and that is key point of this final remark, when a new ruling Basque Government came to power in 2009, the Plan was radically transformed. Instead of paying attention to the whole culture of human rights, the focus was set in a very concrete initiative: to bring testimonies of victims of terrorism to the formal school system. The new representatives of the Government claimed that just to push ahead a general culture of human rights was not enough and could even amount to a kind of justification for terrorism and a way of getting rid of responsibility in telling new generations that history of terror.[19]

The new plan arose a counterproductive reaction against human rights education and throughout 2010 and 2011 it was almost impossible just to tackle this issues in public discussion without a great deal of bitterness and refusal by large sectors of the Basque Public.

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[18] Council of Europe et al., *Human Rights Education*…, pp. 17-18.

[19] See the whole document related to the new version of the Plan and further information about its enforcement at <http://www.jusap.ejgv.euskadi.net/r47-dheduki3/es/contenidos/informacion/plan_convivencia_mayo10/es_plan/2010_2011.html>, 27 December 2012.

After two years of political battle this new direction of the plan was abandoned coming back the Government to an attempt of building up again broad consensus in the matter.[20]

Therefore, the evolution of human rights education policy in the Basque Country comes to a standstill where the tension between two different approaches in the field had open new perspectives for a more inclusive future. The first plan was based in a model of indirect education for human rights and peace assuming that pedagogical (direct) intervention related to our own human rights violations in the Basque Country needs previous and wide support, absent at the moment, amongst both the general public and political arena. It is not possible to try to solve through the school issues highly controversial and subject to hot political discussion. Probably, where there is no consensus towards the existence and the extension of human rights violations, as it is the case nowadays in the Basque region, it is not possible to try to set a successful strategy at the formal educational system based upon tackling directly those infringements. Direct education for peace and human rights, that is education which faces our own ongoing violations of human rights demands special conditions such as consensus at political level.[21]

After the ceasefire of the terrorist organization ETA the aforementioned consensus is closer than ever for the Basque Country. From indirect education to a direct one a transition should and could be carried out. However a lesson should have been learnt: let us continue the long way to peace all together!

Abstract

For decades, Basque society has been suffering different types of violence: civil war of Spain (1936-1939); repression under the dictatorship of the Franco Regime (1939-1977); and, more recently, during the transition to democracy, both terrorism carried out by non-state actor actors (ETA) and torture, police abuse, as well as other kinds of politically-motivated violence committed by the State (and/or state-sponsored or state-like) apparatus (1977-2011). The result has been a deeply divided society where violence has been used systematically in an attempt to achieve political goals both related either to (a higher degree of) autonomy/independence for the Basque region or to a greater deal of identification-integration with(in) Spain.

In 2007, a Basque Education Plan for Peace and Human Rights (*Basque Plan*) was approved as a result of a long participation process that lasted almost two years, and succeeded in enabling a full range of stakeholders (NGOs, Basque Defender of the People' office, Youth representatives, Universities, Human Rights Institutes, formal and non-formal educational agents, Basque media, local, regional and central Basque Governments' authorities etc) to present proposals and to draft the final document. Following the model

[20] See information available at <http://www.irekia.euskadi.net/es/news/8662>, 27 December 2012.

[21] D. Bar-Tal, Y. Rossen, 'Peace education in societies involved in intractable conflicts. Direct and indirect models', *Review of Educational Research*, Vol. 79, No. 2 (2009), pp. 557-575.

plan (*Guidelines for national Plan of Action for Human Rights Education A/52/469/Add.1, 20 October 1997*) issued within the framework of the United Nations Decade for Human Rights Education of United Nations (1995-2004; A/RES/49/184, 6 March 1995) and with the support of the Office of the United Nations High Commissioner for Human Rights, the Basque Plan was included as a *Good Practice* at international level.[22]

The Plan seeks to identify steps whereby the Basque Country can use education as a means to improve the promotion and protection of human rights and it has four main strategic goals: to raise social awareness about human rights; to educate society about human rights; to enforce institutional work in human rights and peace education; and to coordinate policies of peace education and human rights in the region. The Plan is based primarily on non-formal approaches but also incorporates actions specific to the school system.

The aim of this paper is, on the one hand, to present the process of drafting a Basque Plan, its structure, main contents and implementation. On the other hand, however, it will be worth illustrating positive achievements acquired by means of the Plan but also political and technical difficulties the plan has been coming through so far.

Finally, as a conclusion, in analysing the mentioned implementation process and the evaluation of the Basque Plan it will be subject to discussion whether a *direct peace education* (i.e. that which face its own ongoing violations of human rights), and not just an *indirect one*, is likely to be successfully carried out in divided societies and under which kind of conditions should it be possible.

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He has been research or visiting fellow in Hamburg (2000, DAAD), Heidelberg (DAAD, 2004) and recently at the Lauterpatch Centre for International Law (University of Cambridge UK, 2010 2011, 2012). He was awarded with the Von Humboldt research fellow in November 2005.

Prof. Landa has been Director of the Human Rights Office of the Basque Government from November 2005 until Mai 2009 where he was involved in the implementation of policies for politically motivated victims, peace education and human rights policies.

At the moment he is director of a research team funded by the Spanish Government (I+D+I DER2012-33215) analyzing the system of criminal sanctions with a comparative approach.

[22] Council of Europe/OSCE/ODIHR/UNESCO/OHCHR, *Human Rights Education in the School Systems of Europe, Central Asia and North America. A Compendium of Good Practice*, Warsaw 2009, pp. 17-18.

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Mediator vs. Instigator Strategies Through Human Rights Education: The Case of Cyprus

Introduction

"Cyprus is the birth place of the celebrated Goodness of Love", which is why the slogan "make love, not war" would fit so well for the island of Cyprus. It could have been "one of the most fascinating places on earth". However, for the reason that it is situated right in the hearth of the Mediterranean; the recent history of Cyprus is full of the events of conflict and war. There are a limited number of societies in 21st century that are divided. Cyprus is one of them, with a special form that divides not only the societies but the capital city as well. More importantly, the division seems to be going *beyond* a mere geographic concern. That is why David Harvey was quite right to point to the relation between the city and sociology rather than city and geography.

States today have been developing strategies on how to diffuse human rights education since 1995 if not before; as the years 1995 until 2004 were identified to be the 'United Nations Decade for Human Rights Education'. However, we do not see this process in Cyprus. Although talks for a comprehensive settlement have been going on between the leaders of each side, there is a lack of a change in the ground level. This paper argues that Human Rights Education could be employed in the process of transformation. The transformation towards eliminating otherness in Cyprus can be achieved through an effective HRE.

1. Historical Background

"In the aftermath of conflict, revising the content of history curricula presents states with an important means of conveying new narratives of the past, which influence the national identity of citizens, particularly those of the next generation".

1.1. Ottoman Rule

It is important to note here that "during the Ottoman Rule in Cyprus, we can hardly speak of ethnic conflict, but neither we can speak of integration […]"; "an idea of a single overriding and cultural identity makes little sense"; "The peasants did not think in terms of nation but in terms of religion and local circumstances". Shortly, in the Ottoman Rule, the Turkish and Greek Cypriots used to live together without any boundary and more importantly without any need for any border. After the Alliance of Ayastefanos which gave right to Russia to control Hellespont, European countries declared that the Alliance is not recognized by them. Ottoman Empire were invited to a Conference in Berlin and forced to agree on leaving the administration of Cyprus to Britain.

1.2. British Colonial Rule

"In 1914, Ottomans joined the axis powers in the First World War and this joint was followed by Britain's annexation of Cyprus". This annexation had continued approximately nine years until the new government of Turkey recognized it. "In March 1925, Cyprus became legally a royal colony of Britain". In the end of 1930s, the Second World War had started; its affect on today's politics is beyond doubt. Incontrovertibly, it helped the emergence of new powers and their permanent control all over the world. Surprisingly, "Cyprus itself did not affect by the war gravely"; however, since the end of the Second World War, everything went wrong in Cyprus.

It was recognized during the British autonomy that schools and schoolmasters were two major obstacles of creating a common identity based on Cypriotness. One could argue that banning to teach Turkish and Greek histories at schools were based on the idea of preventing any possible ethnic conflict. The other interpretation could based on eliminating non-British instruments not particularly because they were creating Turkishness and Greekness; but because they were not helping to create Britishness. Interestingly, the reaction of this reform was quite different between two communities: while Greek Cypriots claimed this is a "dehellenization" – which actually supports the second interpretation – Turkish Cypriots never used any term directly related with de-identification, for instance "deturkicization". The key result that rises from this debate is not to what extend Britain could stop the ethnic conflict but rather the fact that ethnic identity indeed taught at schools.

1.3. Republic of Cyprus

After a conference in London in 1959 where Cypriots were *not* invited, it was agreed to establish a new and independent republic in Cyprus. Republic of Cyprus

established in 1960 and worked quite well for three years until the drama of 1963 that has an unquestionably affect on today's interpretation of a *Greek Cypriot* by a Turkish Cypriot. The dramatic events were started through Makarios's proposal that suggested removing the right to veto both for Dr. Küçük[1] and Makarios III.[2] According to the Report of 1964 by the Secretary General of the UN, "after 1963, the number of Turkish Cypriot people who seek help in one way or another from the Red Crescent are 25,000 settlers, 23,500 unemployed, 7,500 members from missing families. In total, 56,000 people were in need of help". A well-known military regime in Greece between 1967 and 1974 leaped up to Cyprus. The reaction for this undemocratic fashion in Cyprus was a well planned military intervention by Turkey that took place on the 20th July 1974. A case-fire was declared between both sides on the 25th July 1974; however, this could not prevent the second intervention to come true. Turkish army occupied 37% of the island in the second intervention which is still the case today. That is why Cyprus remains to be a semi-occupied island. The drama of 1974 admittedly has played a key role on today's comprehension of a *Turkish Cypriot* by a Greek Cypriot. "Education played a central role throughout the 20th century in disseminating the ethnic nationalisms that have divided the island. Dominated and influenced by the irredentist nationalisms of Greece and Turkey, Cyprus of this century has experienced intercommunal conflict and mistrust that ultimately resulted in 1974". "In other words, independence from British colonial rule did not bring forward a nation-building project capable of embracing different ethno-religious segments of Cypriot society".

2. Examination of Educational System in Cyprus

2.1. Greek Cypriot Community After the Partition

The much centralised position of British rule has been left to Cyprus by Britain. The central-based approach can be seen on the overall educational system. Ministry of Education and Culture is the core responsible and the only decision-making organ for both major and *minor* determinations. One of the key problems of the system is the seniors' position which non-essentialise a reform. Having said that, it is becoming obvious that the education has been transformed to a complex system where it became nothing but propaganda of the status quo. In Cyprus, status quo means the maintenance of the division between two communities with clear boundaries. "The boundary is the point or line in space where two entities touch each other; the focus is necessarily in contacts". According to the arrangements of the Green Line, a line has been drawn on map which was applied to reality; this made any contact almost impossible between two communities until the opening

[1] Dr. Küçük was the vice president of the Republic of Cyprus.

[2] Makarios III was the president of the Republic of Cyprus.

of check points in 2003. Therefore "contact" meant, for long time, the two points of the line touching each other on ground; but not the contact of people living in each side of Cyprus. "The 1974 War, which divided the island into two ethnically distinct geographical areas, cut off nearly all contact and communication between the two communities". The strict division, very centralised position of education, recent history of Cyprus all together helped to the creation of a value-based education. Such values depend on nationalist, biased and subjective understandings. "Nationalism can be identified as a process of boundary creation or maintenance propounded by political leaders who wish to promote an ideology of egalitarian, yet exclusive, legitimacy, according to which each self-defined "nation" has the right to its own state and to be governed by in-group members".

The Reflection of Ethnic Nationalism on Greek Cypriot School Books can easily be observed right from the cover of history books that are being taught at schools. "The cover of the Greek primary school history textbook on the history of Greece […] presents a group of Greek fighters against a background of Turks holding Greeks captive, while one Turk wields a curved sword ready to behead them". Showing Turks as "barbars" is something that became "natural" in the teaching of history in Greek Cypriot community. "The educational system, and teachers in particular, is involved in the task of naturalizing". It could be claimed that the anger is to "Turks" especially through the reference of 1974. However, there is no clear distinction between Turkish and Turkish Cypriots and as "all the books employ the term Cypriots (Kyprioi) as equivalent to Greeks (Ellines), often within the same sentence or paragraph"; it is not surprising that the same equivalency is indirectly taught about Turks and Turkish Cypriots. That is why Marinos – sixth grade student – says "I am not sure if all Turkish Cypriots are good because they have the blood of the Turk inside them". Greek Cypriot children tend to have a "paradox" as Spyrou puts it while describing a Turkish Cypriot primarily because they have almost no idea about them.

The curriculum is found by pupils difficult to understand and by teachers difficult to teach. According to a fourth grade student, "text is full of difficult terms". One could rightly ask at this point whether these terms have been explained to the pupils in detail or not. The policy of the Ministry of Education is to ensure that the curriculum is totally covered; therefore it seems that in many occasions, such terms have been left suspense for the sake of covering all the topics in textbooks. Additionally, many of the books that are published in Cyprus are not written by experts. It is not because there are no experts; but rather it is because this systematically leads the requirement of receiving books from Greece. "Greece has been providing educational materials (e.g. textbooks) and other assistance, a tactic that is still followed". "20% of the material taught derives from the Cypriot textbooks and the rest from the Greek one".

2.2. Turkish Cypriot Community After the Partition

Cyprus has been divided since 1974. The non-recognised government of 'Turkish Republic of Northern Cyprus' (TRNC) – besides Turkey – was established in 1983. During the 9-year "gap", Cyprus Turkish Federal Government (Kibris Turk Federe Devleti) was effective as a temporary administration. "According to UN's Security Council resolution number 541 and 550, TRNC is «void and non-existent»". Right after two days from the establishment, UN Security Council clearly stated that "the proclamation of such republic of Turkish Cypriots was denounced; and it had been required that self-proclaimed state should be retrieved". However, Turkey seemed to be just ignorant towards the calls simultaneously attempting to be the core supporter of the establishment; if not being the impellent. Even though, the motivation of the government was independence from the Republic of Cyprus, the same logic was followed in the educational system. In other words, education in the north part is as central as was and is in the Republic of Cyprus.

Reflection of Ethnic Nationalism on Turkish Cypriot School Books is observed immediately from the cover page of history books, very similar to the Greek Cypriot case. "The relevant book features Atatürk, the founder of modern Turkey, on the cover. It opens with the flags of Turkey and the self-declared 'TRNC' superimposed over the national anthem of Turkey, followed by a photo of Atatürk, a practice incidentally also followed in the new books due to its enforcement by law". It is worth to note that there is neither a photo of Denktash – the founder president of TRNC – nor the photo of Eroglu – current president of 'TRNC'; but Atatürk. This is how it is in the history school books of Turkey as well. Right after the establishment of modern Turkey in 1930s, the state and Ataturk himself put a strong control over history writing, the historical subjects to be taught, the fields of research were decided by the state. Every decision regarding education is taken by the Council of Discipline and Treatment *(Talim ve Terbiye Kurulu*) in Turkey; significantly all textbooks used at schools in north Cyprus must be authorized by the Council as well. "History of revolution of the Republic of Turkey and Ataturk's history" is one of the compulsory courses in the Turkish Cypriot curriculum, while human rights education (HRE) is not. Human rights have been added into the compulsory courses in the schools of Turkey; however, the question why the north Cyprus has been deprived from this right still remains to be answered according to Çelebi. In an attempt to provide an answer to his observation, I would argue that this is because of the fact that "human rights education is inherently revolutionary" whereas the primary goal of education seems to be nationalism-oriented aimed at anti-revolution. As Bryant puts it better:

An education in nationalism must be an education oriented towards the future and thus is primarily a moral discipline that produces the habits of patriotic life. The schools of Cyprus did not practice a discipline that was a process of objectification of the individual and the body, but one of subjectification, one

in which the individual is not calculable but malleable, in which the student is not exhorted to control himself in relation to himself, but to control himself in relation to others.

3. Overall Framework of Educational System and Human Rights Education

Memory has become a major issue that is deeply associated with social identity, nation building, ideology and citizenship the educational system in general and the history education in particular is characterized by keeping the memory alive. The debate is not just about whether children should be taught to remember the past, but also how the past is interpreted. That is why in the light of this agenda, the emerging question is: how the repositioning should be in Cyprus in order to effectively help the society as a whole to make sense of peace? Or alternatively, has the way educators use past historical traumas to re-socialize children been locked the way through a comprehensive settlement of Cyprus problem? And after all, can an educational system that has emphasis on human rights be the key for unlocking the door that blocks peace in Cyprus?

Any attempt based on "commonalities" rather than differences or in more known terms, otherness requires decentralization. Education has been used as an ideological apparatus in Cyprus for injecting young brains there is no way for a peaceful settlement in Cyprus. Indeed, the centralised position of educational decision making in both communities have been a sufficient element which created and maintained otherness. As mentioned earlier, the core responsible for evaluating textbooks taught at schools in north Cyprus is called the Council of Discipline and Treatment. It could not have been more obvious that the fundamental function of the Council is to discipline. What is needed first of all; however, for making sense of peace through human rights education is in Foucault's terms anti-disciplinarity. In an environment where education is being taking care of so-called motherlands – Greece and Turkey – how can one write about their own history? As Marx impressively puts it: "Man makes his own history, but he does not make it out of the whole cloth; he does not make it out of conditions chosen by himself, but out of such as he finds close at hand".

The definition of human rights education may vary from nation to nation but more importantly among nations as well. While definitions by governmental bodies emphasize the role of human rights education to create continuity, peace and social order; social order almost finds no reference in the definitions of NGOs. The understanding of human rights education by NGOs tends to minimise the state power and its control over people while attempting to maximize social change. As seen, the two definitions are almost contradictory to each other: social order and social change. In other words, HRE remains to be preservative according to the governments while it must be transformative for NGOs. Therefore it is *not*

puzzling "why so many states in fact promote HRE". This paper focuses on the definition of NGOs which seems to be promising for conflict-resolution. As it is after all clear that the current educational system in Cyprus which lacks HRE can offer a very limited help for conflict resolution. In other words, transformation is a must for a peaceful environment. Definition by educators are also valuable for the purpose of gaining peace through HRE as highlight seems to be the human being rather than any nationalist, religious, ethnic or whatsoever identities that polarize humans in general and Turkish and Greek Cypriots in particular. Much educational research in Cyprus is based on quantitative criteria while the human rights perspective seems to be ignored especially for paving the way to prevent conflicts between both communities.

Everywhere in the world but especially in divided societies like Cyprus, education is an important vehicle to blame the "other" for conflicts. Needless to say, this type of education is nothing but an extremely top-bottom mechanism. This paper argues that the ideological orientation of HRE in both formal and informal education must be rooted by these categories to be transformed to bottom-up model:

Citizenship: Most human-rights related accords tend to underlie the rights of "humans" rather than groups. This method; however, is likely to exaggerate differences between "us" and "them". In the case of Cyprus where the differences have already been exaggerated between the two communities, HRE need to focus more on the group rights rather than individuals. This facultative choice could be based on suffering principle. In other words, emphasizing the values of non-discrimination, equality, solidarity on the basis of common human suffering will lead the realization for the human rights violation of the group that has been identified as "other". "The current formal, taught curriculum of citizenship […] meanings for what citizenship is and can be" says Abowitz and Harnish. I argue; however, in Cyprus the formal citizenship education also produces a scope that indirectly but effectively build up what citizenship is *not* and can*not* be. The current systems of both sides try to explain under the counter that citizenship is *not* and can*not* be Cypriot; but Turkish or Greek. As Pingel has already stressed out, "in Cyprus […] the identity does not refer to Cyprus itself; but to factors outside Cyprus, such as Greece, Turkey and Greek and Turkish nationalism". In an attempt to overcome our conflicts, empathy and compassion are vital skills that needed to be developed. HRE for global citizenship seems to offer an ideal ground. Recognizing the other's loss opens up a space for connecting through an empathetic sorrow.

Ideology: HRE that is rooted by human rights ideology deals with classroom relations in particular and power relations in general; aiming at developing a critical understanding of suppression. "Although we are not educating children to be Human Rights Commission judges, we are educating them to participate in society reflectively and critically". Educators are expected to get involved in the task of ideology-liberalisation. "Such a politics of [HRE] pedagogy does not simply tolerate otherness in the classroom – but witnesses the other's suffering. Witnessing

calls for action that is resulted of learning to become a witness and not a simply spectator".

Transformation: The process of re-examining and re-framing history shall lead to a transformation in history textbooks taught at schools. Also with the help of critical but humanitarian ideology, HRE shall help to understand "how human rights and standards are *selectively*[3] respected". HRE cannot be imparted within four walls of the classroom […] should lead to collective action. Therefore HRE gains a meaningful status once it goes beyond from being just another subject added in the curriculum. If HRE is a promising tool for change, it must be more than knowledge about human rights documents but to empower and activate individuals. "Empowered subjects can participate in the transformation of society on the basis of human rights".

Willingness: Conflict, anywhere in the world, will not be solved and given on a silver platter. It can only be achieved through a process of willingness. Willingness in emotional terms is crucial; because it can be said that traumatic events affected everyone either directly or indirectly as everyone knows everyone in Cyprus. "Emotional readiness refers to readiness and willingness to achieve a more general emotional change; […] to become involved in educational efforts that promote peaceful coexistence and reconciliation". According to the research in 2009, there is no relation between emotional readiness to promote peaceful environment through education and traumatic experience. This finding seems to be very promising if implemented effectively in terms of conflict resolution. However, there is a relationship between readiness and structural support provided by governmental policy measures. Rather than interpreting this point as not promising; I would say that the opposite would be surprising in the current educational circumstances – the much centralised position of education. The evidence approves once more why an NGO based definition of HRE is required.

Conclusion

Like many Greek Cypriots, Anna grew up learning in school how "barbaric" and "evil" the Turks are. In May of 2005 Anna met a Turkish Cypriot, Ahmet, […] at a university cafeteria. This was the first time she met "one of them". Ahmet lived in the same village that her parents [did before 1974]. Ahmet invited her to visit her parent's village. Without an instant of hesitation, without knowing why […] Anna accepted the invitation. A few days later, Anna and Ahmet were walking in the streets of the village. At some point, they ran into an old [Turkish Cypriot] man. As soon as Anna pronounced her first and last name, the old man asked her in Greek "Are you the daughter of Andreas and Maroulla?" Anna was shocked. "Yes! But how do you know?" she replied. The old man said "You look exactly like

[3] Emphasis is mine.

your mother! You know we used to be neighbours with your parents. Let me take you to your house. Please tell [your father] that [I] take care of his house until [he] comes back".

Anna tries to explain the epiphany moment that changed everything: her transformed perspective about Turkish Cypriots and how she realized that they had also been refugees in their own country, they too had missing persons and lost loved ones in the war – contrary to everything she had learned in school. Finally Anna says "What matters to me is that I do not see Turkish Cypriots any more as the monsters described to us in school. They are human beings, just like us".

This paper is an attempt to look at the conflict-resolution issue in the light of HRE; suggesting that central to the peaceful settlement, cooperation and solidarity is the issue of observing all as human beings. The examination of current educational system in both sides of Cyprus and their role on disseminating otherness if not inhumanity helps to the maintenance of mistrust. "A key power of the state lay in its control of the flow of information through compulsory education, universities, and the media. Information is power. Wherever the state can control the flow of information, it could justify its exclusive, unchallenged monopoly over the means of violence, hence its legitimacy". I attempted to scaffold an HRE approach to a peaceful settlement in Cyprus.

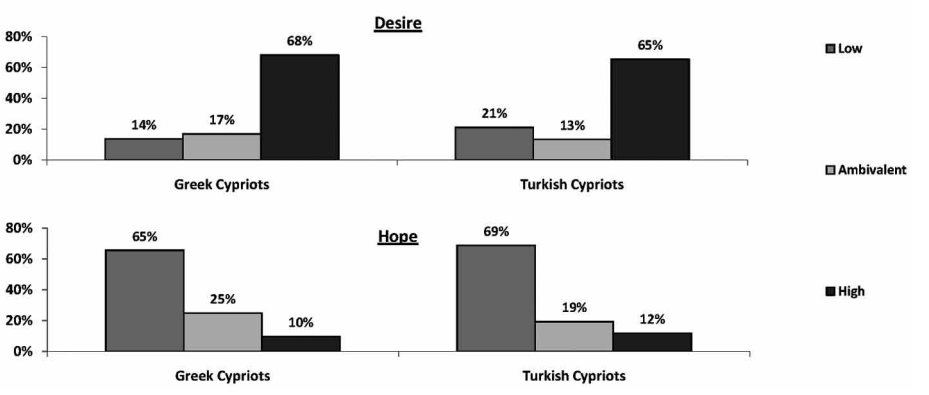
According to the research by Research and Dialogue for a Sustainable Future, the desire for a peaceful settlement in Cyprus is shared by at least 65% of the populations of both communities. The level of hope, however, is 12% or below.[4] It is obvious that we need to work on the improving our hopes for a peaceful future. "HRE is a vital and comprehensive approach which entails many hopes and visions". I have attempted to describe here how HRE might be a very promising starting point towards improving our hopes and therefore willingness to create our own peaceful environment.

Models and definitions of HRE generally focused on individuals. This article argues that a definition based on group-rights can play a significant role in divided societies, like Cyprus to overcome the past. To me, HRE signals entry to a more peaceful environment; in other words, it is a reconciliation strategy.

[4] Please see appendix 1.

Appendix 1

Level of desire and hope that the peace process should/will produce results[5]



Abstract

"The history clichés which are being taught at secondary schools are nothing more than a sham injected into young minds". "The human rights education […] is a social right just like the regular right to education. It is possible to say that the government in northern Cyprus violates both educational and fundamental human rights". "History of revolution of the Republic of Turkey and Ataturk's history is one of the compulsory courses in the curriculum northern Cyprus, while human rights are not. Human rights have been added into the compulsory courses in the schools of Turkey; however, the question why north Cyprus has been deprived of this right still remains". If one would like to make a link between the partition of the island and this deprivation; then probably the most logical one would be following: if many people achieve an awareness level the division causes human right violations in the region, then suppressing possible insurrections would be very difficult. The lack of human rights education plays a controlling mechanism over the population.

I would like to address the "mediator" mechanism of implementing human rights education in Cyprus over the "Cyprus problem". Cyprus remains an island divided into two halves today. In an island where each half is still seen as "other", if not enemy; one of the fundamental ways of eliminating otherness would be remembering that we are all human beings – through education. The Republic of Cyprus that practices control over south Cyprus in reality, has implemented such educational tools to some extent; however, there is a lack of any effort regarding the issue in north Cyprus. That is why I would like to examine what is being controlled by the lack of human rights education while the leaders of both sides negotiate on solving the Cyprus problem.

[5] <http://www.cyprus2015.org/index.php?option=com_phocadownload&view=category&id=1%3Apublic-opinion-poll&Itemid=34&lang=en>.

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Teaching about Rights, Freedom, and Democracy in Citizenship Education Classes in Bulgaria

Discourse on Practice

1. The Political "Forcefield" of Teaching Citizenship, Rights and Freedoms

In the last two decades, citizenship education has been high on the agenda in almost all European countries, "old" and "new" democracies alike. With more than 300 definitions of citizenship,[1] the term is intrinsically political. Furthermore, the very term "citizenship education", гражданско образование in Bulgarian, indicates the intricate relationship between politics and education. Education is in itself always political. The temptation to shape people in a certain ideological direction, to try to develop in them particular political attitudes and a preference for specific political ideas, and ultimately to influence their behaviour, is not new and takes many forms in many different societies.

In one form or another, citizenship education is present in all school curricula in Europe. Usually, citizenship curricula also include a substantial component of human rights education. There is practically no other school venue that offers systematic instruction on the topic. This is why studying citizenship education as a whole offers insight into the way human rights are taught as well. While education about democracy, citizenship, and human rights certainly does not happen only at school, the school is the designated institution which has the task, and the capacity, to do this in a sustained, systematic way, reaching out to practically all youth.

For this reason, our empirical study's focus is on social science teachers at the high-school level. In the context of broader objectives and school wide policy

[1] E. Jones, J. Gaventa, *Concepts of Citizenship. A Review*, Brighton 2002.

arrangements concerning citizenship education, the teachers are the ones who implement the task of citizenship education daily. Obviously, they do this according to their own understanding and skill. In the daily practice of teaching, they find ways to balance with many important, but often incompatible objectives, requirements, and conditions.

In Bulgaria, as in all former socialist countries, the introduction of citizenship education has been an important component of the democratic reforms. Citizenship education was officially included in the Bulgarian State Educational Standards since 2000.[2] Bulgaria has opted for a mixed approach, combining school wide citizenship education objectives with designated subjects in the high school curriculum – the so called Philosophical Cycle – Ethics and Law, Psychology and Logic, Philosophy, and in the last year, the integrative subject "World and Person".[3] Nowadays, citizenship education has a firm place in the Bulgarian school curriculum. Officially, its definition, purposes, and organization are well established. At the same time, many argue, this official consensus is "on paper only" and the reality is quite different.[4] It is tempting and easy for critics to claim that the practice is exactly the opposite to the official "window dressing" documents. In our study, we show a more complex reality – one of teachers implementing programs with varying degrees of success and based on very diverse premises, without necessarily being cynical or without outright ignoring the official programs.

It may be also very tempting for policy makers to introduce uniform citizenship policy, but the demonstrated diversity of views shows this is unrealistic. When we were gathering data in Bulgaria, one state official actually tried to prevent us from talking to teachers, literally stating: "We have standards; we have our officially approved curriculum and generally accepted criteria for evaluation, so teachers are not supposed to think any differently!". Let's leave it at that: it is naïve to think that you can tell any group of teachers, particularly in a post-communist country, what they are supposed to think. To the contrary, it is vitally important to listen to teachers regularly and to obtain feedback based on their inherent criteria instead of generic ones, as success and failure will also be defined in different terms.

Faced with the task to implement demanding and sometimes deliberately broadly defined curriculum in citizenship education, social studies teachers have to find a workable balance of conflicting demands upon their work: how to teach a subject according to their professional criteria and beliefs, while fulfilling the

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[2] R. Vulchev, 'The essence of civil education', 2008, at <http://www.opened-bg.com/index.php?url=goinfnbeg.php>, 2 June 2008 (in Bulgarian).

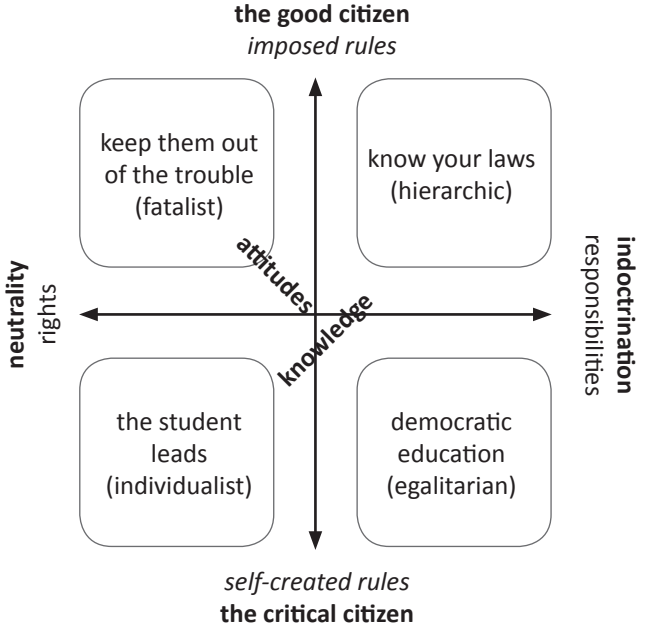
[3] Държавни образователни изисквания за учебно съдържание. Гражданско образование. Степен на образование. Основна. Етап. Гимназиален [State educational content standards. Citizenship education. High school level], at <www.paideiafoundation.org/mce/file/DOI_Gr_9_12.pdf>, September 2012.

[4] G. Dimitrov, P. Boyadjieva, 'Citizenship education as an instrument for strengthening the state's supremacy. An apparent paradox?', *Citizenship Studies*, Vol. 13, No. 2 (2009), pp. 153-169, http://dx.doi.org/10.1080/13621020902731165.

obligation to contribute to citizenship education? Should they educate students mainly about their rights or about their obligations? How do they find a balance between learning about freedom and about taking responsibility for a local and also increasingly global community? Should teachers remain neutral or rather propagate their own political and ideological preferences? Are they obliged to remain loyal to state policies or to the contrary, systematically criticize them? Should they shield children from political controversy or rather use it in the classroom? And finally, what kind of citizens would they educate – good and adapted ones or critical and caring citizens? These and other questions delineate the 'forcefield' in which social science teachers operate.

How to explicate and classify the different types of working solutions? In this study, we perceive the concept of citizenship education as the nexus of a number of important, but equally difficult to define concepts – democracy, politics, neutrality, political education, the place of education in society, and the teacher as a professional.[5] These are not totally independent from each other and do not form random "mix-and-match" combinations. Rather, they constitute "patterns of thinking and subsequent action", which are based on core beliefs about politics, education, and the teaching profession. These views are organized schematically as follows (Figure 1).

Figure 1: Four ideal types of views on citizenship education



[5] M. Jeliazkova, 'Democracy, values, and tradition. Dutch social studies teachers. Attitudes towards citizenship education', paper presented at the International Conference 'Political Mythology and History', University of Sofia, Bulgaria, September 2009.

We used the group-grid theory[6] to lay out the forcefield of dimensions where these diverse views and beliefs would fit. Group-grid theory has been applied to various policy domains. The four core-value system – conservative hierarchy, active and competitive individualism, egalitarian enclavisim, and fatalist isolates – serve as the researcher's compass in structuring and ordering existing discourses.[7] Applied to teachers' views on citizenship education, literature review and pilot interviews add up to a description of the following ideal types.[8] The individualist ideal type is concerned with educating critical citizens, but mainly aimed at promoting their individual progress and gain. The egalitarian type is also critical, but aimed at social equity in its criticism. Both teachers operate as a coach. However, the individualist one puts knowledge of "the system" at the forefront, whereas the egalitarian one is concerned with group values and morality. The individualist type shares with the fatalist one the ideal of remaining politically neutral, as opposed to the hierarchic and egalitarian ones, which are directly concerned with instilling and reinforcing particular values in their students. The hierarchic type is concerned with system-sustainability and thus at educating "good" citizens. The fatalist type sees the 'good' citizen more as one staying out of trouble. The fatalist type shares a preference for attitudes and skills with the egalitarian type, while the hierarchic type's focus is on knowledge about the social order and the established institutions. Unlike the individualists, however, they are concerned with assigning a proper place in society for the future citizens. While both the egalitarian and the hierarchic types encourage participation, the accent is respectively on alternative forms of (direct) participation as opposed to using the legitimate channels (elections, laws).

2. Research Design: Q-methodology as a Suitable Tool for Mapping Diverse Perspectives

Seventeen Bulgarian high school teachers were interviewed in the period of April-May 2011. All of them had academic education in either history or philosophy. Their teaching experiences ranged from three to over twenty years. The group included teachers from six towns in Bulgaria, including the capital, with population size varying from just over 7000 to over a million. The regional spreading was relatively limited due to practical constraints, but since no demographic representation was sought, the sample of respondents is sufficiently diverse. The sample in-

[6] M. Thompson, R. Ellis, A. Wildavsky, *Cultural Theory*, Boulder 1990.

[7] R. Hoppe, 'Applied cultural theory. Tool for policy analysis' in F. Fischer et al. (eds.), *Handbook of Public Policy Analysis. Theory, Politics and Methods*, Boca Raton 2007, p. 293.

[8] M. Jeliazkova, A.K. Kostro, 'Views and beliefs of social studies teachers on citizenship education. A comparative study of Bulgaria and Croatia', paper presented at the 2012 EGPA Conference, Bergen, Norway, 5-8 September 2012.

cluded 11 women and 6 men who taught at schools varying from local vocational to highly selective specialized gymnasia. All the respondents had experience with the subject "World and person" (Свят и личност). The teachers represented virtually all political colours in Bulgarian political life.

Every teacher finds their own particular position in this forcefield. This position never overlaps completely with the officially stated objectives of citizenship education. The question we asked in our study was: can we map this forcefield of dimensions in order to shed a light on the way citizenship is being taught at school? Is it possible to describe the distinct ways in which teachers think? Do they share a common ground? What are the topics that divide them? This study is an attempt to meet the methodological challenges of researching teacher beliefs and "theories-in-action".

Q-methodology is an approach suitable for this purpose. Although we cannot afford to get into detail here,[9] we should state that the choice of method is not only technical. Q methodology allows us to engage in a dialogue with our respondents – the teachers – at all stages of research. We let teachers speak with their own voices and combine this with the necessary academic rigor. The steps in the research involved:

- The construction of a set of statements about citizenship education in the classroom, based on extensive literature study and pilot interviews.
- In an interview situation, teachers were invited to comment on the statements and to rank them in a particular pattern, according to their own interpretation and understanding, on a scale from (-4) to (+4).

Consequently, the rankings were factor analyzed, resulting in 5 factors – five distinct types of discourse on the topic. The table of factor correlations is included in the appendix (Table 1).

For the interpretation of the factors, the interview transcripts were used. Teachers had the opportunity to comment on the interpretations.

What follows below is a description of the five distinct views presented by the respondents. We do not claim that these views are the only ones present among Bulgarian teachers. We also have no estimate of the prevalence of the number of teachers adhering to one discourse or another. Other research instruments are needed for that. What we present here is a part of an ongoing dialogue.

The statements are listed in the appendix at the end of the article, together with a table of factor correlations. In the text, only the number of the statement is quoted, followed by the rate of approval.

[9] For a detailed description of the method, see: S. Watts, P. Stenner, *Doing Q Methodological Research. Theory, Method and Interpretation*, Los Angeles 2012.

3. Five types of teachers

3.1. Common Themes – "A neutral teacher is a scared teacher"

We chose this quote as the most typical for the group of Bulgarian teachers involved in this study. Quite contrary to the common depiction of teachers as passive, indifferent, and lacking initiative, the teachers we spoke to were making a serious attempt to keep up to their own professional standards, to be truthful and to demonstrate a clear position on matters they deem important. Also, the teachers we interviewed cared about their students, felt a degree of responsibility that in many cases went far beyond their professional duties.

The overall impression from the teachers is that they remain critical, guard their degree of professional discretion and assume great responsibility for education Bulgarian youth, even when they feel that the school as an institution and particularly the state are failing them. In fact, especially when the institutions are failing them.

The five views on teaching citizenship represented by the five factors are quite distinct. Yet, there are certain common themes that should be discussed.

All teachers agree that citizenship education is about participation in a democratic debate and this is why they help students to develop their research and discussion skills (14: 3, 2, 2, 3, 2). The strong link between citizenship and democracy is to be found in every interview, in spite of critical notes about Bulgarian political reality. In the eyes of the teachers, the process of democratization, though far from completed, is irreversible. All agree that a certain amount of knowledge about how democracy is working is indispensable (22: 0, 2, 3, 1, 1, 2):

> It is extremely important for them to understand that it is not silence, aggression, negativity or passivity that would help them, but debate, regardless of how different your opponent's opinion is. This is the only civilized way to solve problems. To be able to defend your point of view, firmly, respectfully, without being afraid of the other.

Teachers insist on a solid, though not overburdened knowledge base, but this is not the same as just feeding children with facts, because "Facts do not just hang in the air."

Absolutely categorically, with high statistical significance, teachers reject the statement *My task as a teacher is to defend state policies and interests, because I am an employee of a state financed educational institution* (31: -3, -4, -3, -4, -3). In one case (discussed in factor 2) a respondent referred to other subject teachers as "civil servants" and ascribed a special place to philosophy teachers who make the most of their freedom. The teachers assume a strong professional attitude and do not feel too restricted by state requirements of any kind. This almost allergic reaction to any state interference can be partially traced to old communist times ("We should not lose the art of telling the truth in a situation when it was forbidden to do so."); for younger teachers the explanation is some-

times more trivial – they do not feel supported enough by the state to feel part of any official state policy! Generally, the teachers' attitude towards the state is ambivalent, to say the least. As one respondent puts it "I am out of sync with the state." Traditionally, as well, Bulgarian schools have been considered pioneers of progress, enlightenment and democracy. This is why all respondents define Bulgarian schools as largely democratic (27: -1, -1, -4, -3, -4). The juxtaposition of school and state institutions emerges as a theme:

> [Today's young people] are critical towards society as a whole, towards the institutions which have no clear youth policy and strategy for their future, but they do not necessarily hold schools accountable for these problems.

Quite remarkable is the ambivalent attitude of teachers towards politics and politicians. Most respondents make a clear distinction between the practice of politics – the job of politicians in short – which is considered predominantly as something not suitable for students, if not outright harmful; and the *political nature* of any social phenomenon discussed. The latter is often not referred to as "'politics". Политика in Bulgaria is a negative term for teachers and students alike. Teachers go sometimes at great lengths to explain how they differentiate between active political propaganda (which is considered inappropriate) and allowing for an academic, but not necessarily academically detached analysis of the most urgent problems of society. A positive role model of a Bulgarian politician suitable for school lessons is yet to be found, however.

> For heaven's sake, do not encourage them to get into politics! [They need to learn what is] good and bad, the human nature, how to become good, but no politics, please! They do not have the social experience yet to engage in politics.

This is a theme underlying various other topics and reoccurring in other factors as well:

> Why would anyone want to encourage students' to engage in politics? In Bulgaria, politics is actually over-exposed; politicians get into the centre of events and get a lot of attention […]. In Bulgaria, politics is seen as follows: elections are organized so that some people could enter some institutions and get privileges, and then nothing happens – I do not think that this is the right message to convey to kids!"

3.2. Factor 1: Pragmatic Conservatives – "We give them the rules"

This group of teachers adheres to the following definition of citizenship education:

> It gives students rules of social behaviour […].

Pragmatic Conservatives put a strong emphasis on knowledge, take a mentoring and protective position towards their students, and exhibit a great amount of

trust towards the school as an institution. They see the school as "a model of a social institution" and thus encourage participating in school activities as a preparation for later (8: 2). Compared to the other respondents, they are slightly more interested in factual knowledge – just to look at things as they are, instead of how they should be. (9: 0) These respondents situate citizenship education clearly in the current moment:

> Yes, I agree with this quite a lot, because we tend to a lot of things for the future only, instead of here and now.

The latter quote corroborates the pragmatic, status quo orientation of this group. Partly, this pragmatism could be explained as a reaction to Bulgaria's socialist past, where the unattainable 'bright future' had become a running gag.

> The other subjects do not prepare them for the labour market… […] I tell them that school is also work and if you add up all the financing for their education, they sometimes end up making more money than their parents.

For this group of teachers, the greatest concern is discipline. In their eyes, students do not take their obligations seriously. A number of respondents in this group express a concern about youth "getting the wrong impression" that rights are just given and that one does not need to do anything in return. Very often, these teachers mention rights in conjunction with democracy, stating that "democracy and freedom is not the same as doing whatever you want". Accordingly, this group of teachers is not particularly concerned with guarding individual rights. They try to instil trust in the institutions and in social structures as a way of ensuring a reasonable balance between freedoms and responsibilities. At the same time, however, the respondents immediately counter students' claim on too much freedom with the classic:

> They know their rights perfectly well, but it is about time they should think about their responsibilities as well.

Statement 2 (*We need to teach young people to be independent and to make their own decisions*), while on the surface concerned with granting students independence, is interpreted in this factor in a rather patronizing fashion. One respondent actually regrets that students have "too little opportunity to express their own thoughts, we tend to draw them into the field of our own thinking". Another respondent claims, similarly to the argument against engagement in politics, that students' independence in not a sign of maturity:

> Kids, due to circumstances, are forced to take responsibility for their lives much too early, this puts them under enormous stress.

Remarkably, the teachers in this group do not wish to encourage students to participate in Bulgaria's current political life. (26: -2). They clearly do what they

can to protect students from the hardships of everyday politics. Their attitude towards the everyday practice of politics in Bulgaria is rather negative.

Looking at the strong positive side (+4, +3), we see predominantly statements concerning the method, process, and critical analytic skills necessary to acquire knowledge about institutions, social structures, and politics in general (23, 13, 14, 12). At the same time, respondents are concerned with neutrality and are careful not to promote any particular ideology (34: 3). The outspoken focus on defining the right priorities in social issues (23: +4) betrays a slightly conservative stance, typical for these respondents in general:

> Students need to decide for themselves what is good and what is bad […] Not all things from the past were bad; we should not throw out the baby with the bathwater.

Conservatism is key to explaining why statement 39 (*Students should be helped to realize that they live in a world of growing interdependence. Even though we do not respect each other, we still depend on each other*) holds such a prominent position in the factor (+4). In fact, these respondents are not really concerned with processes of globalization and certainly not with specifically promoting values such as tolerance and multiculturalism. Rather, they focus on the part: learn to live with it!

The Pragmatic Conservatives do not agree with the suggestion that sometimes it is necessary to engage in activities outside the legitimate institutions (32: -4). Generally, the personal political engagement of the teachers is not linked for them to teaching citizenship. Actually, to demonstrate active political engagement is considered an act of irresponsibility. Their greatest fear is that resistance would lead to anarchy. Similarly, discussions about controversial issues should be conducted in a careful way, in order not to 'politicize' issues too much. (19: -3) The reason teachers would nonetheless address controversy stems more from their mentoring role:

> It will be completely anti-pedagogical and senseless to close my eyes to the problems and to let the kids enter society without a clear position on these topics!

Consistent with their pedagogical role, these teachers feel the need to step in where family, in their eyes, fails:

> Parents do not have the time, plus the teacher gives a balanced picture of all views […].

Similarly to all respondents, the Pragmatic Conservatives reject the idea that they are just civil servants and should defend the interest of the state. (31: -3) The explanation they offer is however quite idiosyncratic:

> The state has abdicated from its duties, so why should we feel obliged to defend it?

Actually, they do consider the state interest worth defending, but not the current Bulgarian state, which they perceive as lacking in many ways. They are even ready to take some of the blame for this state of affairs, which may explain their hesitation in imposing their views on students:

> Tomorrow they will rule us, the sooner they take power away from us, the better.

In sum, these teachers see themselves as contributing to the education of a citizen who would find a place in the fabric of society, who would obey the law out of conviction and as a result of thoughtful deliberation, and would be mature enough to ensure social stability, on the one hand, and safeguarding personal rights and freedoms, on the other. This situates the factor mainly in the hierarchical quadrant, with a slight overlap with individualism. The latter is mainly due to the pragmatic attitude of most teachers as well as the strong reaction to over-collectivization that is still pretty common in Bulgaria.

3.3. Factor 2: Deliberative Liberals – "We Are Here to Provoke Them into Freedom"

The name of this group refers to their two most important vantage points – individualistic/liberal orientation and a focus on democratic deliberation. The fact that the Deliberative Liberals value democratic inquiry the highest of all (26: +4) is an indication that we are not dealing with individualists in the everyday sense of the word, concerned with self-interest only. Rather, the keyword for this group of respondents in "inquiry":

> Students should be made aware of the possibility and the need to enter discussions with lots of other people…

This group of teachers' main concern is the method of thinking and inquiry, the need to make one's own decision. They stay clear from everything that looks like indoctrination and imposing specific content and worldview. Equally, providing *information* to students is important (35: + 4). The defence and strengthening of civic rights and freedoms is high on their agenda:

> Particularly in Bulgaria, the most important thing is to inform students about their rights, they just do not know them.

On the same grounds, the Deliberative Liberals do believe that citizenship education is political in its core (20: -3) and look for a balance between individual and collective action. At the same time, they are careful enough to stay at a more general, theoretical level of political discussion, "leaving it to the students to judge" the current concerns of the day. They trust their students and do not feel the need to impose any views on them:

> Political propaganda is forbidden. But even if it were not, my authoritative position would lead to some form of manipulation of the students. I do not want to make them my copies.

The teachers follow the students' interests and needs and adapt their teaching practice to the demands and the capacities of the young people they work with. They put the individuality of their students in the limelight. One respondent even suggests that the subject "World and person" which deals directly with citizenship education, should better be called "Person and world." The Deliberative Liberals do not consider the curriculum in its current form a big obstacle to educating young people the way they find fit. They find enough room in the books for critique and discussion. (25: -4). It is not that the books actually *encourage* criticism; rather, these teachers have their own agenda and very strong didactic preferences and do not feel easily limited by textbooks and curriculum requirements. Although they do insist on providing correct information and acquiring solid grounds for discussion, they do not actually see themselves as teaching a subject.

> I do not feel a teacher or a subject specialist, I am a provocateur, and that's probably the opposite of what they expect from me as a teacher. They expect me to adhere to norms and standards […] Generally, teachers are just like civil servants, with the exception of the philosophy teachers, because they are very critical. Within the framework of limitations, we are able, thank God, to establish some kind of freedom.

And yet, these respondents approve, though moderately, of the idea that citizenship education should be of some use to society (36: +2). As true liberals, the respondents actually claim that just tolerating the other is not enough, a liberal society should foster *respect* for every individual. (39: -2) Similarly, the teachers demand that students learn to take into account the common good, rather than follow only their private interests (17: +3). The very nature of teaching necessarily colours one's attitude and forces the teacher to pay attention to collective processes, taking group interests into account and teaching children "*to live in a common house, like Aristotle said it.*"

Summing up, the Deliberative Liberals see civic education mainly as a tool for promoting emancipation. Knowledge of rights and freedoms is put at the core of their efforts. They strive to equip their students with the necessary tools to operate in a world seen as increasingly complex (15, +3), to understand political structures and games and to find their path in society. Although they certainly do not promote reckless egoism (17, +3), these teachers do see their students as individuals with inherent rights and see it as their task to support them in becoming independent, critical citizens who know how to defend and extend their rights through democratic debate (26, +4).

3.4. Factor 3: Local Social Guardians – "They Need Us as a Personal Example"

The Local Social Guardians strongly emphasize the role of the teacher in the process of educating students.

> Knowledge is the basis, but it is isn't the whole story. Otherwise they would just stay home and watch television. You need to prepare, every day, every lesson, for every group. You don't know how they would surprise you, you need to be prepared to react, to calm them down and still take the challenge and make them think deeper in a certain direction. To do your job, actually.

The Local Social Guardians differ from all the other respondents who tend to seek a balance between the role of a professional and the role of a teacher. Not that they are very much inclined to indoctrinate (1: -2). Rather, the teachers are convinced that their students "*need a sense of direction*". They assume great responsibility in countering the influence of the students' home environment:

> […] even when they do express their will, the family would tell them it's not for them [to have these ambitions].

The Local Social Guardians feel that their students fail to defend their own rights and position in society, that they do not share in the common good (17: -3) This is why they reject the idea to somehow "shape" the students with the purpose of "some use to society" (36: -3):

> It is quite hard for them to take the common good into account, while they see that everything around them is ruled by self-interest and money. This is not cynical, just their reality. […] for some of them, it is pure survival, how to make ends meet […] they need us teachers to support them.

Contrary to the pragmatic conservatives, the local social guardians see their students as vulnerable an in danger. Their rights could be easily violated because of ignorance, no access to power structures, and lack of resources. The teachers see it as their task to educate students about their rights (sometimes seen also as entitlements). They do this both by providing them with the necessary knowledge (22: +3) and as establishing themselves as role models (18: +4). They also feel strongly about the role of the school as an example of a democratic institution (27: -4), a safe place to learn the first things about democracy in a world otherwise chaotic and threatening to the students.

The respondents strongly encourage involvement in community activity (28: +4). The idea behind it is that charity is a low-threshold activity that students understand, even when they are not interested in politics. In addition, the teachers see involvement in charitable and community service as a way of teaching responsibility, on the one hand, and a means of empowerment, on the other.

Quite interestingly, this group of teachers does agree with the statement that politics is too abstract for their students (41: +3). However, the Local Social Guardians are ambivalent in their views, because they see different layers in political education. To begin with, they do think that the textbooks are written in a way that makes them inaccessible to the students, both in style and in price (in one of the schools, students could not even afford to buy the books and were using syllabi put together by the teacher, instead). These teachers' hopes are not high when it comes to teaching rigorous theoretical models and structures (12: -4), also because, to an extent, they share their students' cynicism – nothing is the way it looks, the laws in the books are not the same as the laws in real life.

At another level, the teachers felt that students were not interested, because they came from families where no one was engaged in politics in any way. The teachers considered it as their duty to show to the students that it does matter to get involved. At yet another level, the respondents strongly felt that their students felt left out, marginalized and disadvantaged by today's political ruling class in Bulgaria and this is why they were very cynical towards anything political. Again, the teachers saw themselves as an example that there are also positive ways to participate in social life. They were very strongly involved in local politics and felt that their activities could not and should not remain hidden from the students.

For the same reason, this group of teachers very strongly rejects the qualification of the school as an undemocratic institution (27: -4). Unlike the Personal Growth Facilitators and the Global Future Debaters who make a claim on the school a playground for community involvement, the Local Social Guardians see the school as a corrective and emancipatory institute in a society seen as grim in general:

> If the school is not democratic in Bulgaria, I would not know what is!

This group stands out among the others, both statistically and substantially speaking. Compared to the other groups, the respondents tend to teach at school with a large share of disadvantaged students. Although only indicative, this information is important for understanding these teachers' perspective.

3.5. Factor 4: Personal Growth Facilitators – "We Teach Them to be Happy"

The Personal Growth Facilitators define their perspective as follows:

> Citizenship education requires high personal erudition, combined with honesty and lack of hypocrisy.

Participation, action, involvement is what this group of teachers is about – practice what you preach, also outside the classroom, and set an example of honest

and decent behaviour (5: +2). Seeking growth and change, through dialogue and self-perfection, these teachers respect their students and attempt to provide for them the right environment to help them in their development. The high loading respondents in this use words like emotions, feelings, growth, and "the joy of life". They also expressed concern about "overlooked" topics such as ecological education and art education.

This group's emphasis on the universal, moral aspects of citizenship education makes them more attuned to the topic of universal human rights. Growth, harmonic development, self-realization of the human potential – are the overarching goals of their everyday efforts. They look at education in a broader context, with school only being a part of it. Participation in "real life" (10. +4) and engagement at all levels are certainly more important. Interdependence and taking care of each other are values highly cherished by this group (39: +3). They strongly reject the idea that one should participate in public life for the sole purpose of personal advancement (7: -2). Human nature and the values associated with human life are central to their teaching. Politics as practiced in Bulgaria is seen as something that children should be shielded from, for as long as possible.

Participation in real life, as opposed to just lessons, is the most important for this group of respondents, in contrast to all the rest (10: +4). Statements stressing particular skills and attitudes receive approval (34, 14, 2, 6, 26, 23). Not only should students participate and be engaged in "*attitude building*", they should do this in groups, because

> Personality develops much better in a group than trough individual projects.

This is why, together with factor 5, this group of teachers is categorically against any hint of instrumental use of citizenship education, by the state or by the students themselves (8: -3; 7:-2):

> Oh no, we are not going to educate self-seeking komsomol snitches any longer!

The Personal Growth Facilitators feel very strongly about letting the students free in expressing their opinion, without anyone pushing them in a certain direction (1: +4). Similarly to the Local Social Guardians, the teachers in this group are way too personally engaged to consider withholding their preferences and views from students (30: -2). For them, citizenship education does not end with just *informing* students about their rights and freedoms (35: -1):

> You can't just come and tell them, we are not the news broadcasting service.

In general, the respondents in this group tend to sort negatively the statements suggesting that one needs to teach facts and "a body of knowledge" (4, 24, 35, 9, 11). The only exception is the approval of the idea that it is important to teach the basics of democracy (22: +1). Democracy is much too cherished, it constituted the fabric of society in the eyes of these respondents. This is of course the undisputed

consensus item of the whole sample. This is not to say that all respondents adhere to the same understanding of democracy. Rather, they share the conviction that the social and political changes in the last twenty years are irreversible.

A climate of collaboration which promotes free development and self-growth is a priority for this group of respondents. This does not imply, however, that they would shy away from controversial topics in the classroom (19: -4). Actually, many respondents seem to make a distinction between political issues and social issues, the latter being more constant.

All things being said about participation in real life, the Personal Growth facilitators still seek a solid knowledge base for their work, it goes beyond just practice:

> It does not make sense to be a teacher without being a specialist […] we give them a perspective a way of thinking.

This factor coincides the most with the egalitarian ideal type, with a twist: personal growth is seen as being facilitated by participation in a group, rather than directed at group preservation. Again, like in factor 1, truly collectivist attitudes are not popular in a country with a communist past and are always countered by a healthy dose of self-interest.

3.6. Factor 5: Global Future Debaters – "The Street Won't Turn Them into Global Citizens"

The most important task of citizenship education, according to the Global Future Debaters, is to help students develop as thinking citizens (13: +4). The respondents recognize the serious dilemmas young people face and strive to equip them with the necessary instruments of analysis, self-reflection, debate and argumentation (1, 23, 14, 6). Similarly to the Personal Growth Facilitators, the teachers in this group adhere to the broadest idea of citizenship education, action oriented, including matters as ecological citizenship and global awareness, but critical thinking skills remain the core and receive the most attention.

This group approves of the necessity to provide students with skills to advance in society (7: + 2), because the future citizens they have in mind will live in a *complex global world* (15: + 4). It is not about survival, in their reading, but about giving students the most suitable skills and instruments to understand and manage the complexity of the modern world, "*to understand the origin and the logic of processes*."

In doing so, the Global Future Debaters always depart from a strong professional identity, based on subject knowledge (18: -3). Like the Personal Growth Facilitators, they acknowledge the importance of real-life experiences. Unlike them, however, they emphasize the importance of debating and discussion skills, in addition to real-life engagement. In addition, the Global Future Debaters are not

inclined to impose any specific type of action on students; they need to take the lead. They do not deem it suitable to "stir things up if necessary" (32: -2).

> This is more [suitable] for the street, a school has other rules.

This is also why they moderately agree with keeping controversy outside the classroom – creating and maintaining an atmosphere of trust is of crucial importance to foster the development of independent thinking. Nevertheless, these teachers' civic engagement is strong, but oriented towards individuals instead of institutions:

> We make the state, the initiative has to come from society, it is not necessary that all measures come from the state.

From this perspective, there is no great concern about the division of society in elites and others, while others do take a strong stance in one direction or another (41: 0). This is something that belongs to the past, together with ideologies (34: 0).

The group underscores the European citizenship dimension as the most explicit of all. It is, however, quite divided in its judgment of the value and the success of citizenship education as a European project. One of the high loading respondents is quite positive and cosmopolitically oriented, while the other one, to the contrary, is convinced that citizenship education was implemented under pressure and as an act of compliance – to demonstrate that Bulgaria belongs to the European Union:

> It is just to show off – look, we have that thing – but there is no tradition, nobody takes care that teachers get schooled […]. The European Union is not a panacea for all problems in Bulgaria.

The global European orientation of this group of teachers makes the choice for an institutional approach logical. Not only values and abstract ideas, but the specific social structures and channels of influence are important. Civic disobedience is an option for this group of teachers, when other options do not yield results. Action is what counts, active defence and expansion of freedoms is what makes civic education meaningful.

All respondents in this group share a focus on universal human values. They consider the current political practice quite corrupt and thus not worthy of discussing in the classroom (20: +1). Instead, students should engage in activities in the school as a safe playground, which is considered a very suitable environment for learning essential democratic skills (27: -4).

The Global Future Debaters take a rather pragmatic attitude toward the fashionable patriotic discourse in Bulgaria. They do think that students should know "*what this country has achieved in order to go further*" (40: 2). However, the growing interdependence of people in the world takes precedence and is a far more

dominant theme (39: +3). The statement is interpreted at an interpersonal level – students need to learn how to respect each other, to be able to get in the shoes of others and understand their social experience.

In sum, the teachers in this factor are more concerned with the future of citizenship education and the future of their students in a global dynamic world than with the current practice which can be disappointing at times. In the grid-group field, this group of teachers is positioned on the egalitarian/individualistic divide.

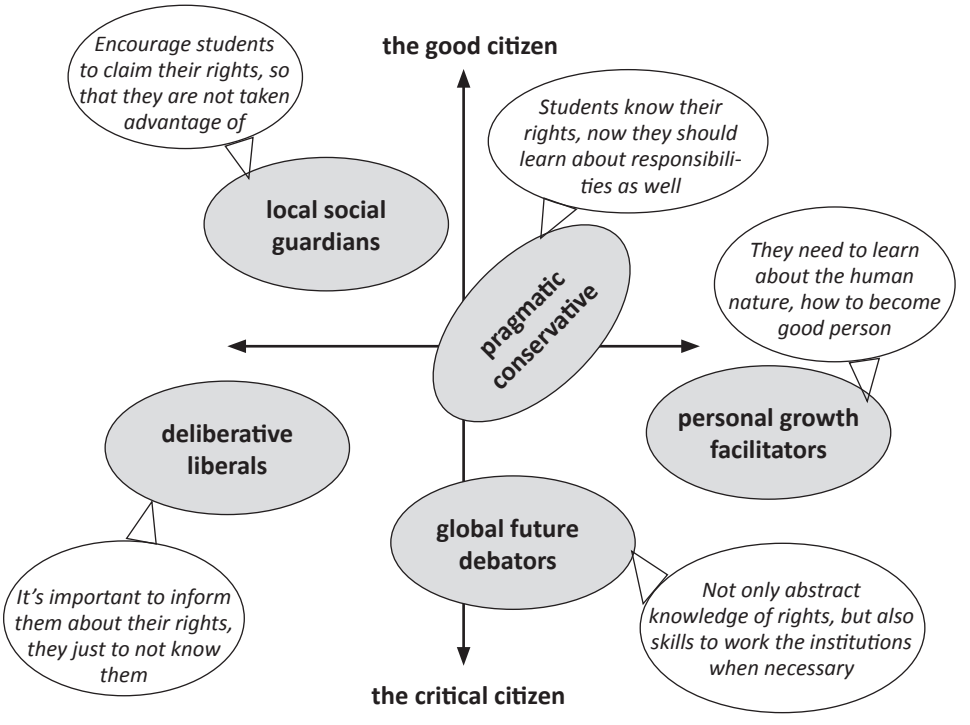
3.7. Discussion

We have described five empirically grounded types of teachers' views on citizenship education in Bulgaria. The types are hybrid, compared to the ideal ones. Their position on the group-grid forcefield is represented in Figure 2. These types reveal and intricate interplay of the perceived role of the teachers themselves, Bulgarian society as they see it, and the way teachers perceive their students. The general patterns also colour the way the issue of human rights is approached. Teachers in our sample did not see human rights education as a separate item, but as an element, albeit substantial in a general effort to educate young citizens. The first group of teachers, the Pragmatic Conservatives, stresses responsibilities as much as rights. They tend to value more traditional political rights which ensure participation through established institutional channels. The Deliberative Democrats are concerned with informing students about their rights. They do feel that there is not enough awareness of these rights in post-communist Bulgaria. The Local Social Guardians see it as their most important task to shelter vulnerable students from mistreatment and manipulation. The Personal Growth Facilitators underscore the universal dimensions of human rights and the value of life, while the Global Future Debaters seek to equip their students with the necessary skills to find their way in the complex globalizing world and not only to defend, but to expand their claim on rights and freedoms.

Probably the most striking is the idea of the school as a corrective of the shortcomings of society. Bulgarian teachers feel that they have a responsibility towards the youth which should not be only theirs, but they are almost the only ones assuming and carrying out the task of educating the future citizens. Against the background of general dissatisfaction with political order as a whole and the state of education in particular, we did not register too great doubts in the ability of schools to educate and to shape young people in a certain direction.

Our Bulgarian respondents strongly denounce any obligation to defend state policy and any association with the role of civil servant. What this says about the status of the school as an institution and of the teachers as professionals in Bulgaria, is an issue that deserves more elaboration elsewhere. Probably here it is a good place to note that the issue of national pride and loyalty did not attract considerable attention at all.

Figure 2: Five empirical types of views on citizenship education and human rights



The respondents are divided on the issue of politics being too abstract and reserved for the elite (41), with a number of respondents and one factor clearly agreeing with the statement. The possible explanations are twofold. On the one hand, Bulgarian teachers have several years of experience working with the new curriculum on citizenship education. We could safely assume that their claims are based on experience with teaching the material, which many consider complex, though very much needed. On the other hand, as we have already discussed, the Bulgarian idea of "political" is rather negative, with a sharp distinction between actual political practice seen as pernicious and the political dimensions of society in a more general, long-term perspective.

Interestingly, the official Bulgarian citizenship education program is often criticized for putting too much stress on knowledge reproduction and less on skills and attitudes. The teachers we interviewed, to the contrary, are weary of too much emphasis on activities and projects without the necessary knowledge base for making them meaningful. It is thus worth noticing that the amount of time spent on official discussions about the merits of programs, textbook content, and teaching methods, is disproportionately large compared to the deeper concerns of teachers. Most of them felt they were professional enough to deal with any of the materials available and to adjust them to their own views and preferences. Our data shows that no amount of detailed curriculum requirements, specifications of

standards, objectives and evaluation criteria would erase the diversity of perspectives on citizenship education teachers exhibit. In this sense, citizenship education in any given country cannot even be seen as a single policy project without making it void of its most important feature – preparing young people to be citizens in a presumably pluralistic and democratic society.

The research findings demonstrate that "taking the national context into account" is not enough in adapting curricula from other countries or from European sources. The national context is the common scene where several quite distinct perspectives coexist, held together by unifying themes. Equally important, a state initiated policy on citizenship education does not automatically ensure promotion of state-imposed objectives. Quite the opposite, in the case of Bulgaria, teachers use the existing state-shaped curriculum context to act as a corrective to what they see as serious shortcomings of the current political reality of Bulgaria, in an attempt to educate its future citizens who would hopefully do better.

Appendix – list of statements and Average q-sort factor values (on a scale of -4 to +4)

Statement	Factors				
	1	**2**	**3**	**4**	**5**
1. Students need an environment in which they could discuss the problems of society without anyone pointing a finger at them and correcting them.	1	0	-2	4	2
2. We need to teach young people to be independent and to make their own decisions.	3	1	1	2	1
3. I encourage my students to get involved in social life through the established institutions and to listen to expert opinion.	2	0	-1	1	1
4. These are the rules, these are the laws. I think this is the bulk of citizenship education.	-2	0	-1	-2	-2
5. The teacher should be a model of honest and decent behaviour; this is the core of citizenship education.	0	-1	0	2	-1
6. We have to teach young people to be critical and not to believe everything they see and hear in the media.	2	2	1	2	3
7. The teacher should make it clear to the students that they need to participate in public life if they want to advance in society.	1	1	2	2	2
8. Citizenship education should contribute to the development of competences required by the labour market.	2	-1	0	-3	-4
9. We should pay more attention to knowledge: to look at how things really are, instead of just discussing how they should be.	0	-1	-2	-1	-2
10. It is not enough only to engage in discussions about how to improve the world, it is important to give young people the chance to participate in real life.	1	0	-3	4	-1
11. The teacher should stress first of all the anatomy of government: the separation of powers, the functions and prerogatives of the institutions, the different types and purposes of democratic systems.	-2	0	0	-1	-1
12. I am pleased when my students begin to discover structures and regularities and when they begin to understand the world of politics.	2	3	-4	0	-1
13. The goal is to educate thinking citizens who can employ various methods, theories and models to explore the world around them, and who are able to assess facts and to arrive at conclusions.	3	2	-1	2	4
14. It is important that students learn to defend their views in political discussions and social debate; this is why I help them to develop research and discussion skills.	3	2	2	3	2

Statement	Factors				
	1	**2**	**3**	**4**	**5**
15. Citizenship education should contribute focus on the development of skills and attitudes, much needed for students to survive in today's complex world.	-1	3	1	0	4
16. Young people may learn the law by heart, but this does not mean they will necessarily obey it.	0	1	2	1	-2
17. Students should learn to take into account the common good, rather than follow only their private interests.	-1	3	-3	1	3
18. I feel that I am first and foremost a teacher and only then a subject specialist. The subject matter is only secondary.	-2	-2	4	0	-3
19. Controversial political problems should not be discussed in class.	-3	-1	1	-4	1
20. Citizenship education should not be associated with politics, because individual acts of compassion and generosity are more important.	-2	-3	-1	-1	1
21. The subject "*World and person*" is in fact citizenship education. Both are aimed at educating future citizens	-1	-2	-1	0	1
22. Young people should acquire knowledge about democracy: how it works and why is it worth defending it.	0	2	3	1	2
23. It is very important that students learn how to analyze social problems, but also select the most important ones.	4	1	2	1	3
24. The teacher should present to the class only established facts about society. Social norms are not a suitable topic for teaching.	-4	-3	-1	-2	0
25. Official citizenship programs are essentially uncritical: democracy is good, we are a democratic state, therefore we are good.	-1	-4	-2	0	0
26. The democratic approach to inquiry and debate should be demonstrated in class, in order to promote (поощри) students' interest in politics.	-2	4	0	2	0
27. Students cannot learn democracy at school, because school itself is not a democratic institution.	-1	-1	-4	-3	-4
28. Citizenship education means to hold students accountable for their behaviour and to get them involved charity and community activities.	0	1	4	-1	-1
29. It is better that the teacher discusses norms and values instead of stiffly adhering to neutrality.	1	-2	3	3	-1
30. The teacher should not disclose his or her political views to the students. Quite the opposite, only broadly accepted social and political values should be discussed.	1	-1	-2	-2	1

Statement	Factors				
	1	2	3	4	5
31. My task as a teacher is to defend state policies and interests, because I am an employee of a state financed educational institution.	-3	-4	-3	-4	-3
32. I am obliged as a citizen and a teacher to stir things up if necessary, and not only through the so called legitimate political channels.	-4	1	1	0	-2
33. In my opinion, citizenship education is an emergency measure by the state against the obviously growing lack of social tolerance.	0	-2	-2	-3	-3
34. We should not declare any ideology to be correct; instead, we should give students an opportunity to get acquainted with various ideas about political and social order.	3	3	2	3	0
35. The most important task of citizenship education is to inform students about their civil and political rights and freedoms.	0	4	1	-1	-2
36. Citizenship education should be of some use to society, for instance by contributing to greater safety.	-1	2	-3	0	0
37. Citizenship education is an outdated concept, because it conveys to students the values of the middle class.	-3	-3	0	-2	0
38. Civic obedience means more than just obeying the law, it means obedience to higher personal standards and higher social interests.	1	0	0	1	-3
39. Students should be made to realize that they live in a world of growing interdependence. Even though we do not respect each other, we still depend on each other.	4	-2	3	3	3
40. Citizenship education should cultivate a spirit of unity, loyalty to the state and national pride.	2	0	0	-1	2
41. For most students politics is way too abstract and incomprehensible, it belongs more to elite schools.	-3	-3	3	-3	0

Table 1: Correlations between factors

	1	2	3	4	5
1	1.0000	**0.4159**	**0.0941**	**0.5516**	**0.3442**
2	0.4159	1.0000	**0.0978**	**0.4578**	**0.2992**
3	0.0941	0.0978	1.0000	**0.1834**	**0.1755**
4	0.5516	0.4578	0.1834	1.0000	**0.4054**
5	0.3442	0.2992	0.1755	0.4054	1.0000

Abstract

This paper presents the results of an empirical study of the views of Bulgarian teachers on citizenship education. Combined quantitative and qualitative analysis using Q-methodology resulted in outlining five groups of teachers with distinct views on the topic of citizenship education and teaching human rights. The Pragmatic Conservatives focus mainly on knowledge of the institutions and on preparing students to function in society. They see themselves as supervisors of the youth which they educate to become good, pragmatically adapted citizens with a healthy critical stance towards the current Bulgarian state apparatus. Human rights are usually presented in the context of responsibilities and discipline. The Deliberative Liberals teach mainly through dialogue and debate, they coach their students on the road to independent critical citizenship. The students' rights and freedoms receive the most attention by this group of teachers. Their first and foremost priority is to inform students about their rights and to teach them how to defend them. The Local Social Guardians are mainly concerned with vulnerable students in disadvantaged situations, which seem to be left behind and feel marginalized in the modern Bulgarian state. These teachers take the responsibility to protect the students and to teach them basic survival skill based on adequate knowledge about society. They feel that it is important to teach students to claim their rights and not to be taken advantage of. The Personal Growth Facilitators are mainly concerned with the all-round development of students which also includes aesthetic, emotional and ecological aspects of citizenship. The teachers adhering to this view stress collective responsibility and community action much more than the other groups. Universal human rights and values are high on the agenda for these teachers. Finally, the Global Future Debaters are cosmopolitically- and globally-oriented, and see it as their task to prepare the citizens for the increasingly complex world of the future. They are the only ones explicitly oriented towards European values.

This diversity has implications for human rights education, for citizenship education policy, teacher training, and curriculum development in post-communist and possibly other European countries.

Margarita Jeliazkova

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Jeliazkova's academic background is in Philosophy (Sofia University, Bulgaria), Education (Philosophy for Children, Montclair State University, USA), and Political Science (Rutgers University, USA).

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DOI: 10.12797/9788376383651.27

Teaching Teachers about Human Rights in Estonia

Modern teacher training in human rights began in 1991, when Estonia regained its independence.

Human rights education is included in the civic education curricula. The existing curricula was worked out over several years and from this year we prepared in Estonia in concurrence the teaching materials, human rights trainings and public awareness activities.

The United Nations Convention on the Rights of the Child article 29 states:

States parties agree that the education of the child shall be directed to:

a) The development of the child's personality, talents and mental and physical abilities to their fullest potential; b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations; c) The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child living, the country from which he or she may originate, and for civilizations different form his or her own; d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin; e) The development of respect for the natural environment.

UN invites Governments, agencies and organizations of the United Nations system, and intergovernmental and non-governmental organizations to intensify their efforts to disseminate the United Nations Declaration on Human Rights Education and Training and to promote universal respect and understanding thereof. This is important to remind our governments to accept and implement this essential function in relation to the human rights framework.

The Declaration states in article 1**:**

1. Everyone has the right to know, seek and receive information about all human rights and fundamental freedoms and should have access to human rights education and training.

2. Human rights education and training is essential for the promotion of universal respect for and observance of all human rights and fundamental freedoms for all, in accordance with the principles of the universality, indivisibility and interdependence of human rights.
3. The effective enjoyment of all human rights, in particular the right to education and access to information, enables access to human rights education and training.

And in article 2:

1. Human rights education and training comprises all educational, training, information, awareness-raising and learning activities aimed at promoting universal respect for and observance of all human rights and fundamental freedoms and thus contributing, inter alia, to the prevention of human rights violations and abuses by providing persons with knowledge, skills and understanding and developing their attitudes and behaviours, to empower them to contribute to the building and promotion of a universal culture of human rights.
2. Human rights education and training encompasses:

a. Education about human rights, which includes providing knowledge and understanding of human rights norms and principles, the values that underpin them and the mechanisms for their protection;
b. Education through human rights, which includes learning and teaching in a way that respects the rights of both educators and learners;
c. Education for human rights, which includes empowering persons to enjoy and exercise their rights and to respect and uphold the rights of others.

Teaching human rights in schools starting from teaching the teachers, but unfortunately UN Declaration on Human Rights Education and Training is not dealing with the HRE in schools and then the states, NGO-s, teachers' organisations and students organisations have to take the opportunity to focus on the missing but very important area – teaching teachers.

This is important to explore opportunities to call upon existing monitoring mechanisms, such as the United Nation treaty body monitoring system and the Universal Periodic Review, also other international, regional and national human rights monitoring mechanisms.

"Look Back into the Future – Education on Contemporary Human Rights Issues Through an Historical Lens"

The Estonian Institute of Human Rights project "Look back into the future – Education on contemporary human rights issues through an historical lens" aims at enhancing human rights education in Estonia by organising a series of human rights trainings.[1] It brings together history and civic education teachers and non-

[1] 'Vaata tagasi tulevikku', Estonian Institute of Human Rights Online, at <http://www.eihr.ee/vaata-tagasi-tulevikku>, 31 December 2012.

governmental organisation activists, which will further organise school and out-of-school human rights education activities. The project also aims at setting the basis of a strategic partnership for the advancement of human rights education in the country, as well as a website for networking in the field, as well as functioning as main resource point for Human Rights Education. The project is financed by Foundation "Remembrance, Responsibility and Future" and the project activities are from May 2012 until to February 2013.

The objective was to organize a series of training courses on human rights education in Tallinn, Tartu, Pärnu and Jõhvi. The target group is comprised of history, social science and civics teachers, the representatives of agencies and non-governmental organization, who are involved with human rights.

The concrete objectives of the project are:

1. To bring together the main actors involved in Human Rights Education and set the basis of a strategic partnership working for strengthening Human Rights Education in Estonia;
2. To train teachers from four main geographical areas of Estonia, developing their knowledge, skills and attitudes in Human Rights Education;
3. To analyse the existing human rights teaching material in Estonian language, to complement it with recent international publications in Human Rights Education and adapt it for human rights teaching based on the historical development of the country; this includes identifying key moments in the national history and civic education school curricula for using these materials;
4. To develop a network of teachers and Human Rights Education activists, interested in implementing Human Rights Education activities in their daily work contexts (schools, NGOs) and identify concrete ways of action after the trainings;
5. To create a "website" serving as resource for Human Rights Education in Estonia.

The main activities of the project are the Strategic partnership meeting, the preparation of the training materials, the delivery of the training courses, setting of a Human Rights Education website, and immediate follow up activities by the participants (especially the human rights education activities organised by participating schools on Holocaust day).

a. The Strategic meeting aims at bringing together various stakeholders that can contribute to the advancement of Human Rights Education in Estonia, such as the Ministries of Education and Culture, various non-governmental organisations, media. The meeting will create the opportunity to reflect upon how to embed human rights teaching in the history curricula, how to further support teachers in developing the necessary competences for teaching human rights and organising human rights education activities, how to articulate the non-governmental initiatives in Human Rights Education and ultimately, how can awareness for human rights significantly increase in Estonia.

b. In the last decade, several training materials and relevant material for human rights and history have been elaborated in Estonia, see for example the manual *Tell ye your children… A book about the Holocaust in Europe 1933-1945* on Holocaust, or the documents published by the Estonian Institute for Historical Memory. Nevertheless, these resources are never used in classes and the trainings organised by the non-governmental sector use generally manuals such as COMPASS, of the Council of Europe's Youth Directorate, or ABC Teaching Human Rights by the United Nations' OHCHR. In the formal education sector, there is a need for finding where exactly in the curricula human rights could be taught directly and indirectly. Teachers need to see and learn how relevant documents for the National Socialism, Holocaust can be used during the history classes, while addressing human rights. In the non-formal education sector, it is about understanding of violations and proscriptions of human rights in the broader context of European history in the 20th century. We aim thus at looking at content to be taught in the classes and trainings, and linking it with concrete manuals and texts, as well as proving a methodology to be used in educational contexts for teaching human rights.
c. Four main training seminars will take place in four different locations/regions of Estonia: Jõhvi, the main town of the Ida-Virumaa region, the most eastern region of Estonia, near the border with Russia; Pärnu, the third main town of Estonia in terms of population, situated on the west coast; Tartu, the second largest city of the country and its main university centre and in Tallinn, the capital. In finding locations for the seminars, we are aiming at covering the main regions of Estonia. It is also important to mention that Jõhvi is mostly inhabited by Russian speakers – yet, the gymnasiums and high schools in Estonia are recommended by the Ministry of Education to also teach in Estonian. It is therefore very important for the Russian speaking teachers to attend these seminars in Estonian language and become more familiar with the human rights terminology and content in Estonian. The training seminars will be delivered by a team composed of: Merle Haruoja, Elizabeth Kasa Mälksoo, Toomas Hiio and Sulev Valdmaa. Activities are take place and will aim at introducing human rights in general and looking in particular at their historical development in Estonia, principles and methods for Human Rights Education and relevant pedagogic materials that can be used by teachers and NGO representatives in their daily educational activities. At the trainings, we also intend to invite a guest – according to the case, a speaker from the Estonian Institute of Historical Memory to present the participants parts of the Institute's findings with regard to the Estonia's history, or a legal scholar with activities on human rights and research on history from Tartu University. The methodology of the training is based on a combination of lecture and practical activities, which will enable the participants to experience directly activities of Human Rights Education. An important part of the training seminar is devoted to identifying ways in which the participants foresee to continue implementing Human

Rights Education activities in their context (school classes, extracurricular activities, trainings organised by NGOs, campaigns etc). Each training seminar will be evaluated in the end through oral and written evaluation methods.

d. The website will serve as platform for Human Rights Education exchange in Estonia. It will contain important information related to human rights (links legal instruments, statutes of their ratification by Estonia, links to representative institutions in the field), news about the field, links to various Human Rights Education resources developed by international organisations. It can also serve as database for partner finding in projects related to human rights and history.
e. During the project, the participants will be supported in identifying ways for organising further Human Rights Education activities. Yet, even before the end of the project, there will be a series of HRE events through which teachers and NGOs could collaborate. We aim thus at creating a series of events in various schools of Estonia, during the 27 January, a date established since 2002 by the Ministry of Education as being the commemoration of the Holocaust. During the events, the teachers could use the material and methods presented in the trainings. It is also a good opportunity to bring the event to the attention of the media, together with the project's results and the newly set Human Rights Education activists' network and website.

Among the expected results of our project are:

1. Creating a framework for dialogue between main stakeholders that could contribute at the advancement of human rights learning in Estonia;
2. Developing the competences in Human Rights Education of approx. 100 teachers and NGO activists from Estonia;
3. Identifying concrete ways of working with the history and civic education curricula for teaching human rights;
4. Establishing a working network and website of Human Rights Education in Estonia;
5. Organising a series of events in various Estonian schools on 27 January 2013 for the commemoration of the Holocaust.

Human Rights are Fundamental Rights and Fundamental Rights are Human Rights

In Estonia we need nowadays more NGO-s activities, because we have to take account the United Nations, Council of Europe documents together with European Union documents.

According to the EU Charter of Fundamental Rights the Union contributes to the preservation and to the development of these common values while respecting the diversity of the cultures and traditions of the peoples of Europe as well as

the national identities of the Member States and the organisation of their public authorities at national, regional and local levels.

EU institutions co-operation with regional organizations is important and inclusion of NGO-s is providing the best possibilities for the protection of human rights in our region.

During the global economic crisis situation we all need to pay more attention to vulnerable groups like children, minorities, disabled persons, elderly persons, victims of violence etc. and to find the recourses and to provide these persons together with EU, international organizations, governmental and non-governmental organizations fulfilling their equal rights.

It is up to us NGO-s, human rights educators, teachers to explain, how human rights education is unique and complementarity to other approaches that we can find in schools, such as citizenship education, peace education, global education, anti-discrimination education, and so on. We need to be clear about how human rights education is relevant to the issue and challenges people genuinely care about and effectively enables learners to take action.

On 11 August 2011, the European Commission proposed to designate 2013 as the "European Year of Citizens" to mark the 20th anniversary of the establishment of the European Union Citizenship under the Maastricht Treaty in 1993. The civil society in EU is ready to mobilise and coordinate wide civil society engagement in the activities which will be scheduled during the European Year of Citizens 2013, to initiate a European-wide debate on issues relating to the exercise of European citizens' rights and to citizens' participation in the democratic life of the EU.

Human Rights Teaching Material

The Author compiled the Human Rights Teaching Material in Estonian language and until today this is amended in according to international and internal developments[2]. The teaching material is available in internet freely and compiled on the bases of human rights catalogue.

1. Introduction to the subject of human rights, human rights as part of international law
2. History of human rights
3. Civil and political rights
   - 3.1. Right to life
   - 3.2. Right to protection against torture or cruel, inhuman or degrading treatment or punishment
   - 3.3. Prohibition of slavery and forced labour
   - 3.4. Legal rights, right to personal liberty and recourse

[2] 'Inimõiguste õppevara', Estonian Institute of Human Rights Online, at <http://www.eihr.ee/inimoiguste-oppevara>, 31 December 2012.

- Right to protection against arbitrary arrest, detention or deportation
- Right to judicial protection in case of the violation of one's fundamental rights
- Right to fair, impartial and public tribunal and punishment according to the law
- Right to be presumed innocent
- Right to non-retroactive penal law
- Right to be equal before the law
- Right to privacy, right of immunity of home, right to protection against arbitrary interference into family and private life
- Right to protection of personal data

3.5. Right to protection against racial, national, gender-based, language or religious discrimination
3.6. Right to freedom of thought, conscience and religion
3.7. Right to freedom of expression, assembly and association
3.8. Right to the choice of residence, freedom of movement
3.9. Right to periodic, free and fair elections on the common and equal basis
3.10. Right to marriage
3.11. Right to self-determination
3.12. Right to a nationality and citizenship
3.13. Rights of persons belonging to minority groups to protection

4. Economic, social and cultural rights
   4.1. Right to food
   4.2. Right to work, rest and free time
   4.3. Right to join trade unions
   4.4. Right to social security
   4.5. Right to health and adequate standard of living providing health and welfare
   4.6. Right to protection of the family
   4.7. Right to education and participation in cultural life of the society, right to one's own language
   4.8 Right to own property and to its protection against arbitrary expropriation
5. Human rights protection in armed conflicts
6. Rights of the child
7. Rights of the women/equality between women and men
8. Rights of the refugees and foreigners
9. Rights of migrant workers
10. Rights of persons under imprisonment or detention.
11. Rights of the disabled/handicapped persons
12. Right to development
13. Right to peace
14. Right to a balanced environment
15. Right to good administration

16. Instruments/bodies of the realization of internationally accepted human rights documents
17. Institutions dealing with international human rights
18. The European Union and human rights

This is our, human rights educators and NGO-s duty today to value the work what was done and what is to do in future. The collective experiences increasingly being presented in formats that can assist governments and authorities in organizing Human Rights Education, in collaboration with stakeholders.

In conclusion, I hope that on the next year we will together with authorities, NGO-s and human rights educators promote in Estonia the public awareness project – "Human Rights Education for All".

Abstract

Modern teacher training in human rights began in 1991, when Estonia regained its independence.

Human rights education is included in the civic education curricula. The existing curricula was worked out over several years and from this year we prepared in Estonia in concurrence the teaching materials, human rights trainings and public awareness activities.

The Estonian Institute of Human Rights project "Look back into the future – Education on contemporary human rights issues through an historical lens" aims at enhancing human rights education in Estonia by organising a series of human rights trainings. It brings together history and civic education teachers and non-governmental organisation activists, which will further organise school and out-of-school human rights education activities. The project also aims at setting the basis of a strategic partnership for the advancement of human rights education in the country, as well as a website for networking in the field, as well as functioning as main resource point for Human Rights Education. The project is financed by Foundation "Remembrance, Responsibility and Future" and the project activities are from May 2012 until to February 2013.

The lack in Estonia is the comprehensive and systemised Human Rights education together with teachers training and education in Universities.

The UN Declaration on Human Rights Education and Training is stimulating increased activity in the teachers education area.

Teaching human rights in schools starting from teaching the teachers, but unfortunately UN Declaration on Human Rights Education and Training is not dealing with the HRE in schools and then the states, NGO-s, teachers' organisations and students organisations have to take the opportunity to focus on the missing but very important area – teaching teachers.

Merle Haruoja

Merle Haruoja has been a human rights lawyer and an NGO activist for more than 20 years. She is the founder of the Estonian Child Welfare Union (1988) and the Estonian Institute of Human Rights (1992). She is the author of numerous human rights articles

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The *Human* Right to Education, the Ethical Responsibility of Curriculum, and the Irony in "Safe Spaces"[1]

We don't need no education
We don't need no thought control
No dark sarcasm in the classroom
Teachers leave them kids alone
Hey! Teachers! Leave them kids alone!
All in all it's just another brick in the wall.
All in all you're just another brick in the wall.[2]

Introduction

What do these lyrics tell us about education and society? About the (safe) space we call "classroom"? About the right to education? Is this gloomy picture of education, with its aggressive overtones, merely artistic hyperbole? Or does it tell us something about the nature of education? Globalization and the rise of the knowledge economy have had a vast impact on the way we conceptualize education.[3] Bridges and Jonathan[4] sketch this view of education as follows:

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[1] This paper was first published by ©2012 Sense Publishers, The Netherlands as part of the series *Critical Issues in the Future of Learning and Teaching*. Permission has been granted by Sense Publishers and the Editor of the book, Cornelia Roux, to republish the chapter from the book: C.D. Roux, *Safe Spaces. Human Rights Education in Diverse Contexts*, Rotterdam 2012, pp. 51-62.

[2] Lyrics of the chorus of *Another Brick in the Wall*, Part 2, Pink Floyd, Roger Waters (1979).

[3] M. Apple, *Global Crises, Social Justice, and Education*, New York–London 2010; S. Sörlin, H. Vessuri, *Knowledge Society vs. Knowledge Economy. Knowledge, Power, and Politics*, New York 2007.

[4] D. Bridges, R. Jonathan, 'Education and the market' in N. Blake et al. (eds.), *The Blackwell Guide to the Philosophy of Education*, Oxford 2005, p. 132.

> […] education becomes a commodity and schools production lines, "educated" students the products, and teachers rewarded on the basis of their productivity. Such language […] systematically distorts our understanding of the nature of education […] It turns intrinsic values and essentially moral and humanistic relations into instrumental ones.

This description accurately portrays the visual depiction in the music video of *Another Brick in the Wall*. It also tells us that our understanding of education as a humane act with intrinsic value has changed to an instrumentalist understanding.

In this paper, I will attempt to clarify what we understand by 'education' and "rights" in the context of the right to education. Scholarly explorations have revealed that neither of these concepts is static and that their varying interpretations have a direct influence on the way we understand the right to education.[5] This paper will, firstly, aim to contribute to a more nuanced understanding of education and rights. Secondly, this paper will attend to the plea of curriculum renewal and the ethical turn in the study of curriculum that necessitates us to rethink how we curriculate and to think about our ethical responsibilities.[6] Lastly, the implications of the right to education and the ethical responsibility of curriculum will be discussed in the context of "safe spaces". Literature has indicated that the use of the notion of safe spaces is often ambiguous and that this might have several implications for education.[7]

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[5] P. du Preez, C.D. Roux, 'Human rights values or cultural values? Pursuing values to maintain positive discipline in multicultural schools', *South African Journal of Education*, Vol. 30, No. 1 (2010), pp. 13-26; P. Gynther, 'Basic skills provision for the have-nots: a right hoax? Re-examining international standards on the right to education', *International Journal of Inclusive Education*, Vol. 15, No. 8 (2011), pp. 851-864, http://dx.doi.org/10.1080/13603110903452333; T. McCowan, 'Reframing the universal right to education', *Comparative Education*, Vol. 46, No. 4 (2010), pp. 509-525, http://dx.doi.org/10.1080/03050068.2010.519482; L.K. McMillan, 'What's in a right? Two variations for interpreting the right to education', *International Review of Education*, Vol. 56, No. 5-6 (2011), pp. 531-545, http://dx.doi.org/10.1007/s11159-010-9183-7.

[6] L. Cary, *Curriculum Spaces. Discourse, Postmodern Theory and Educational Research*, New York 2007; K. Morrison, 'The poverty of curriculum theory. A critique of Wraga and Hlebowitsh', *Journal of Curriculum Studies*, Vol. 36, No. 4 (2004), pp. 487-494, http://dx.doi.org/10.1080/0022027042000211458.

[7] R. Boostrom, 'Safe spaces. Reflections on an educational metaphor', *Journal of Curriculum Studies*, Vol. 30, No. 4 (1998), pp. 397-408; M. Redmond, 'Safe space oddity. Revisiting critical pedagogy', *Journal of Teaching in Social Work*, Vol. 30, No. 1 (2010), pp. 1-14, http://dx.doi.org/10.1080/08841230903249729; B.S. Stengel, L. Weems, 'Questioning safe space. An introduction', *Studies in Philosophy of Education*, Vol. 29, No. 6 (2010), pp. 505-507, http://dx.doi.org/10.1007/s11217-010-9205-8.

The *Human* Right to Education. Scholarly Reflections

The right to education is a second generation right concerned with the social, economic and cultural well-being of people in a society. The right to education has received considerable attention in literature both in South Africa[8] and abroad.[9] Much of this research focuses on the legal application of this right and, as a result, legal cases to augment arguments are widespread. Besides the legal implications of the right to education, there is also a moral undertone to it. McCowan[10] states that

> [u]niversal rights are primarily *moral* than *legal*, although they have official status through non-binding declarations such as the UDHR, and in some cases (such as in the United Nations Convention on the Rights of the Child [CRC]) they are turned into legally binding treaties.

Continuing from my earlier work that emphasized the moral nature of human rights,[11] I would like to propose here that we critically engage with the notion of the right to education and its ethical implications. In this regard, Kolstrein[12] – whose work is mostly concerned with the ethical implications of human rights – reminds us that the rights discourse in education is always an "ethical and moral imperative".

Literature indicates that the notion "right to education" is very elusive for three reasons: its moral and legal nature is often uncritically intertwined, what is meant by education is vague, and the conceptual underpinning of rights is often disregarded.[13] Despite the elusiveness of the notion, most would agree that the

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[8] S. Motala, V. Dieltiens, Y. Sayed, 'Physical access to schooling in South Africa. Mapping dropout, repetition and age-grade progression in two districts', *Comparative Education*, Vol. 45, No. 2 (2009), pp. 251-263, http://dx.doi.org/10.1080/03050060902920948; A.J. Greyling, 'Reaching for the dream. Quality education for all', *Educational Studies*, Vol. 35, No. 4 (2009), pp. 425-435, http://dx.doi.org/10.1080/03055690902876529.

[9] T. McCowan, 'Reframing…', pp. 509-525; L.K. McMillan, 'What's in a right…', pp. 531--545; S. Rana, 'The right to education. From La Frontera to Gaza, a brief communication', *American Quarterly*, Vol. 62, No. 4 (2010), pp. 855-872; M.H. Rioux, P.C. Pinto, 'A time for universal right to education. Back to basics', *British Journal of Sociology of Education*, Vol. 31, No. 5 (2010), pp. 621-642, http://dx.doi.org/10.1080/01425692.2010.500094.

[10] T. McCowan, 'Reframing the universal…', pp. 510-511.

[11] P. du Preez, *Facilitating Human Rights Values Across the OBE and Waldorf Education Curricula*, South Africa 2005; idem, *Dialogue as Facilitation Strategy. Infusing the Classroom with a Culture of Human Rights*, South Africa 2008; idem, C.D. Roux, 'Human rights values…', pp. 13-26.

[12] A.M. Kolstrein, 'Why are we involved in human rights and moral education? Educators as constructors of our own history', *Journal of Moral Education*, Vol. 40, No. 3 (2011), p. 289, http://dx.doi.org/10.1080/03057240.2011.596327.

[13] P. du Preez, C.D. Roux, 'Human rights values…', pp. 13-26; P. Gynther, 'Basic skills…', pp. 851-864; T. McCowan, 'Reframing the universal…', pp. 509-525; L.K. McMillan, 'What's in a right…', pp. 531-545.

right to education is an inevitably important right and the Constitution of the Republic of South Africa (1996), makes this clear in Chapter 2 (Section 29.1), when it states

1. Everyone has the right
a. to a basic education, including adult basic education; and
b. to further education, which the state, through reasonable measures, must make progressively available and accessible.

The basic idea of this right is that everyone should be granted the opportunity to receive education and that this education should be equal. What I would like to address is the following: What exactly is meant by education in this sense? What do we consider as education? What do we expect of education? In the general tenor of the Constitution we might answer: education for all and education as equal is education based on the principles of participatory democracy. But, are we living up to this democratic ideal? At present, are we not merely granting education as a basic right, but failing to educate in human rights, which is part of the *human* right to education?

McCowan[14] posits that little research has been done to clarify what we understand under education when we use it in the context of the right to education. In response to the question of what education means in the context of the right to education, McMillan[15] discusses two ways of interpreting education without arguing for or against one way or the other. Education, she argues, is understood by some in terms of its purpose in the process of *socialisation*[16] *and by others in terms of its potential to contribute to human capital*.[17] In terms of socialization, the benefits of education are *intrinsic* in as far as it raises a person's life quality.[18] Regarding education's potential to contribute to human capital, the benefits of education is both *instrumental*, in that it enables employment and opportunities, and *positional* since it could position one in relation to others.[19] McMillan[20] postulates that our understanding of education in terms of the right to education should always include both interpretations of education. This will enable us to interpret the right to education, not only in terms of access to education institutions, but also in terms of access to meaningful learning.[21] This, I will argue, enables us to include "rights *in* education" and "rights *through* education", which signifies meaningful learning, in our definition of the "*human* right *to* education", which is often perceived only

[14] T. McCowan, 'Reframing the universal…', p. 509.
[15] L.K. McMillan, 'What's in a right…', pp. 531-545.
[16] Ibid., p. 536.
[17] Ibid., p. 538.
[18] E. Unterhalter, H. Brighouse, 'Distribution of what for social justice in education? The case of Education for All by 2015' in M. Walker, E. Unterhalter (eds.), *Amartya Sen's Capability Approach and Social Justice in Education*, New York 2007, pp. 67-86.
[19] Ibid.
[20] L.K. McMillan, 'What's in a right…', pp. 531-545.
[21] T. McCowan, 'Reframing the universal…', p. 509.

in the context of access to education institutions. Spring[22] puts this differently: "the right to education includes the right to education in human rights".

It is also necessary to elucidate the different conceptual underpinnings of rights, since this too will contribute to the view we hold of the right to education. McMillan[23] states that rights could be interpreted ontologically from a universal perspective or a cultural relativist perspective. In addition, each of these positions could also be underscored by two epistemological positions: foundationalism and anti-foundationalism.[24] Each combination of ontologic and epistemologic perspectives gives rise to a different understanding of rights, that is a liberal-natural perspective, a pragmatic perspective, a communitarian perspective, and a cosmopolitan perspective.[25] McMillan[26] argues that we need to acknowledge our variations in understanding (both "education" and "rights") since this will frame the way we interpret the right to education. To support my earlier argument that the "*human* right *to* education" embraces "rights *in* education" and "rights *through* education" – as revelations of meaningful learning and ethically responding to the rights of others – I will suggest that we consult Parekh's[27] postulation. Parekh,[28] arguing from a cosmopolitan pragmatic position, asserts that although moral life can be expressed in a variety of ways, one should remember that moral expression – however different – could at any given moment also be judged in terms of universal values, and in this sense moral expression and universal values should correlate. In terms of rights-talk, this implies that we view official human rights documents as our universal benchmark, and that we critically negotiate our moral expressions of human rights in local contexts so that it is line with universal benchmarks.

In considering these theoretical clarifications, two incidents will be discussed below to further highlight the need to address the question of granting access to education as a basic right *and* the *human* right to education through meaningful learning and attending to our ethical responsibility to the rights of others. These incidents are derived from the various school-based projects on human rights in the curriculum that I have participated in as well as my real-life experiences of teaching human rights to student-teachers at two different universities in South Africa. These events will also be used to frame arguments in the remainder of this paper.

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[22] J.H. Spring, *The Universal Right to Education. Justification, Definition, and Guidelines*, New Jersey 2008, p. 2.

[23] L.K. McMillan, 'What's in a right…', p. 542.

[24] T. Dunne, N.J. Wheeler (eds.), *Human Rights in Global Politics*, Cambridge 1999, p. 4; P. du Preez, *Dialogue as Facilitation…*, p. 93.

[25] Ibid.

[26] L.K. McMillan, 'What's in a right…', p. 544.

[27] B. Parekh, 'Non-ethnocentric universalism' in T. Dunne, N.J. Wheeler (eds.), *Human rights…*, pp. 128-159.

[28] Ibid., pp. 130-131.

Reflections on School-Based Research

From research conducted between 2005 and 2011, I often got the impression that human rights are dealt with in a very undemocratic way. That human rights – as empty, a-contextual content – are deposited into children. The *teaching* of human rights was mostly monological and uncritical, which is not in tune with the general spirit of education in a participatory democracy. This made me question the actual *learning* that takes place when it comes to human rights. This, firstly, highlights the gap between the intended curriculum and the received curriculum, or as Pinar[29] suggests: the discrepancy between the lived curriculum and the planned curriculum. Secondly, it corroborates the fact that people often only conceive of the right to education as providing access to education and not as inclusive of meaningful learning. Given this, we need to ask whether we are in fact living up to the ideal of an education for all, an education for equality, as suggested by the *human* right to education. In addition, school-based research indicated that little progress occurs when human rights are concerned in the curriculum. The basic contents remain the same, at least from Grades 4 to Grade 7. Other research has also indicated that integration and infusion of human rights throughout the curriculum is ideal, but seldom occurs.[30] This is illustrated in the reductionist way that human rights are taught in Life Orientation by only teaching learners their rights in relation to responsibilities throughout the different grades. Moreover, little evidence of human rights infusion and integration in other learning areas can be found.

Lived Experiences of Teaching Student-teachers

When we speak of the *human* right to education, we need to ask what ought to be educated and what is less important to educate, and who decides this? This is not so much a matter of access to education, as it is a question of meaningful learning. The question of who decides is both an ethical and epistemological concern that needs thorough contemplation. In my own classroom encounters, I have experienced how matters of human rights often become part of the null curriculum – that which is *not* taught for whatever reason.[31] One such occasion occurred when I was teaching a class on human rights and curriculum theory. I introduced the right to equality irrespective of one's sexual orientation, and in so doing in-

[29] W. Pinar, 'Allegories-of-the-present. Curriculum design in a culture of narcissism and presentism', paper presented at the 'First international conference on curriculum and instruction', Turkey 2011.

[30] N. Carrim, A. Keet, 'Infusing human rights into the curriculum. The case of the South African Revised National Curriculum Statement', *Perspectives in Education*, Vol. 23, No. 2 (2005), pp. 99-110; P. du Preez, *Dialogue as Facilitation…*

[31] M. Quinn, 'Null curriculum' in C. Kridel (ed.), *Encyclopedia of Curriculum Studies*, vol. 2, Los Angeles 2010, pp. 613-614.

troduced the terms homosexuality, bisexuality and transsexuality. I did this for two reasons: [1] to illustrate the nature of the null curriculum and how it could potentially marginalize, and [2] to provoke students to engage in a classroom dialogue about an often silenced social matter. For a moment the class was silent, after which one of the postgraduate students asked me what exactly these terms mean. At that moment it occurred to me that never in her pre-graduate studies has she even thought about this – obviously this was part of the null curriculum she was exposed to. Another student asked to leave the class, since homosexuality was against her religion and she did not wish to engage in any dialogue about it. I asked her to stay, but (hesitantly) excused her. Before she left the class, another girl requested her to remain in the class and take part in the dialogue, with the following motivation: "From my perspective homosexuality is not right, but I teach Grade 1 learners and one of the children in my class comes from a homosexual family. We need to speak about this and learn from one another. We cannot ignore the social reality." This for me was an enlightening moment, because I realized that the safe space to speak about human rights and complex social issues is not so much created by educators (teachers or lecturers), but by learners (children or students) the moment they realize their ethical responsibility to respect the rights of the Other, irrespective of their own beliefs. It also made me think, can we honestly say that we support the right to education, if we deliberately decide not to educate basic *human* rights of equality?

In what follows I will explore the ethical responsibility of educators to not only respect and follow through the *human* right of education, but to provide an education for human rights. As already postulated, education for human rights is in itself part of the *human* right to education. This can only be realized when we carefully consider the curriculum, which is the study of education and society,[32] or as Pinar[33] explains: curriculum is a complicated conversation in the service of social and self-reflective understanding. This understanding of curriculum necessitates us to relate social matters such as human rights to the theory of curriculum.

The Ethical Responsibility of Curriculum

Curriculum as an expression of a society and its needs has gone through a considerable number of transformations. These transformations have at different stages been conceptualized differently. For example, Wraga and Hlebowitsh[34] spoke

[32] L. Le Grange, 'The didactics tradition in South Africa. A reply to Richard Krüger', *Journal of Curriculum Studies*, Vol. 14, No. 3 (2008), p. 399.

[33] W. Pinar, 'Allegories-of-the-present…'

[34] W.G. Wraga, P.S. Hlebowitsh, 'Toward a renaissance in curriculum theory and development in the USA', *Journal of Curriculum Studies*, Vol. 35, No. 4 (2003), p. 426, http://dx.doi.org/10.1080/00220270305527.

of the "the stubborn disarray of the curriculum field" and blamed the neglect of theoretical aspects due to an overemphasis on pragmatic considerations for this disarray. Koetting and Combs[35] support the theorizing of curriculum since the language of theory constitutes an understanding of how individuals reflect and interpret their experiences, and how experiences shape their world. In this sense, theories could contribute towards informing the conceptions of individuals and ultimately lead to change.[36] The language of curriculum in the South African context has become increasingly political since the 1990s.[37] This was important to give expression to people's real-life experiences and to initiate transformation in South Africa. However, Jansen[38] argues that although the process of politicizing the nature of curriculum has assisted us in the initial phases of transformation, it has not assisted us effectively in our search for reconciliation. In similar vein to Jansen,[39] Cary[40] advocates an ethical turn in curriculum which concerns distancing ourselves from the political concerns in curriculum and placing ethics at the centre of our attention. In short, what I will argue for here is that we infuse curriculum theory with the language of ethics.

The language of ethics in curriculum theory relies on a particular ontological understanding of education. It suggests an understanding that, primarily, embraces the intrinsic value of education in that it contributes to the learners' life quality through meaningful socialization processes. In terms of the right to education, the act of merely providing access adds mostly to the instrumental and positional value of education.[41] In contrast, an understanding of the *human* right to education that includes meaningful engagement contributes to the intrinsic value of education that relies on an ethical language. Such ethical language draws from relationships between people and could not be realized in contexts where the only concern is personal gain. Put differently, being ethical signifies the character and quality of human existence and relationships. In this sense the ethical becomes the premise from which a person's moral agency flows.

This understanding of education and the ethical turn in the study of curriculum implies careful epistemological decision-making processes. Here it is not only

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[35] J.R. Koetting, M. Combs, 'The importance of theory and theoretical discourse', *Curriculum and Teaching Dialogue*, Vol. 4, No. 2 (2002), p. 137.

[36] Ibid., pp. 139-140.

[37] L. Chisholm, 'Gender equality and C2005', paper presented in 'Curriculum for gender equality and quality basic education in schools conference', United Kingdom 2005; U. Hoadley, 'Knowledge, knowers and knowing. Curriculum reform in South Africa' in L. Yates, M. Grumet (eds.), *Curriculum in Today's World. Configuring Knowledge, Identities, Work and Politics*, Abingdon 2011, pp. 139-154.

[38] J. Jansen, *Knowledge in the Blood. Confronting Race and the Apartheid Past*, Stanford 2009, p. 256.

[39] Ibid.

[40] L. Cary, *Curriculum Spaces…*, p. 137.

[41] E. Unterhalter, H. Brighouse, 'Distribution of what…', pp. 67-86.

important to select contents wisely, but to arrange them in such a way that they could contribute to meaningful learning and elicit the ethical responsibilities we have towards others. In this sense the responsibility of educators does not stop when contents have been selected. In fact, that is where our responsibility begins. What is further required is the strategic knowledge and skill regarding curriculum design to initiate meaningful learning and ethical responsiveness. In what follows I will discuss the intended versus received curriculum, the null curriculum, and integration, progression and infusion of the *human* right to education as integral aspects of curriculum design. I will relate these design principles to the nuanced understanding of the *human* right to education discussed in the previous section of this paper.

The intended curriculum refers to the overt curriculum as communicated through national policy statements. According to Schubert[42] the intended curriculum is often contrasted with the hidden curriculum (what is learned from organizational structuring and social contexts), the null curriculum, the taught curriculum (what teachers interpret from policy and what they actually teach) and the learned curriculum (what learners learn or receive from the curriculum). In South Africa the intended curriculum attempts to integrate human rights contents and principles in various learning areas. The *Manifesto on Values, Education and Democracy*[43] is a supplementary document to the curriculum that provides strategies to infuse human rights values throughout the curriculum. However, research has indicated that the intended curriculum for human rights education is often jeopardized due to organizational structuring and social contexts that are inherently against the basic principles of human rights, the fact that educators often deliberately refuse to address human rights in fear that their own human rights might be at stake if learners know too much, and educators who interpret human rights only from a legal perspective and disregard its moral significance.[44] This approach to human rights education has given rise to the a-contexual way in which it is deposited into learners' minds and the reductionist fashion it has been addressed in Life Orientation. The methodological implications of this are vast and will be addressed later. At this moment I will focus on the ethical and epistemological implications of this since it has a direct influence on the received curriculum.

Our responsibility as educators is, firstly, to reflect on our own life worlds and belief systems. This, according to Cary,[45] entails the ethical process of becoming aware of our epistemological positions through autobiographical journeys and how these journeys shape our ways of knowing and how we understand others.

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[42] W.H. Schubert, 'Intended curriculum' in C. Kridel (ed.), *Encyclopedia of Curriculum Studies*, vol. 1, Los Angeles 2010, pp. 488-489.

[43] Department of Education, *Manifesto on Values, Education and Democracy*, South Africa 2001.

[44] P. du Preez, *Facilitating Human Rights…*; idem, *Dialogue as Facilitation…*

[45] L. Cary, *Curriculum Spaces…*, p. 138.

This also has an influence on what we consider important to teach and learn and will therefore inform the contents we select. Reflection thus enables us to understand the workings of the null and hidden curriculum and *act* to prevent this influencing the quality of education learners receive. In this sense our ethical responsibility in education is to adhere to a pedagogy of praxis.

Secondly, we have the responsibility to arrange contents so that learners can experience authentic learning contexts and engage with their complexities through dialogue. This (as indicated in incident two above) enables learners to take ownership of their own learning through creating safe spaces in which they could learn from one another. The question then is: how do we arrange these contents? Here the principles of integration, progression and infusion are important. Integration enables a curriculum worker to view all knowledge as interrelated and to reject the compartmentalized view of knowledge.[46] Practically, this implies that we integrate human rights in various learning areas when we teach, but that we also integrate various perspectives on human rights when we teach and learn. Infusion of human rights in all aspects of school life, and not only in contents, is also important.[47] This provides authentic contexts in which we can learn about the practicalities of human rights and experience its moral nature. This requires that we internalize human rights and arrange our school culture in such a way that it is infused by human rights values. Most importantly, we need to assure progression in terms of the level of difficulty in human rights education.[48] Human rights education is not only about teaching and learning the content of human rights, but entails the process of being challenged by ever increasing, complex social issues that require human rights application.

Thirdly, the question then becomes: what is our responsibility in terms of the methodology of teaching and learning human rights? As mentioned above, research has indicated that due to the fears attached to the teaching of human rights, a mostly monological and uncritical approach has been followed.[49] Research has also indicated that a dialogical approach is essential to turn the situation around and the exact nature of dialogue has also been elaborately discussed.[50] In essence, the power of dialogue lies in the following: "The Other is re-disclosed bit by bit, little by little, in the continuous revelation of dialogue, which includes both of our rhetorics, a rhetoric that seeks and a rhetoric that reveals, a rhetoric that questions and a rhetoric that answers".[51] Although the nature of dialogue is quite clear, the nature of a "secure and compassionate space" for dialogue to transpire is elu-

[46] B. Bernstein, 'On the curriculum' in U. Hoadley, J. Jansen (eds.), *Curriculum. Organizing Knowledge for the Classroom,* South Africa 2009, pp. 287-291.

[47] P. du Preez, *Dialogue as Facilitation…*

[48] L. Chisholm, 'Gender equality…'

[49] P. du Preez, *Dialogue as Facilitation…*

[50] Ibid.

[51] J.W. Murray, *Face to Face in Dialogue. Emmanuel Levinas and the Communication of Ethics*, Lanham 2003, p. 78.

sive and requires further investigation.[52] In this regard, Holley and Steiner[53] state: "[…] few go into much detail about what they mean by safe space or how to create it. Additionally, while safe space has become an increasingly used metaphor for a desired classroom atmosphere, the utility of striving for safety is rarely questioned nor are possible drawbacks examined."

In conclusion to this section, the responsibilities of educators to give meaning to the *human* right to education could be captured in the following: we have the responsibility to enable spaces where children can learn that they have a moral duty to actively protect the rights of others.[54] The question then becomes: what is the nature of these spaces? This question will be discussed next.

The Irony in 'Safe Spaces'

Boostrom[55] says: "It may seem that the meaning of "safe space" is so obvious that explaining the phrase would be unnecessary, but the meaning is not as clear-cut as might be supposed". He proceeds by arguing that the notion of a safe space has become an emerging metaphor since the 1990s to explain classroom life.[56] Safe spaces in the context of this paper and the work of Boostrom,[57] Stengel and Weems,[58] and Redmond[59] do not refer to literal or physical safety, but denote the figurative and discursive use of the notion.

Since the 1990s, important questions have been asked about the nature of safe space. Stengel and Weems[60] highlight several of these questions: What are safe spaces? How do we know they are safe? Who and what are they safe from? What most authors agree upon is that safe spaces are not merely a matter of comfort, stability, certainty and compliancy. Rather, safe spaces, in their figurative form, are governed by instability and uncertainty[61] and discomfort.[62] Stengel and Weems[63] elaborate further: "[…] safe spaces are «contentious» and «risky», yet «playful», «pleasurable» and ripe with educational possibilities."

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[52] P. du Preez, *Dialogue as Facilitation…*, p. 101.

[53] L.C. Holley, S. Steiner, 'Safe space. Student perspectives on classroom environment', *Journal of Social Work Education*, Vol. 41, No. 1 (2005), p. 49, http://dx.doi.org/10.5175/JSWE.2005.200300343.

[54] J.H. Spring, *The Universal Right…*, p. 3.

[55] R. Boostrom, 'Safe spaces…', p. 398.

[56] Ibid.

[57] Ibid.

[58] B.S. Stengel, L. Weems, 'Questioning safe space…', pp. 505-507.

[59] M. Redmond, 'Safe space oddity…', pp. 1-14.

[60] B.S. Stengel, L. Weems, 'Questioning safe space…', p. 506.

[61] Ibid.

[62] M. Redmond, 'Safe space oddity…', p. 12.

[63] B.S. Stengel, L. Weems, 'Questioning safe space…', p. 506.

Two assumptions about safe spaces arise that lead to the ironic nature of safe spaces. The first is that in its entire fixation with safety, it is essentially about risk and danger. The second is that this presumably stable and safe space in the classroom, is safeguarded against the unstable outside world. This is, alas, not the case. The notion of safe spaces is highly political. In a world characterized by suspicion, terrorism and warfare; instability and uncertainty creates a situation in which individuals tend to isolate themselves in an attempt to safeguard themselves from potentially dangerous contexts. Conflicts that concern clashes between individuals' private and public lives (which are often religiously motivated) further lead to isolation. So Boostrom[64] rightly observes that safe spaces inherently assume that people are isolated (both physically and psycho-socially) and that safe spaces assume that we will be less isolated if we express our individual diversity.

When we understand the irony of safe spaces, I would argue, we are in a better and less naïve position to address the questions of what constitutes safe spaces, how we know they are safe, and who and what they are safe from. Jansen's[65] understanding of risk-accommodating environments is helpful to begin conceptualizing what a safe space could be like. He defines such space as a place where human beings can engage in the difficult task to unburden themselves.[66] In line with Jansen,[67] I would argue that we know a space is safe when risks can be taken in such a space. The second incident discussed in the opening section of this article illustrates how a risk could be taken by learners and they can unburden themselves of the difficult social matters they are confronted with, by seeking advice from each other and dialoguing real-life experiences. In this sense learners are safe from the isolation, instability and uncertainty that is often associated with an individualist society in which people's private lives are superficially divorced from their public lives. Based on the discussions throughout this paper, I would argue that a space is safe when learners create this space themselves. The role of the educator is therefore to arrange contents and design curricula in such a way that they stimulate dialogue and enable learners to create safe spaces.

In addition, we should not assume that granting access to education automatically guarantees a safe space. The *human* right to education also requires us to infuse a culture of human rights into our curriculum to facilitate the process of learners engaging with their private and public lives. In short, a safe space constitutes a space where peoples' private and public lives intersect and where risks could be taken in the general tenor of the *human* right to education.

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[64] R. Boostrom, 'Safe spaces…', p. 398.
[65] J.D. Jansen, *Knowledge in the Blood…*, p. 274.
[66] Ibid.
[67] Ibid.

Conclusion

The irony of safe spaces enables us to extend our understanding of the *human* right to education. It has the potential to unite private and public lives in authentic spaces where risks can be taken and meaningful learning with an ethical conscious can emerge. The most important prerequisite for effective dialogue is a safe space. Without safe spaces we cannot do justice to our responsibility to bring the *human* right to education to fruition and in this sense we do not pay heed to the ethical nature of curriculum work. So, if we do not facilitate the development of safe spaces and remain teaching human rights in a reductionist fashion, what space are we creating? We are creating empty spaces.

We are creating empty spaces when we view the right to education as mere access to education institutions, when we merely see the work of curriculum as the selection of contents and methodology, and when we attempt to safeguard learners against the social realities in which they are situated. This empty space justifies the evil of the knowledge economy and denies the ethical responsibility human beings have toward one another. It reduces complex social problems that require human rights application, to a-contextual content that has some remote theoretical significance. In doing so, we are in fact delegitimizing the intrinsic value of education. We are smothering opportunities for dialogue and perpetuating fear and isolation. As mentioned in the lyrics that follow, our empty spaces creates waves of hunger for something more real, it propagates isolation, fear and violence, and it ultimately leads to discontent.

What shall we use to fill the empty spaces
Where waves of hunger gnaw
Shall we set out across this sea of faces
In search of more and more applause
Shall we buy a new guitar
Shall we drive a more powerful car
Shall we work straight through the night
Shall we get into fights (…)
Drop bombs (…)
Bury bones (…)
How shall I fill the final places?
How shall I complete the wall?[68]

Abstract

Scholarly explorations have revealed that neither "education" nor "rights" are static concepts and that their varying interpretations have a direct influence on the way we un-

[68] Lyrics of *Empty Spaces*, Pink Floyd, Roger Waters (1979).

derstand the right to education. This paper will, firstly, aim to contribute to a more nuanced understanding of education and rights. Secondly, this paper will attend to the plea of curriculum renewal and the ethical turn in the study of curriculum that necessitates us to rethink how we curriculate and to think about our ethical responsibilities where the right to education is concerned. Lastly – based on literature that indicates that the use of the notion of safe spaces is often ambiguous – the implications of the right to education and the ethical responsibility of curriculum will be discussed in the context of the notion "safe spaces".

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"What about Newspapers?"

Some Reflections on Asia, Language Barriers, and Human Rights Education in Higher Education Institutions in (Eastern) Asia

Introduction

Human rights education has been a long overlooked goal of the human rights movement. It is an essential pre-requisite to the realisation of a meaningful global culture of respect for and promotion of human rights. The World Programme for Human Rights Education is the latest UN initiative to focus attention on this, with particular emphasis during this the second phase (2010-2014) on, inter alia, tertiary level education – universities. This paper seeks to contribute to the burgeoning literature on human rights education by considering the language barriers which currently mar the realization of tertiary level human rights education in some countries. In furtherance of this, consideration is given to the disparate experiences of China and some of the smaller South East Asian countries. Developing human rights education in universities in China has been a major national task, supported by a range of overseas partner institutes and donor organisations. However, advancements made in China have been aided by the availability of source material in Chinese, particularly online (for example, through www.ohchr.org). Similar materials are not available in other Asian languages. This gives rise to significant problems when seeking to establish human rights education initiatives particularly in higher education institutions.

This paper seeks to analyse the relevant issues and present some personal reflections on ways forward. To do so, first the aims of human rights education in higher education institutions will be clarified. This will lead to a discussion of methodology and of course, the implications flowing from limited physical resources to support the teaching in the area. A partial solution of focussing on skills and attitude (from the hand, heart, head model of human rights education) will be discussed. Newspapers and materials drawn from popular culture and indeed

tradition can be used as a base for teaching and learning initiatives, promoting a practical approach to human rights education which respects the principles underpinning the concept. It will be argued that high quality learning can thus be delivered with a minimum of academic sources. Whilst perhaps not ideal, it is nevertheless feasible to contribute towards the realization of a global society aware of and supporting the fulfilment of international human rights with limited official texts and materials.

Human Rights Education: Curriculum and Learning Development. The Basic Requirements for Human Rights Education

Human Rights Education is not new – among earlier statements thereon are those made by the General Assembly in the resolution adopting the Universal Declaration of Human Rights[1] and those made by the participants during the 1993 World Conference on Human Rights: "human rights education, training and public information [is] essential for the promoting and achievement of stable and harmonious relations among communities and for fostering mutual understanding, tolerance and peace".[2] In terms of the UN Declaration on Human Rights Education and Training[3] human rights education has a wide definition, encompassing all "educational, training, information, awareness-raising and learning activities aimed at promoting universal respect for and observance of all human rights and fundamental freedoms".[4] Human rights education is both education on human rights and education in accordance with human rights standards,[5] or as the Declaration notes, education about, through and for human rights.[6] It embodies the interdependence of human rights education and human rights in education. Or, as Kirchschlaeger phrases it, "HRE [human rights education] is definitely not a 'nice to have' but a 'must have' for today's education programmes: Everyone has a right to learn *about, from* and *for* human rights!" (original italics).[7] It is more than action

[1] UN General Assembly resolution 217 (III) D, *Publicity to be given to the Universal Declaration of Human Rights*, UN Doc A/RES/3/217, 10 December 1948.

[2] Vienna Declaration and Programme of Action Part II.D, para 78, attached to UN Doc A/CONF.157/23, 12 July 1993.

[3] Adopted by General Assembly resolution 66/137, UN Doc A/RES/66/137, 16 February 2012.

[4] UN Declaration on Human Rights Education and Training, UN Doc A/RES/66/137, 16 February 2012, Article 2(1).

[5] K. Tomaševski, *Human Rights in Education as Prerequisite for Human Rights Education*, Lund 2001.

[6] UN Declaration on Human Rights Education and Training…, Article 2(2).

[7] P. Kirchschlaeger, 'Human rights education for a sustainable future. The relationship between human rights education (HRE) and Education for Sustainable Development (ESD)' in F. Waldron, B. Ruane (eds.), *Human Rights Education. Reflections on Theory and Practice*, Dublin 2010, p. 76.

plans[8] and requires a transformative approach.[9] Starkey argues that human rights education is an integral part of the preparation of young people for adulthood in an increasingly globalised world – cosmopolitan citizenship[10] – although Howe and Covell note that children traditionally suffer from not being considered citizens in their own rights and thus a sense that they are recipients of human rights education in preparation for adulthood and assumption of citizenship.[11] Whilst the first phase of the UN World Programme on Human Rights Education clearly emphasized that all children are entitled to human rights education, regardless of the arguments on citizenship, the second phase shifts the focus to tertiary level education and key professions.[12] This phase also reinforces the need for universities to consider models of integrating human rights education within their existing structures, infusing rights awareness, cultivating an environment conducive to the promotion of protection of respect for and fulfilment of human rights. Human rights education should achieve more than the transmission of knowledge about human rights – rather it should secure more holistic goals, changing attitudes in response to an awareness of human rights norms and developing skills necessary to actively create this culture of respect for human rights.

The necessarily holistic model of human rights education makes certain demands not necessarily relevant to other types of education. For human rights education to be successful, results have therefore to be achieved and change effected in the three distinct aspects noted above: knowledge, skills and attitude (or as it is often more visually represented – head, heart and hands).[13] Knowledge is the traditional realm of liberal universities – transferring knowledge, creating knowledge and contributing towards the development of knowledge. An important part of human rights education is of course ensuring a broad awareness of human rights, their content and the obligations of the State in respecting them. In

[8] G. Alfredsson, 'The right to human rights education' in A. Eide, K. Krause, A. Rosas (eds.), *Economic, Social and Cultural Rights. A European Challenge*, Dordrecht 2001, p. 273.

[9] See also: F. Tibbits, 'Understanding what we do – emerging models for human rights education', *International Review of Education*, Vol. 48 (2002), p. 157.

[10] H. Starkey, 'The Universal Declaration of Human Rights and Education for Cosmopolitan Citizenship' in F. Waldron, B. Ruane (eds.), *Human Rights…*, pp. 39-40; see also: A. Osler, H. Starkey, 'Learning for cosmopolitan citizenship. Theoretical debates and young people's experiences', *Educational Review*, Vol. 55, No. 3 (2003), p. 243, http://dx.doi.org/10.1080/0013191032000118901; iidem, 'Education for Democratic Citizenship. A review of research, policy and practice 1995-2005', *Research Papers in Education*, Vol. 21, No. 4 (2006), p. 433, http://dx.doi.org/10.1080/02671520600942438; M. Nussbaum, 'Education and democratic citizenship. Capabilities and quality education', *Journal of Human Development and Capabilities*, Vol. 7, No. 3 (2006), p. 385, http://dx.doi.org/10.1080/14649880600815974.

[11] R.B. Howe, K. Covell, *Empowering Children. Children's Rights Education as Pathway to Citizenship*, Toronto 2005.

[12] Draft Plan of action for the second phase (2010-2014) of the World Programme for Human Rights Education, UN Doc A/HRC/15/28, 27 July 2010.

[13] Hands are substituted in some visualizations for feet.

furtherance of the World programme, this obviously includes teacher training.[14] Skills are traditionally taught in the vocational courses offered by universities – medicine, dentistry, law, accountancy, teacher training etc. In some countries, the latter (law, accountancy, teacher training) are not university courses per se but are postgraduate vocational training options. However, the principal skills nurtured in universities tend to be academic in nature – critical analysis, reasoning, oral argument, numeracy etc. Such skills are highly transferrable and of course valuable. Nevertheless, the skills required for human rights education draw on some of these more traditional academic skills – the most obvious example is advocacy which demands a degree of oral reasoning.

Successful human rights education should lay the foundations of the process of active citizenship identified by Banks.[15] Creating and developing knowledge and understanding as well as skills (of empowerment) can be effected with many traditional academic teaching methods. Effecting an attitudinal shift is perhaps the most difficult aspect. This is not something which can be taught directly in traditional "rote learning" style or the nurturing of traditional academic transferrable skills. Rather it is something which evolves through time, the evolution continuing after the end of the formal education process. Human rights education is "lifelong learning".[16] In keeping with the tenor of the Universal Declaration of Human Rights,[17] and numerous treaties since,[18] the goals of education apply throughout life – strengthening respect for human rights, promoting tolerance and friendship among nations and groups; advancing peace.[19] The formal aspect of education thus lays the foundation, plants the seeds and nurtures the roots of the tree of learning which continues to thrive (it is hoped) throughout life.

So, having established the desirability of human rights education and its nature and goals, it is now necessary to briefly consider the implications for curriculum and learning development.

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[14] See also: K.M. Campbell, K. Covell, 'Children's rights education at the university level. An effective means of promoting rights knowledge and rights-based attitude', *International Journal of Children's Rights*, Vol. 9, No. 2 (2001), p. 123, http://dx.doi.org/10.1163/15718180120494883.

[15] J. Banks, 'Diversity, Group Identity, and Citizenship Education in a Global Age', *Educational Researcher*, Vol. 37, No. 3 (2008), p. 129, http://dx.doi.org/10.3102/0013189X08317501.

[16] See, for example: M. Nowak, 'Prioritising human rights education and training', *European Human Rights Law Review*, Vol. 3 (2004), p. 235; see also: the Hamburg Declaration on Adult Learning, at <http://www.unesco.org/education/uie/confintea/declaeng.htm>, 7 August 2013 – which recognises the power of education in various sectors including empowerment of women, indigenous rights and education for peace and citizenship.

[17] Article 26(2) Universal Declaration of Human Rights.

[18] See, for example: Article 13(1) International Covenant on Economic, Social and Cultural Rights; Article 7 International Convention on the Elimination of all forms of Racial Discrimination; Article 25 African charter on Human and Peoples' Rights; Article 13(2) European Charter on Social and Cultural Rights.

[19] Article 26(2) Universal Declaration of Human Rights.

Curriculum and Learning Development

This paper focuses on human rights education within tertiary level institutions, i.e. universities, thus the education under discussion is generally formal, delivered through courses taught within that institutional environment.[20] Accordingly, theories of curriculum development are relevant. Biggs[21] notes that successful curriculum design is derived from a balance between content, teaching methods, assessment process, educational environment and applicable institutional constraints.

A very simple systems approach to curriculum design[22] requires that the course under development takes cognisance of the existing knowledge of the students,[23] aims at delivering on the learning outcomes prescribed at the start of the course,[24] considers the physical materials available to the teacher and students and reflects all university constraints. Obviously university constraints, usually to do with timings of class (blocks of time or single hours), numbers of students, length of class (weeks) and assessment cannot easily be challenged and thus must usually be complied with. However, it is possible to work round most of these restrictions with a little forethought.

For human rights education, a pre-requisite is thus that the teacher has existing appropriate knowledge upon which to draw. Considerable numbers of international development projects aim at building capacity amongst higher education teachers – this has involved pure transfer of knowledge and partnership activities aimed at developing knowledge of the subject and understanding of appropriate teaching methods and assessments. Some of those in China are noted below,[25] others are ongoing in Southeast Asia. The capacity of staff teaching the course is essential to the success of the module, at least as regards the transfer of knowledge aspect. For human rights, given many academics are, in effect, "self-taught" on the subject of human rights, it will inevitably take the proverbial generation for subject knowledge to be implicit in general knowledge as a foundation upon which

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[20] Universities can and do deliver and receive human rights education in other ways, this paper just happens to focus on the more formal education process.

[21] J. Biggs, *Teaching for Quality Learning at University*, Buckingham 1999.

[22] N. Falchikov, F. Percival, *The Systems Approach to Course and Curriculum Design*, [Dundee] 1990.

[23] On "prior knowledge" of students, an important factor particularly with (mis)conceptions re human rights, see, inter alia: M. Svinicki, 'What they don't know can't hurt them: the role of prior knowledge in learning', *The Professional & Organizational Development Network in Higher Education*, 2006, at <http://www.asa.mnscu.edu/facultydevelopment/resources/pod/Packet14/whattheydon'tknowcanhurtthem.htm>, 7 August 2013; or more generally: 'Recognise Who Your Students Are', at <http://www.cmu.edu/teaching/designteach/design/yourstudents.html>, 7 August 2013.

[24] On learning outcomes, see the seminal work of R. Mager, particularly *Preparing Instructional Objectives. A Critical Tool in the Development of Effective Instruction*, Atlanta 1998.

[25] E. Bjornstol, 'Human Rights Law Education in China', 2009, *Web Journal of Current Legal Issues*, at <http://webjcli.ncl.ac.uk/2009/issue1/bjornstol1.html>, 7 August 2013.

to build. Teaching and assessment methods can also be expanded on through capacity building projects and through sharing of best practices. This aspect, the professionalism of academia, is building within the region, albeit that most scholars do not yet require formal tertiary level teaching qualifications.[26] However, the availability of physical resources is often the most challenging of these aspects: many universities unless developed south east Asian countries do not have the technological access common in, for example, higher tier Chinese universities. Thus universities may offer only traditional lecture format without access to visual projection facilities or computerised resources within the classroom.[27] In addition, external (non-local, i.e. outside the country) internet access may be restricted (i.e. very slow) and/or very expensive. If there are insufficient resources available in the library, this combination presents real problems for curriculum design.

For human rights education to become a reality, clearly there is a need not only for tertiary level courses to be available (if not mandatory) for all students, but also for staff expertise in the topic and in appropriate teaching methodology, as well as physical resources to facilitate and support learning, teaching and assessment. This paper particularly centres attention on the latter – physical resources – and presents an exploitable opportunity for remedying deficiencies in local language materials. To do so, the contrasting positions pertaining in China and some countries of South East Asia will be considered. The availability of core texts in the local language plays a crucial role in the successful implementation of human rights education as the case of China evidences.

Reflections on the Process in China

There is no doubt that there has been a dramatic increase in the offering of human rights courses within Chinese universities since 2001 when the education authorities first elevated human rights to the list of subjects approved for inclusion in Law degrees. Notwithstanding the sensitivities of human rights in China, and thus the fact that many universities choose not to offer pure human rights degrees, there is clear evidence of an infiltration of human rights throughout syllabi. Many law schools now offer human rights as a module,[28] the National Human Rights Education Annual Meeting[29] attracts increasing numbers of applications

[26] Practice varies from country to country but there is evidence across the sector of moves towards university level teachers requiring formal teacher training and/or qualifications.

[27] PowerPoint, visualisers, WiFi access etc. may all be unavailable in most classrooms.

[28] For a (Chinese language) overview of experiences of those teaching these courses, see: S. Sun, *Zhoungguo Daxue de Ren Quan Fa Jaio Xue. Xianzhuangyu Zhan Wang (Human Rights Teaching at Chinese Universities. Problems and Prospects)*, science publishing.

[29] Organised by various Chinese universities (different host each year) in cooperation with the Danish Institute for Human Rights, the Norwegian Centre for Human Rights and the Raoul Wallenberg Institute in Sweden.

from interested scholars and there is evidence of growth in the interdisciplinary and single disciplinary research on human rights matters.[30] In its second National Human Rights Action Plan,[31] China states it will "encourage institutions of higher learning to offer public courses and specialized courses on human rights, support the development of related disciplines and majors, and encourage studies on human rights theories".[32] In addition, expert centres are being established at, in the first place five universities, as focal points on human rights education. Obviously, as is so often the case, there is a disconnect between the theory outlined on paper and in policy documentation and the reality in practice. However, there is no doubt that "human rights" as a term is enjoying enhanced acceptability within the country including at an official level,[33] and that partly as a corollary thereto, human rights is increasingly taught at higher education institutions, albeit primarily in legal education programmes.

One major factor in the growth of human rights education in China is the availability of core materials. However, as Bjornstol notes, although there was "considerable interest in human rights issues among legal scholars in China in 2001, […] no legal institutional had the qualified teachers, teaching capacity or indeed teaching materials to start offering such optional human rights law courses for their students".[34] This situation has now been rectified: the perceived deficit in academic knowledge and teaching methodology was addressed through intensive efforts of various external partners and donors – for example Smith and Bai note that from 2001-2007, some 200 Chinese University teachers were trained in international human rights law, a further 200 being involved in additional Nordic human rights institution programmes aimed at supporting capacity in human rights education within China.[35] With respect to physical resources, a number of books were published in the early years of this century.[36] However, the increased avail-

[30] For example: T. Landman, W. Simmons, R. Smith (eds.), *Wo Men Shi Dai De Ren Quan. Duo Xue Ke De Shi Ye (Human Rights in Our Time. Multidisciplinary Perspectives)*, China 2010.

[31] Available online in English through the Xinhua website: <http://news.xinhuanet.com/english/china/2012-06/11/c_131645029.htm>, 7 August 2013.

[32] Action Plan: note 31, Part IV, Human Rights Education.

[33] Arguably what is meant by the term may differ from person to person and may not coincide with the views of external human rights scholars and lawyers.

[34] E. Bjornstol, 'Human Rights…'

[35] R. Smith, G.M. Bai, 'Creating a culture of Human Rights Education in China' in J. Grimheden, R. Ring, D. Karlsson (eds.), *Festschrift in Honour of Katarina Tomasevski*, 2011, at <http://www.rwi.lu.se/ktfestschrift/On-line_festschrift_in_honour_of_Katarina_Tomasevski.html>, 7 August 2013.

[36] Chinese University of Political Science and Law, Norwegian Centre for Human Rights, *International Human Rights Law Textbook*, China 2002 – popularly known as "the blue textbook"; C.M. Yang (ed.), *Ren Quan Fa Xue* (*Human Rights Law)*, Beijing 2004; and X.M. Xu (ed.), *Guo Ji Ren Quan Fa Xue* (*International Human Rights Law)*, Beijing 2004 ("the yellow textbook") – the production of which was supported by the UN Foreign and Commonwealth

ability if the internet and the prevalence of accessible electronic technology have radically enhanced the range of materials available for teaching and learning human rights. Chinese is an official UN language and thus almost all core materials on human rights are available in Chinese online (through ohchr.org). This means that academics wishing to introduce the subject can access the primary materials through the Office of the High Commissioner of Human Rights, through government websites or through mirror repositories (e.g. Peking University Law School's Research Centre for Human Rights and Humanitarian Law). Where Chinese language sources are not accessible in China (e.g. video clips produced by OHCHR which are distributed through YouTube, a site blocked in mainland China), the relevant organisations will normally provide alternative methods of accessing that teaching/learning resource – for example, emailing a media file or sending a CD Rom or DVD instead.

There is no doubt that the availability of core materials (treaties, state reports, concluding observations of UN treaty bodies, universal periodic review documentation) influences decisions to teach human rights within Chinese universities – without this "virtual library" it would be difficult for academics to begin course in the subject, not least as the available Chinese language textbooks are increasingly outdated. Achievements in China are important for human rights education as, given that China is home to almost a fifth of the world's population, succeeding in human rights education there would mean statistically one in five of the world are aware of their human rights, albeit with a considerable geographical concentration!

A Linguistic Overview of the Accessibility of UN Material

Inevitably it is difficult to obtain precise statistical information on linguistic competences. There is no doubt that the official UN languages are amongst the most widely understood on the planet.[37] However, the official statistics can be misleading – many minority groups (occasionally even majorities of the population) in countries professing an official language which is a UN language do not actually have linguistic competence therein. More easily ascertainable are the range of countries which do not use UN languages as the official or an official language, although again this can be misleading. The official language of some countries is not necessarily the lingua franca or even mother tongue of most of the population.[38]

Office through the British Council; B.Y. Li, *Ren Quan Fa Xue* (*Human Rights Law)*, Beijing 2005 ("the red textbook"); and Nanjing University Law School's contribution C.F. Yang (ed.), *Ren Quan Fa Xue* (*Human Rights Law)*, Beijing 2010.

[37] G. Weber, 'Top languages. The world's 10 most influential languages', *Language Monthly*, Vol. 3 (1997), p. 12, at <http://www.andaman.org/BOOK/reprints/weber/rep-weber.htm>, 31 December 2012.

[38] Language is one of the legacies of colonization, though now globalisation is a major influencing factor – both are outwith the scope of the present paper.

When viewed in a global context, Asia is perhaps the most challenged region linguistically, as far as prevalence of UN languages is concerned. Although on paper Europe has similar problems, English and French have long been the primary legal languages used in diplomacy and international interactions. Nevertheless, there are real problems in the Council of Europe with the number of Russian and Turkish language complaints being lodged before a Court that officially uses only French and English.[39] Indeed, Europe is one of the most linguistically diverse regions of the world in terms of number of languages per geographical unit of measurement.[40] In Africa which has a vast number of indigenous languages, French and English are widely used in higher education and indeed are often an official language (along with regional and local languages – Mozambique, Angola, Guinea-Bissau, Cape Verde, and São Tomé and Príncipe of course use Portuguese). In Central and South America, Spanish is widely understood (obviously Brazil is the principal exception). Caribbean islands usually have English, Spanish or French as official languages, along with local languages (though note the Dutch Antilles and Puerto Rica with the prevalence of Dutch and Spanish, respectively) In the South Pacific, English or French is often spoken along with Bislama and a variety of local languages. The Middle East[41] and North Africa region along with the Cooperation Council for the Arab States of the Gulf use Arabic (and for the former, possibly also French or English).

In Central Asia, Turkey suffers from linguistic issues as do other neighbouring countries, however, heading further east Russian is often understood and can be used by former Soviet Union territories. The Indian subcontinent presents challenges when Afghanistan, Pakistan, Bangladesh and India hosts large swathes of the population who do not converse in any UN language (there is a prevalence of English speakers, especially amongst higher education staff in these countries but a marked difference is evident when assessing the linguistic competences of the rest of the population). Further east, Chinese is understood throughout most of China; in the far north-western region, Arabic and Russian may also be used. Written Chinese can also be understood in Taiwan,[42] Hong Kong and Macao, though there are significant difference with Cantonese (Macao and Hong Kong)

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[39] Rule 34, Rules of Court, European Court of Human Rights state French and English as the official languages of the Court.

[40] For a popular review of languages of the world, see: M.P. Lewis (ed.), *Ethnologue*, Dallas 2009, at <http://www.ethnologue.com>, 7 August 2013. The South Pacific region has a greater number of languages but these are not all official and many are spoken by very small numbers of people in specific enclaves.

[41] The conference was held in Europe thus Europe is the central point for the geographical denotations. Obviously China for example, does not consider itself the "East", indeed the Chinese character for China is literally "middle kingdom", a pictorial (squared off) globe bisected in the middle by a vertical line representing China's position.

[42] NB Taiwan is not currently a UN member State and remains officially recognised by China (disputed by many others) as part of mainland China.

and with written Chinese (Taiwan uses traditional Chinese characters as opposed to the simplified characters now adopted on the mainland of China). Japanese has a strong linguistic identity and many Japanese cannot access other UN languages, although English is increasingly common for business purposes. Korean is a unique language,[43] with hangul script developed in the fifteenth century and gaining popularity through the twentieth century (not least as it converts easily to use with modern technology and keyboards) though in South Korea, many people can use English. From the foregoing, it appears that Asian languages are disproportionately underrepresented in the UN notwithstanding that the most populous language, Chinese, is an official UN language.

Turning to the regional organisations, ASEAN[44] for example, has adopted English as its official language although English is not widely spoken in Laos, Vietnam, Myanmar, Indonesia or even Thailand. (English is widely spoken in the Philippines and in much of Malaysia and Singapore. Obviously English is also spoken in areas of Myanmar and Thailand and it is taught in other countries.) By way of comparison, the languages of former colonial powers also predominate in other regional organisations: the Council of Europe uses French and English;[45] the Organisation of American States uses Spanish, Portuguese and English;[46] and the African Union uses French, English, Portuguese and Arabic.[47]

If one can read and use one of the official languages of the UN, it is relatively easy to obtain access to the full range of human rights instruments and documentation in paper form or electronically.[48] If you cannot, even the most basic approach to human rights presents problems, not least as some countries do not purport to have even their national reports publicly available in national languages, these being submitted to the UN by necessity in an official UN language. These problems are particularly acute within an academic context when students are traditionally required to use written sources, reference them appropriately and analyse them. A formal or approved source of the material is thus required as human rights should not be anecdotal and most certainly should not be the preserve of the edu-

[43] Usually referred to as a language isolate – created by a former leader (Sejong).

[44] Association of Southeast Asian Nations.

[45] Often the choice for inter-State discussions but not official languages of many of the Council's member States.

[46] These are official languages in most member States, albeit there are a host of indigenous languages also in everyday use.

[47] Again these are official language in many States although often indigenous languages also have official status.

[48] There is nevertheless a problem with the UN Secretariat generally prioritizing a couple of languages – „the unmentionable language question" at Philip Alston put it in his *Final report on enhancing the long-term effectiveness of the United Nations human rights treaty system*, annexed to UN Doc E/CN.4/1997/74, 27 March 1996, at para 102; see also: the High Commissioner on Human Rights 2012 paper, *Reform of the Treaty Monitoring System*, OHCHR, Geneva 2012, at <http://www2.ohchr.org/english/bodies/HRTD/docs/HCReportTBStrengthening.pdf>, 7 August 2013.

cated linguists. The availability of UN core human rights texts and related national and regional documentation on human rights in languages understood by those in a State is thus crucial for human rights education to be realized. Although Part D of the General Assembly resolution (217(III)) adopting the Universal Declaration on Human Rights (on publicity)[49] can be achieved in a number of informal ways, it is particularly important at a tertiary level of education for formal sources to be available in the language of instruction and for that language to be accessible to the majority of students (i.e. it is not appropriate to only teach human rights in French, English, Chinese, Arabic, Russian or Spanish). This presents a real challenge to proponents of human rights education within those States in which those UN languages are not the language of instruction.

The Challenge for Human Rights Education

The basic principles of human rights education are well established as outlined above – everyone is entitled to know his or her rights. When human rights education is realized, it is anticipated that there will be a gentle (or maybe not so gentle) squeeze on the government of the state, a "grassroots upwards" movement aiming at ensuring the State's laws and policies embody respect for, fully comply with, and are underpinned by core human rights principles. States themselves of course are obligated to ensure publicity for the Universal Declaration of Human Rights and other treaties.[50] This obligation extends to the outcomes of many human rights monitoring mechanisms. There is thus an obligation on foreign ministries (or other government bodies) to ensure they adequately translate and disseminate pertinent materials. However, this goal is not fulfilled in many States, not least the United Kingdom, France, Russia, the United States of America and China.[51] Independent and even State media rarely provide extensive coverage of UN instruments and the concluding observations of UN treaty bodies. The same is true for universal periodic review.

Obviously the United Nations itself advocates publicity for UN treaties and reports. These dissemination requirements appear in numerous contexts, some formal, such as treaties,[52] others less formal – exhortations of the UN Hugh

[49] See: note 1.

[50] See, for example: Article 44(6) UN Convention on the Rights of the Child by which States Parties are obliged to "make their reports widely available to the public in their own countries".

[51] The five permanent member States who sit on the United Nations' Security Council. Each has also sought and secured election to the UN Human Rights Council thereby holding themselves out as upholding "the highest standards in the promotion and protection of human rights" – UN General Assembly resolution 60/251, *Human Rights Council*, UN Doc A/RES/60/251, para 9.

[52] Noted above.

Commissioner for Human Rights, for example. It is undoubtedly primarily the responsibility of States to ensure that the core texts and relevant national documentation[53] are made available and accessible to all in the country. This generally would require the material to be made available in the languages of the State and actively disseminated in a format which will be understood by the population (e.g. care must be taken where the prevalent languages are not written and, of course, where the population, or sectors thereof, may have a low literacy rate).[54] In the internet era, this is a relatively cheap and easy possibility – an accessible electronic depository of the material would go some way to fulfilling this requirement. However, for a number of reasons, not least cost, States do not appear to prioritise dissemination of materials in this way. Consider the comments of the Committee on the Rights of the Child on dissemination of rights' information throughout Mongolia[55] or the Committee against Torture commending Iceland's translation and dissemination of the previous conclusions and recommendations[56] to give two examples.

If the core documentation is not available in a language understood by the students, or even the teachers, human rights education will be, at least in part, stymied. Of course, the basic principles and concepts can still be taught and understood, partly fulfilling the purpose of human rights education. Outreach activities can ensure a wide swath of the population are aware of rights to education, clean water etc. However, for human rights education to be fully realized in accordance with the terms of the UN Declaration on Human Rights Education and Training and the World Programme for Human Rights Education, appropriate materials, including primary sources, must be available in the relevant national and arguably other local languages. Tertiary level education, the focus of this paper, is generally predicated on reading documents. This is especially so for legal education and the education of civil servants, law enforcement officers and others mentioned in the second phase of the World Programme. Lawyers require access to the primary

[53] State reports to UN treaty bodies, concluding observations of the treaty bodies on those reports, the text of individual communications against the State (if applicable) as well as arguably the texts of all treaties, reservations and associated documentation binding on the State.

[54] UNICEF and other child focussed non-governmental organisations.

[55] "The Committee recommends that the State party increase and strengthen its efforts to disseminate the Convention and to raise public awareness about its principles and provisions, particularly among children, parents, and professionals working with children, through adequate and systematic training and sensitization on children's rights of professional groups working with and for children, including law enforcement officials, parliamentarians, judges, lawyers, health personnel, teachers, and the media, taking into account the language needs of the population". Consideration of reports submitted by states parties under Article 44 of the Convention Concluding Observations. Mongolia, UN Doc CRC/C/MNG/CO/3-4, 29 March 2010, para 22.

[56] Consideration of reports submitted by states parties under article 19 of the Convention, Conclusions and Recommendations of the Committee against Torture, Iceland, UN Doc CAT/C/CR/30/3, 27 May 2003, para 6.

legal sources – treaties – to gain knowledge of the intricacies of the rights and freedoms, as well as an understanding of the national, regional and international frameworks, to enable them to defend human rights. Similarly civil servants/government officials completing national reports for the UN must know the official standards their performance is being measured against. There is no doubt that a lack of access to official documentation in the relevant language hinders the realization of human rights. States should thus ensure that the texts are available not only in the official UN languages but also in additional national and local languages to ensure human rights are accessible to all and, of course, can be taught within universities and other higher education institutions.

Notwithstanding the argument for local language UN documentation, a word of caution – there is a hidden danger in embracing what may seem as ideal, via the translation of core human rights texts into official state languages: instant illiteracy when required to use UN materials in later years. A number of UN and human rights terms do not directly translate easily into other languages. Indeed, many of the terms are not common even in States using the official UN languages (in English, think about derogations, progressive realization of rights, reservations and declarations – all familiar to international lawyers and human rights specialists but often perplexing to everyone else, including national lawyers). For this reason, I would tentatively propose that translated texts should be accompanied by whichever official UN language is most commonly used in the State or most accessible to most people in the State or even approved by the State. That way students can compare the local language version with an official UN language version. Such a bilingual approach may help students develop linguistic capacity in a UN language but will help them understand the key terms and concepts more completely and accurately.

Teaching Human Rights Without Textbooks – the Role of Newspapers and Other Forms of Media

What then are the minimum resources for successfully teaching international human rights at university? Even as a basic introductory course in a higher education institution, it is argued in this paper that the core treaties and newspapers can suffice. Textbooks, whilst often considered standard, do not necessarily constitute a core requirement for successfully teaching students, even law students, human rights. With innovative teaching methods, students can learn sufficient about human rights to pass an undergraduate knowledge, attitude and skills based module and be sufficiently informed to progress to postgraduate study and indeed to work with human rights in practice. In reflection of basic curriculum design,[57] what is important is to focus on remember what the students already know (both

[57] Examples of basic curriculum design are given in the texts referenced above.

formal knowledge from prior study[58] and general knowledge from current affairs and society)[59] what the students need to know and how the knowledge gained will be assessed, the latter may be inflexible in some countries/universities.

Newspapers also provide distinct pedagogical advantages – by training students to view almost all aspects of daily news, current affairs, and even daily life through a prism of human rights, the process of inculcating a culture of human rights has begun. Students move beyond a traditional transmission and reception model of human rights knowledge to a participatory model of considering real 'case studies' and then applying core treaties. Such problem based learning techniques enables students to develop skills of problem identification, critical analysis, extrapolation of relevant information etc all in a human rights based context. Anything and everything can be viewed through a prism of human rights in this way, a sustainable contribution to creating a human rights culture.

Newspapers are cheap or even free, easily available in most (written) languages and generally accessible to all. Newspapers often (though not always) contain a range of international news stories – these are particularly useful for "neutralising" potentially controversial or sensitive political subjects. It is usually possible to find a story concerning the salient issue from a third country. Students are perfectly able to make connections between the issues being discussed and their own state should that be the latent objective. Such a technique can also benefit foreign teachers not wishing to seen as criticizing the State in which they find themselves working.

For especially sensitive issues, it is also possible to use newspaper stories but, for the purpose of the discussion, change the country. After all, the exercises are designed to help students learn, the objective is not to provide accurate legal advice which can be relied upon by a potential victim – much more information would obviously be required for this (and it moves into the realm of clinical legal education).[60] Activism may be directly or indirectly fostered – students may be inspired by stories they read and analyse to offer assistance in some meaningful way.[61] Thus students may be moved to work with 'soup kitchens', local refu-

[58] For example, previous higher education courses or previous classes, as well as compulsory secondary level courses. The interrelationship with other forms of learning is clear in the diagram at the end of chapter 2 in *Campasito. Manual on Human Rights Education for Children*, at <http://www.eycb.coe.int/compasito/chapter_2/1_int.html>, 7 August 2013.

[59] This is sometimes termed alternative knowledge or prior knowledge; it can be a powerful source of inaccurate knowledge of human rights, for example. See, for example: *Assessing Knowledge of Human Rights among the General Population and Selected Target Groups*, 1998, at <http://www.queensu.ca/samp/migrationresources/xenophobia/research/case.htm>, 7 August 2013.

[60] For an introduction to and overview of clinical legal education, see: F. Bloch (ed.), *The Global Clinical Movement. Educating Lawyers for Social Justice*, New York 2011.

[61] This could be streetlaw style work – see generally: D. McQuiod Mason et al., 'Clinical legal education in Africa. Legal education and community service' in F. Bloch (ed.), *The Global…*

gee populations, street children, rural migrant workers etc, depending of course on the country and context. Students may also be prompted to develop outreach activities,[62] addressing an issue which came up in a story – for example, working on equal access to education in rural areas by delivering workshops and disseminating information to parents, particularly of girls or disabled children who may be unrepresented or even excluded from the education system.

Of course, newspapers can also be criticised as a resource – it may be argued that they are non-academic, containing possibly non-verified sources, possibly containing strong political or religious views (depending on the newspaper) and even being a vehicle of State propaganda, any of which may be at odds with contemporary human rights. However, I would argue that these reasons do not negate the benefits of employing newspapers. (The only exception would be not choosing a paper or a story which in itself clearly breaches human rights – e.g. gross violation of privacy, unacceptable obscenity – unless the benefit/detriment argument is overwhelmingly in favour of benefit.) Using official, State supported/owned or even run newspapers can offer advantages in countries in which human rights may be sensitive – the State authorities cannot really object to their own newspapers being used as a base for discussion. Moreover, news reports are something students are familiar with and thus draw on their prior knowledge and re-emphasises the real life implications of human rights. Hypothetical case studies, whilst obviously easily focussed on appropriate subject matter and highly suitable for practical problem skill development, do have a risk of being "typically academic" and thus not as indisputably "real" as newspaper stories may be (in origin, the comments above regarding politicization etc remains). Newspapers are "real" and thus human rights become something which permeates all aspects of life beyond the classroom.

Newspapers can obviously be augmented or substituted for other forms of popular media; much will depend on the local context. Thus it may be possible to analyse issues in a popular, widely watched television drama or a movie, a novel, a poem or even a photo or other visual image. Copyright issues may limit the use that can be made of such sources within the classroom.[63] However, if well-known and accessible to all students, they can offer a useful point of reference for debate and study. Thus a scenario in a television situation comedy with which everyone is familiar could present an opportunity to examine human rights issues. Similarly legends and folklore, many stories around which have strong moralistic overtures, or in modern terminology, they concern human rights and the actions of the State's main stakeholders (usually an emperor/empress, king/queen, sultan/sultana, ruler etc.) towards the general population, or part thereof.

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[62] For an overview of outreach, see for example: Part II of F. Bloch (ed.), *The Global…*

[63] Copyright also affects newspapers however, depending on the size of the group either a single paper can be used and the story read out or sufficient copies can be obtained for use in the classroom. Some publishers will provide copies free to universities for education purposes, these may be current issues or older returned/unsold issues.

As is apparent, there is near unlimited potential for advancing human rights through popular media and, especially, newspapers. The knowledge of the teacher is obviously an important pre-requisite as, without a sound understanding of contemporary human rights and the core instruments, the range of issues may need revision – it would thus be possible for the teacher to pre-select stories rather than open the floor to students to randomly choose.

Even in countries fortunate enough to teach in one of the official UN languages, it is good practice to include "real life" examples and stories in most classes by way of illustration and to "make human rights real and applicable to everyone everywhere". Indeed this can also broaden student awareness of global issues, promoting another objective of human rights education. So how can this "agenda" be moved forward, can it help advance tertiary level human rights education in Southeast Asia and beyond?

Moving Forward: Conclusions and a Wish-list

Perhaps the foregoing model is overly optimistic, perhaps it is open to accusations of being patronizing. However, it is a method which has proven track success in countries speaking official languages and outwith. Is it ideal? Obviously not, but it is practical and it works to a greater or lesser degree thus is surely worth considering.

Open educational resources should be used to maximize the availability, accessibility and appropriateness of materials. There are two main options for achieving this: an international depository and a national depository. First the pros and cons of an international depository. The OHCHR website is one option which could be explored, creating a freely accessible depository for translations of core UN human rights treaties and for local language UN documentation. This documentation should be in the public domain and available to all without distinction. The benefits of the UN hosting the material are obvious: the material is available in one location; the website is reliable and generally available; the website is rarely if ever blocked in countries; and copyright issues are obviated as the material is freely available as an open resource for educational use. Moreover, a system could be adopted by which States are given a few months to approve or reject any unofficial translation, adding credibility to any translation provided. The disadvantages are the resource implications for an OHCHR which is already overstretched; the potential for hosted documents to be deemed "official" when they are not and for States to reject translations; the cost implications in some countries of accessing an international internet domain; and of course discrepancies between translated and the official versions of texts.

What then of the option of a national depository? This would clearly be ideal. Many States do provide documentation on their foreign ministry website or have it accessible on request through the foreign ministry. However, many other States

do not make the documentation available in this manner. National human rights institutions may make available documentation on the State's reporting obligations and ratifications and associated documentation as part of their annual work programme. A number of non-governmental organisations do likewise. The latter may be controversial and not supported by the government. Overseas donors and partners often assist with local translation of universal periodic review documentation, core UN treaties and treaty body general comments/recommendations and, occasionally, even State reports and concluding observations. These are often published and distributed for free but in a finite number of publications linked to the objectives and timeline of the particular project under which the translation was funded. This does mean such publications can be eclectic, incomplete and often difficult to trace. Obviously, the best solution for supporting human rights education would be making material available electronically on a freely available website, perhaps hosted by the foreign ministry or the national human rights institution (if one exists). National libraries or even (State) universities can also be good depositories for this type of documentation and, where the country in question lacks resources, overseas funding can be available to assist with the establishment of appropriate and sustainable databases to host this type of documentation.

Advocating the universal availability of local language resources is an important first step. At present, translated texts remain the property and copyright of the donors, translators etc. They are not necessarily circulated widely or made freely available. Changing this would be a major step towards greater availability of human rights documentation in many countries. In the interim, it is ever more important for more innovative teaching methods to be embraced, ensuring that resource barriers to human rights education in higher education are broken down and that incrementally human rights education for all can become a reality. In furtherance of the objectives of the second phase of the World Programme for Human Rights Education, it is now time for tertiary level educational institutions to take up the challenge of promoting and supporting human rights education – training the lawyers, doctors, law enforcement officers, civil servants, military, and teachers of tomorrow the nature and scope of human rights, laying the foundations for lives and careers characterised by respect for human rights.

Abstract

Developing human rights education in universities in China has been a major national task, supported by a range of overseas partner institutes and donor organisations. However, advancements made in China have been aided by the availability of source material in Chinese, particularly online (for example, through www.ohchr.org). Similar materials are not available in other Asian languages. This gives rise to significant problems when seeking to establish human rights education initiatives particularly in higher education institutions. This paper seeks to analyse the relevant issues and present some personal reflections on ways forward.

Pedagogic and academic literature on curriculum and learning development will inform the initial section of the paper, establishing threshold requirements for teaching human rights at higher education institutions. Inevitably there are limitations based on the available paper and electronic resources. Viewed in the context of human rights education, the issue is more acute. Human rights education is, of course, predicated on universalism of human rights. The literature makes clear the need for human rights education and the fact it should conform to the "4As" of education and other rights (i.e. it should be available, accessible, acceptable and adaptable). At higher education this presents problems when the materials are available in limited languages; not all States and/or National Human Rights Institutions translate all pertinent UN documentation, for example, into national languages. NGOs and civil society offer a partial solution through local translations of treaties and UN reports. This language issue is more acute in higher education when access to primary source material is required. However, even if the primary source material is available in appropriate languages, a lack of access to academic commentary thereon, suitable textbooks and support materials remains. There are many factors limiting availability of these materials including internal capacity.

This paper will offer some reflections on the experience of the author in working with institutions, particularly China and Southeast Asia, developing capacity to offer human rights courses in higher education institutions. A partial solution of focussing on skills and attitude (from the hand, heart, head model of human rights education) will be discussed. Newspapers and materials drawn from popular culture and indeed tradition can be used as a base for teaching and learning initiatives, promoting a practical approach to human rights education which respects the principles underpinning the concept. It will be argued that high quality learning can thus be delivered with a minimum of academic sources.

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Media Education – a Chance for the Polish School and an Attempt at Defining its Identity

Introduction

The author undertook this study in order to understand and critically discuss opinions, arguments, and conclusions that dominate in the literature and formal solutions in the field of media education. Main threads include a characteristic of methods of knowledge production in media didactics and analysis of the Polish core curriculum in 2008 in association with EU solutions.

The search for the theoretical bases serves to establish to what extent the authors reconcile normative science of teaching and learning with terms, such as phenomenon temporary adequacy[1] and subjective human agency[2] and at what stage the didactic of Polish media is. Stereotypes traced in the literature sources, like: reducing thinking, eclectic demanding, mechanism of stimulus generalization and antagonizing relations: a school – reality outside of a school are a start point to a negative assessment of formal solutions. The author not only challenges approaches to the subject, but also establishes by core curriculum authors media learning outcomes. Critics of indifference and the vegetative state of Polish educational standards are exposed by quotes from EU resolution on media competency.

The statement has a pragmatic sense, but implies two general questions. The first one is related to didactic condition after system transformation, the second one concerns a meaning of curricular reforms in ideological and praxeological dimensions.

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[1] T. Szkudlarek, *Media. Szkic z filozofii i pedagogiki dystansu*, Krakow 1999.

[2] M. Domecka, 'Dualność czy dualizm? Relacje pomiędzy strukturą i podmiotowym sprawstwem we współczesnych debatach teoretycznych', at <http://www.academia.edu/1358188/Dualnosc_czy_dualizm_Relacje_pomiedzy_struktura_i_podmiotowym_sprawstwem_we_wspolczesnych_debatach_teoretycznych>, 21 November 2012.

Escape into a Breakthrough

An attempt at a description of new Polish literature on media education, although the bibliography is very extensive, does not seem to be difficult, since publications form a kind of stabilized, prototype of a mega-text, which has: origin, attributes and boundaries.[3] In order to clarify the description, it is worth to reach i.e. for the criteria of text coherence of de Beaugrande or Dressler,[4] taking into consideration that superficial (grammar) coherence can be omitted for obvious reasons. Specifically, additive features of phenomenon are recognizable because of other indicators, such as: acceptability, conceptual coherence, ability to ready links between texts, informational layer, and intentionality.

The most persistent two features: intentional author's attitude to proclaimed content (intentionality) and recipient's approval (acceptability) have the beginning in epistemological status of didactic knowledge. Knowing reality by education theory creators is the same as knowing of the true result, which is accuracy and course of actions. One's own idea of didactic efficiency temporarily legitimizes veracity of actions taken, which is why recipients do not question their usefulness. Moreover, writers of didactic texts, in addition to authorization granted by the environment, use a wide range of resources to describe a good shape of school education after a change of a school practice. The mechanism is simple: first author shows right methods, which ensure effectiveness, and then determines what the ways of doing the right things in the process of achieving results (meeting goals) are.

The features of mega statements about media education are based on further operators which are also included in act of communication. Lecture of didactic text is usually preceded by hypothesis that rules traced by the author have been expressed as a result of assembly sufficient knowledge and writing style is relatively adequate. The belief in purpose and conceptual coherence form a synergistic effect, by which a recipient accepts informational layer of text. In didactics the text is cross-discipline, thus recipient trusts that text exchange and translation are possible. Even so, as in the case of media education plays a key role, an author reaches to most recent sources and poorly naturalized in didactic science, as updated school practice is organically linked with intentional raising the level of education.

In comparison with other statements, the didactic of media is distinguished by situational. The authors benefit so much from the granted rights, that exploring various areas of knowledge, equate value of information, omit methodological foundations and cultural context of theoretical background. As a result, even academic books look like essays, statements directed to sensational reading, based on subjective connection between sender and recipient.

[3] J. Bartmiński, S. Niebrzegowska-Bartmińska, *Tekstologia*, Warszawa 2011, p. 36.

[4] Recall based on ibid., p. 48. See: R. de Beaugrande, W.U. Dressler, *Wstęp do lingwistyki tekstu*, transl. by A. Szwedek, Warszawa 1990.

Co-author of "media pedagogy",[5] in the chapter "Media as a creation and creator contemporary culture – culture conditionality of media", part of "Global culture as a base of contemporary *paideia* and humanism", constructed a deduction by arguing title thesis with words of French politician and economist, J. Delors, K. Żygulski, Polish sociologist of culture, T. Eriksen, Norwegian anthropologist, B. McNair, English sociologist of media, K. Zanussi, Polish director and group of Polish teachers: A. Zaidler-Janiszewska, Z. Melosik and T. Szkudlarek, B. Suchodolski, I. Wojnar, a sociologist A. Kłoskowska, Canadian sociologist D. de Kerckhove and the Pope John Paul II. In less than four pages of text were quotes constructed from one up to a few sentences, which, for strengthen the message, were accompanied by the names. From the tangle: a negative assessment of the impact mass media and hyper media on contemporary culture, intellectual's confession that, only because of cultivated profession, officially agrees on live in the country where 90% of society "feeds" on forms of mass culture and brisk, metaphysical reflection about *ecce homo* actions, a recipient is able to decode much more than only author attitude. He could also imagine the cost, which elite will bear before common language with crowd of consumers will be found.

Generalization and eclecticism of content, as well as rhetoric about saving contemporary culture by custodians of tradition, were included into typical for mega text confrontational scheme. The issue can be explained, as it has its root in unique kind of Polish didactic, in the background of historical events but after more than twenty years, still didactic teachers refers to system transformations and claims that in Polish didactics theoretical background is missing. In author's opinion this twenty years period should be now closed and particular conclusion should be made.

The intentions of today's authors (ones who wrote after the year 1989) seem to be clear: end the era of vulgar sociologies,[6] abolish faith that society can be educated in one value system,[7] release education (i.e. lectures) from previous era ideology and get back a sense of human agency. Due to nature of a change, attributes of text are not surprising. Compensation threads were to alleviate two traumas, two types of powerlessness – the old one and the new one. A teacher role was bound with macrostructure using emotive arguments. A need of value consensus dominated, that is why so many topics were postponed. In this context, it seems that drafted ten year ago an M. Jędrychowska's opinion is significant: "Didactic of literature and Polish language, if it is to be a subject of corresponding current needs, if it is to effectively fit into the present day, than regardless of adopted methodological orientation […] should in its content

[5] J. Gajda, 'Media wytworem i kreatorem współczesnej kultury – kulturowe uwarunkowania mediów' in B. Siemieniecki (ed.), *Pedagogika medialna*, Warszawa 2007, p. 79.

[6] A. Bogaj, S. Kwiatkowski, M. Szymański, *System edukacji w Polsce. Osiągnięcia. Przemiany. Dylematy*, Warszawa 1997, p. 79.

[7] A. Radziwiłł, *Ideologia wychowania w Polsce w latach 1948-1956*, Warszawa 1981, p. 6.

contain also those things that culture brings, in which we participate and with which we live on a daily basis".[8]

Defining from a perspective a mega text situational, it is necessary to point two tendencies recognized by researchers, which are organically linked: displacement of individual response to specific conditions[9] and epistemological avoid.[10] Emergence of otherwise natural denial of individual behaviours is explained by Daniel Tripp that in that kind of situation: "You do not know the right way of performing and from a full mind of professional experience you cannot bring a satisfactory solution".[11]

It seems equally natural that second phenomenon, which consists on simplifying description of actions using a symbolic language. In a context of own didactic idea it can be said that theoreticians stopped at the stage of giving meaning to actions, but they did not create any tools to rationalize those actions. Polish projects prove that its authors paradoxically have been hostages of cognition area, which should be limited in the process of translation, because: "Without anti-informative barriers people do not longer know how to find a sense in the own experience, lose ability to remember and it is difficult to imagine a reasonable future".[12]

Media's didactic as a sub discipline of didactic itself has special privileges to use, combine and interpret a knowledge coming from different sciences and different areas.[13] The authors resolutely penetrate texts of others and equally boldly operate with abstract counterparts, assigning completely new meanings to concepts.

Specific lack of boundaries and flexibility in achievements fragmentation is undoubtedly a peculiar differentiator multi mega interdisciplinary text on media education. Following can be found in publications side by side: achievements of autonomous disciplines and sub disciplines, theories and opinions, results of empirical studies and forecasts, that is why taking into consideration other matters about teaching how to learn, which are standardized by a science, extent of media education is even more impressive.

In publications, with equal success, quotes of: McLuhan, Foucault, Zimbardo, Baudrillard, Fukuyama, Bauman, Fisk, Banjamin, Deleuz, Latour, de Kerckhov can be found, yet tracking how educators try to engage themselves into impulsive

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[8] M. Jędrychowska, *Najpierw człowiek. Szkolna edukacja kulturowo-literacka a problem kształcenia dydaktycznego polonistów. Refleksja teleologiczna*, Kraków 1998, p. 13.

[9] D. Tripp, *Zdarzenia krytyczne w nauczaniu. Kształtowanie profesjonalnego osądu*, transl. by K. Kruszewski, Warszawa 1996, p. 13.

[10] T. Szkudlarek, 'Wyzwania pedagogiki krytycznej' in T. Szkudlarek, B. Śliwerski (eds.), *Wyzwania pedagogiki krytycznej i antypedagogiki*, Kraków 1993.

[11] D. Tripp, *Zdarzenia krytyczne…*, p. 13.

[12] N. Postman, *Technopol. Triumf techniki nad kulturą*, transl. by T. Bieroń, Warszawa 1995, p. 78.

[13] P. Zamojski, 'Ideologiczne wymiary procesu kształcenia a zakres problemowy dydaktyki' in L. Hurło, D. Klus-Stańska, M. Łojko (eds.), *Paradygmaty współczesnej dydaktyki*, Kraków 2009, pp. 124-134.

debate, it is easy to predict that next update of school practices will be justified with theory of *homo sapiens wikinomicus*,[14] occurrences *data journalist* or *infotainment*[15] or hybrid aesthetics of contemporary culture.[16]

Although continuous search of didactic science outcome keep educators on track, it condemning to reductive reasoning at the same time. Trying to include media education into contemporary reflection on culture, economy, politics and history, the authors of educational projects not only perform fragmentation, but also minimize a theoretical background, creating its own dimension of informativeness and conceptual coherence of text.

The first step is usually intentional selection of sources. At this stage the importance of the theory in a world-wide scale counts. Later on educator creates a catalogue of distinctive features, which gives a possibility to formulate rules and directives. A qualitative change occurs in a clear way – after elimination of contexts,[17] meaning fluctuations[18] (chronology) and methodology[19] educational standards become neutral and universal.

On the list of common treatments are: contexts reduction, ignoring meaning and methodologies fluctuations and stimulus generalization.

In media didactics conceptual and informative coherence of mega text is subordinated to idea: „straightening curves", which would exclude Polish school from global trends. Educators justify a stimulus generalization[20] and accepting new challenges most often with students' needs, which does not limit possibility to us confrontational scheme, since according to squaring the circle logic, educational institutions need to keep pace with society. System is based on tolerance of majority, which feeds itself with mass culture forms generated by minority.

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[14] D. Tapscott, A. Williams, *Wikinomia*. transl. by P. Cypryański, *O globalnej współpracy, która zmienia wszystko*, Warszawa 2008.

[15] J. Majewski, 'Ponowne zaczarowanie świata', *Znak Online*, at <http://www.miesiecznik.znak.com.pl/Tekst/pokaz/3583/calosc>, 21 November 2012.

[16] L. Manovich, *Język nowych mediów*, transl. by P. Cypryański, Warszawa 2006.

[17] D. Klus-Stańska, 'Integracja i dezintegracja wiedzy szkolnej. Uwagi na marginesie koncepcji Basila Bernsteina', *Kwartalnik Pedagogiczny*, No. 3/4 (2010).

[18] M. Domecka, 'Dualność czy dualizm? Relacje pomiędzy strukturą i podmiotowym sprawstwem we współczesnych debatach teoretycznych', *Kwartalnik Pedagogiczny*, No. 3/4 (2010).

[19] It is about a phrase in a science of sciences under an influence e.g. Thomas Kuhn's theory as well as about state of opinion after system transformation. Maria Jędrychowska ten year after a transformation claims that: "Teaching of Polish literature and Polish language if is to be so effective to fit into present needs and present day than regardless of methodological orientation adopted […] in its content should also contain that what culture contains – in which heritage we participate and that we live every day". M. Jędrychowska, *Najpierw człowiek…*, p. 13.

[20] In psychology, the nature of causal conviction that conditionally responses by described stimulus will trigger widespread reaction. Method of prevention are differentiating researches through which researcher specifies a stimulus until he considers it as appropriate in a context of expected response.

A key educators' argument is a possibility: "the student's understanding social, cultural and economic changes taking place today".[21] Educators define in various ways a word: "crisis" and analyze so called "new man" in sociological and psychological context. There are even phenomenological descriptions of students and traditions, just to prove the validity of directives, but it is more and more difficult to negotiate what is the purpose of a school education in the background of the civilization phenomena. Educators use efficiency model which treats equally all students.

Sub disciplines cultivating respective fields for years with a fixed prestige have a relatively easy task. In texts which are addressed to teachers of Polish language a generation of picture generation which is neutral for style and convention is usually compared with literary tradition. The generation aims to maximize temporary impressions, because it has been raised in "thicket of media communication and the world of pop culture".[22] Even in the most general aspirations teachers of Polish language says: "The student should be familiar with historical circumstances, which affected […] position in standards, which included an evaluation of artistic and non-artistic qualities of works, polemics led, literary dialogue by subsequent authors which proves their viability and ability to cause a mental or emotional agitation.

Only in a context of this knowledge […] a student might believe that he has the right to make a reading choice, following his own needs and taste. In these choices a student is not helpless, since he is familiar with points of reference that the more you need the sooner a hierarchy crisis progresses […]".[23]

Clearly marked opposition: stability – movement and associated valuation: canon – the good, present – evil, the author strengthen by using a word: "a law", thus it has been created a typical antagonism for didactic, which is motivated by behaviourism rules. Yet thesis: the past as a condition to make today a right choice would be called by psychologists as a magical relationship. Stimulus generalized by the author would be described by psychologists as an experimental (ironically, because in a school practice a pattern of chronological literature course was fixed), so that Polish language teachers have not conducted any differentiating research, on which baseline it could be claimed how other models are effective, e.g. non-chronological model.

Phenomena: stimulus generalization and establishment of magical dependences dominate in theory of media learning as well. Educators have not clarified own view yet, because they do not have any evidences that proves impact of media education on teaching effectiveness. No description language, as a tool or subject

[21] B. Siemieniecki, 'Komunikacja a społeczeństwo' in idem (ed.), *Pedagogika medialna*, p. 15.

[22] A. Janus-Sitarz, 'Wstęp' in eadem (ed.), *Szkolne spotkania z literaturą*, Kraków 2007, p. 12.

[23] Ibid., p. 9.

learning, has been created for this respective area. However very clear are following: duality and confrontation. At the content level, publications in a field of media didactics are composed of two subsets, mutually exclusive and complementary to the whole. Inside of each subset distinctions, as reductive thinking and understanding relations: school – reality outside of a school, are antagonizing the technological features with untouchable school universe and proof that education institutions are not capable to create synergic system of "new" nor to emancipation of traditionally understood authority.

Positions of researchers are differentiated by valuation that is why they differently understand effectiveness media education, but the common denominator is a method: to push own arguments with deprecation of other opinions. Champions of technological acceleration criticize conservatism of teachers in the background of characteristics of generation Y and digital society. According to other authors there are two worlds which operate dialectically: theirs – students: alien, incomprehensible (often worse) and ours – educators. The lost world for the new, difficult mission.[24] To create the majority and minority degrees, regardless of principles, the paradigm of the Polish language is used, therefore civilisational leap bear the epithets "double" and "triple".

As a result, despite of passing time, the mega text about media education is a reservoir of ethical and pragmatic dilemmas that is being identified by an environment – which is trying to define modernity for its own use. Wrong thinking is not an effect of asynchronous moulding concepts. Educators are away from reality because of lack of agreement on inconsistency of subject learning – media and a school, since creators of theory of education would like to work in a homogenous field, regardless of proclaimed thesis. They attempt to build standards which are capable to influent on complex and temporary structures; the attempt is based on reduced, symbolic and antagonistic descriptions of heterogeneous subject. They are confident that the implementation of directives, neutral in their opinion, can guide the development of people with no forced socialization experiencing.

Interdependence is shown in the most in rare occasions within school characteristics and outside of school reality. School in rather privileged manner want to choose from those social phenomena that could be used as an old way purpose, that is why educators tolerate existence e.g. the Internet users' need as a group of needs which are similar to others already developed in a teaching progress. There is no full, neutral, unquestioned agreement on culture connections: school and media. Student's view and media's view are sharpened in order to accomplish a consensus in profit and lost balance, after recalculation of investments and possible income – raising a level of education effectiveness.

[24] Studies which have been conducted among teachers are metaphors: Internet and inkwell. W. Dróżka, 'Doświadczenie transformacji społecznej i edukacyjnej przez nauczycieli – rekonstrukcja narracji' in D. Klus-Stańska (ed.), *Dokąd zmierza polska szkoła?*, Warszawa 2008, p. 129.

Still, threads which are positioning in methodologies are an annoying symptom of weakness of media didactics. An interest of "screen reader" weakened, of which Aniela Książek-Szczepanikowa characterized well in 90.[25] Despite of time passage in books for teachers and interdisciplinary media projects, although it is noteworthy because of regulators which follow the footsteps of an Internet user behaviour and cultural poetics and can be called as attempts to conceptualize new elements in a natural bed of teaching, are still placed in last chapters.

Despite of time passage in books for teachers and interdisciplinary media projects, although it is noteworthy because of regulators which follow the footsteps of an Internet user behaviour[26] and cultural poetics[27] and can be called as attempts to conceptualize new elements in a natural bed of teaching, are still placed in last chapters. Lack of research and scientific studies cannot be replaced by individual attempts, such as proposal to creation of functional code based on naturalized in teaching literature phrases: "education by (media) and education for (media)".[28]

According to the author's opinion, the environment must break apathy raised by "escape in a breakthrough and push forward to analysis of Polish conditions as well as to substantial knowledge about Polish media. Practiced valuation of relations: school – reality outside of a school as unnatural phenomena in terms of duality and dialectical arguing exclude possibility of creation any didactic concepts. Indicates only simulation of ideological neutrality, distance to world, which requires an intervention.

Faster; From Scratch; Following the New

Polish Ministry of National Education's activity in the area of regulation of media education in the educational policy calls for harsh criticism. Another project of reform does not marginalize the topic, but also perpetuates dangerous stereotypes, taking away a school from current social trends and scientific knowledge about them.[29] The core curriculum shocks with educational objectives and general statements which are designed and understood as usual. Those are addressed to

[25] A. Książek-Szczepanikowa, *Ekranowy czytelnik. Wyzwanie dla polonisty*, Szczecin 1996.

[26] M. Rusek, 'Polonista wobec hipertekstów literackich' in A. Janus-Sitarz (ed.), *Szkolne spotkania…*, pp. 216-231.

[27] A. Janus-Sitarz, *Przyjemność i odpowiedzialność w lekturze*, Kraków 2009, p. 369.

[28] J. Gajda, 'Sposoby i zakres manipulacji w mediach a profilaktyka edukacyjna' in B. Siemieniecki (ed.), *Manipulacja. Media. Edukacja*, Toruń 2007, pp. 207-214.

[29] Rozporzadzenie Ministra Edukacji Narodowej z 23 grudnia 2008 r. w sprawie podstawy programowej wychowania przedszkolnego oraz kształcenia ogólnego w poszczególnych typach szkół (Dz. U., 15 January 2009), at <http://www.lex.pl/du-akt/-/akt/dz-u-09-4-17>, 17 November 2012.

all teachers, which causes blurring of responsibility for such "use" of the Internet and "various sources of knowledge, media included".[30] For the obvious reasons, the author does not elaborate, noting only that equalization of "different sources of knowledge" eliminates standard of education, which is learning of media communication reception.

Among the culpable errors it is worth to mention: complete „media silence" in subjects as: philosophy, ethics, entrepreneurship, security education, economics in practice, physics, history and biased selection of educational effects. The simplest messages: SMS, e-mail, chat and blog are combined only with: "awareness of fraud danger and manipulation caused by anonymity of Web communications' participants, ease of offending strangers, making fun and embarrassing others as a result of distribution of images of them in awkward situations".[31]

Bias that would result in imbalance in the presentation of the contemporary world is seen in a collection of educational content in a statement: "Media Science", in a subject: "Nature" on the fourth stage of education. Authors predicted that the student learns

> Recent developments in space explorations, such us discovery of planets circulating around other stars; common chemical errors appearing in media and distortions contained in advertisements; a dispute over GMO and products made of it; students decide the question: media and ecological society's awareness; health in the media; between advertisement and information, truths and myths about light food; controversial issues in the media: exhaustion of energy sources, dangers of nuclear power, an impact of human activity on a climate.[32]

In distorted picture or reality are: mistakes, controversy, manipulation, lies, anonymity, danger. Outside of the interest area are: parent, integrity, expansive and culture types of media functions. While the topic about jeopardy which is being identified by theorists based on empirical researches educational goals has been mentioned – it is worth to point out that in the Core Curriculum following are not included: depression, virtual addiction, pornography, cyberbullying, sexting, narcissism, unavailability to perform a self-assessment and stalking because of which a student of secondary school committed a suicide.[33] In the context of knowledge operationalization project declared by authors of the project, the model of Polish studies is weak. Media education is subordinated to the principle: "learning

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[30] See: E. Nowel, 'Kto wyręczy(a) MEN w edukacji medialnej', paper presented at the conference: "Medialny obraz rzeczywistości", Kalisz, 10-11 May 2012 (pre-printed); eadem, 'Edukacja medialna – wszystko i nic w podstawie programowej', *Język Polski w Gimnazjum*, No. 4 (2011/2012), pp. 73-84.

[31] Rozporządzenie Ministra Edukacji Narodowej z 23 grudnia…

[32] Ibid.

[33] D. Szreter, 'Samobójstwo gdańskiej gimnazjalistki Anny Halman i reakcja na nie. Sprawa dla filozofa', at <http://gdansk.naszemiasto.pl/archiwum/2051432,samobojstwo-gdanskiej-gimnazjalistki-anny-halman-i-reakcja,id,t.html>, 17 November 2012.

about", e.g.: specific characteristic of the species, migrating motifs in an established scheme – a life-giving tradition – the text of a contemporary culture. Creative tasks on Polish language classes are not taken into account.

The Lisbon Strategy can be only realized on: geography, science and IT and art classes. In each case a student will create multimedia presentations and during art classes

> shall use media creations in his creative activity (following the basic principles of copyright law on the protection of intellectual property rights) and […] he performs creative activities through the channel of artistic expression and other elements of arts and forms of communication media, by e.g. designing press releases or television programs (in scope of: edition, pre-press, speech visualization, advertising and public relations).[34]

Taking into consideration that Polish Core Curriculum created before publication of Audiovisual Media Services Directive where in forty-seventh statement a competency is defined as:

> skill to use of media includes an ability, knowledge and judgment to allow consumers to effectively and safely use media. People characterized by the ability to use media can make conscious, informed choices, understand the nature of content and services, and also are able to use a full range of opportunities made available by the new communication technologies. They can better protect themselves and their family from harmful or offensive materials. Therefore, it is crucial to promote the ability to use media in all social groups and carefully monitor development of those abilities.[35]

Media and culture of technology were treated as an alien object in school welfare. The institution is capable to resist a harmonious tradition to students coming from a world full of threats, inhabited by anonymous strangers, manipulators, liars and crazy inventors. A tradition constantly being adjusted for the use of confrontational scheme and because of increasingly compressed basic knowledge. Despite of the fact that student take knowledge "on faith" – in the same way as in a previous era, the main purpose of education is preservation of continuity.

The intention should be assessed in light of the example. It is a model of cultural text recipient and therefore audiovisual texts on fourth stage of education. Characteristics of a high school student (whole population is composed from 80%

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[34] Rozporządzenie Ministra Edukacji Narodowej z 23 grudnia…

[35] Directive of the European Parliament of the Council 2010/13/UE, 10 of March 2010 on the coordination of no-where laws, regulations and administrative provisions of the Member States concerning the provision of audiovisual media services (Directive on Audiovisual Media Services – codified version), L 95/1, quote: E. Murawska-Najmiec, 'Organizacje międzynarodowe. Edukacja medialna w polityce Unii Europejskiej i UNESCO' in J. Lipszyc (ed.), *Cyfrowa przyszłość. Edukacja medialna i informacyjna w Polsce. Raport otwarcia*, section 6, pp. 74-98, at <http://nowoczesnapolska.org.pl/wp-content/uploads/2012/01/Raport-Cyfrowa-Przysz%C5%82o%C5%9B%C4%87-.pdf>, 17 November 2012.

of graduates of the third stage) who interprets a masterpiece (on the fourth stage only masterpieces are read) should be overseen from a perspective of gnosiology, since a student should read the text as a whole based on a fragment only.

Accumulation of paradigms: structuralism and semiotic can be easily explained. After system transformation a model of functional analysis was an environment reaction on era of "ideological straitjacket". Theorists' proposals has been used in didactics in order to update school's teaching practice. In this way process of knowing text became even more complicated and the creators of those standards created even more standards, which changed a quality of requirements.

In the case of media education, as the creators of report: "Digital future. Media and information education in Poland" report point out, the problem of regulating requirements will become more complicated. The first reason is an abridgement of the text of the EU Directive. The Polish translation of definition of media literacy is reduced to "skill to media usage" which causes interpretation disputes and disregards organic connection of media training components, which are: **"access, understanding and creative usage"**.[36]

It is worth to underline, that previously quoted definition and three major operating components concern the poorest model of media education: "Others are using extended versions, that is '6 Cs' (*Comprehension, Critical Capacity, Creativity, Consumption, Citizenship and Cross-Cultural Communication*). Some theorists of the subject are complementing this by an additional inclusion of '3 Ps' (*Protection, Promotion, Participation*)".[37] It seems that educators who are responsible for production of standard-setting knowledge and directives should translate this type of description into language of actions, giving up from citation of general theory of culture and biased heritage search.

Message included in EU documents, which is related to process of self-regulation and "Self-control over own media behaviour (receiving and creative) in accordance with competencies, which respective person gains in media education"[38] puts as well Polish wishful didactics as anachronistic Core Curriculum in a very bad light. In the author's opinion, an amendment of the Polish document, in which the term: "media education" appears only twice, connected with outdated educational objectives, should begin with analysis of EU premises[39] and their titles.

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[36] E. Murawska-Najmiec, 'Organizacje międzynarodowe…', p. 77.

[37] Ibid., p. 79.

[38] Ibid., p. 80.

[39] Konwencja UNESCO w sprawie ochrony i promowania różnorodności form wyrazu kulturowego, at <http://www.unesco.pl/fileadmin/user_upload/pdf/Konwencje__deklaracje_raporty/Konwencja_o_ochronie_roznorodnosci_form_wyrazu_kulturowego.pdf>; Deklaracja z Grünwaldu o edukacji medialnej, at <http://eur-lex.europa.eu/Notice.do?mode=dbl&lang=pl&ihmlang=pl&lng1=pl,pl&lng2=bg,cs,da,de,el,en,es,et,fi,fr,hu,it,lt,lv,mt,nl,pl,pt,ro,sk,sl,sv,&val=471774:cs&page=>, 14 November 2012.

Titles include a protection of juveniles and human dignity,[40] core competencies[41] and rules of building an integrative knowledge-based society.[42] At the stage of standards development educators should use final definitions. General ones are called as: "abilities to media usage", more precisely refers to, for instance: "different levels of media usage", such as "ease", "activity", "creativity", and "criticality". Others might become a source of a standard: "understanding a media economy and difference between pluralism and media ownership".[43] It is worth mentioning that the European Union has already completed regulatory actions and media education as a regional theme is a "supplementing national and supranational oversight and legal protection of young people in this area".[44]

Glaring neglect of Polish decision makers should be highlighted; summarizing (rephrasing) recommendations of the "European Parliament resolution of 16 December 2008 on media literacy in digital environment" as it affect *expressis verbis* the titled issue. The creators of the resolution emphasizes that media education is a key element to inform consumers, awareness and knowledge of issues related to intellectual property rights, active participation of citizens in democratic processes and to promote intercultural dialogue.

In the light of EU directives, media education goals include: a competent and creative usage of media and its content, a critical analysis of media products ('Commission Recommendation of 20 August 2009' already included e.g. interactive advertising), an understanding media market and independent production of media content, that is why it is recommended to inform, in scope of media educa-

[40] Zalecenie Parlamentu Europejskiego i Rady z dnia 20 grudnia 2006 r. w sprawie ochrony małoletnich, godności ludzkiej oraz prawa do odpowiedzi w odniesieniu do konkurencyjności europejskiego przemysłu audiowizualnego oraz internetowych usług informacyjnych, at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32006H0952:PL:HTML>, 14 November 2012.

[41] Umiejętność korzystania z mediów w środowisku cyfrowym. Rezolucja Parlamentu Europejskiego z dnia 16 grudnia 2008 r. w sprawie umiejętności korzystania z mediów w środowisku cyfrowym (2008/2129(INI)), 2010/C 45 E/02', at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52008IP0598:PL:HTML, 14 November 2012.

[42] Zalecenie Komisji z dnia 20 sierpnia 2009 r. w sprawie umiejętności korzystania z mediów w środowisku cyfrowym w celu stworzenia bardziej konkurencyjnego sektora audiowizualnego i treści cyfrowych oraz stworzenia integracyjnego społeczeństwa opartego na wiedzy, at <http://ec.europa.eu/culture/media/literacy/docs/recom/c_2009_6464_pl.pdf>, 14 November 2012.

[43] Dyrektywa Parlamentu Europejskiego i Rady 2010/13/UE z dnia 10 marca 2010 r. w sprawie koordynacji niektórych przepisów ustawowych, wykonawczych i administracyjnych państw członkowskich dotyczących świadczenia audiowizualnych usług medialnych (dyrektywa o audiowizualnych usługach medialnych), at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:095:0001:0024:PL:PDF>, 14 November 1012.

[44] Opinia Komitetu Regionów 'Rozwijanie umiejętności korzystania z mediów w perspektywie regionalnej – edukacja medialna w polityce edukacyjnej UE, 2010/C 141/04', at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:141:0016:0021:PL:PDF>, 14 November 2012.

tion, about all aspects of intellectual property rights particularly in relation to the Internet and security of data privacy and the right to decide on the use of own information on the Internet.

Media education should be as far as possible targeted on practice connected with economic, political, literary, social, artistic and technical information subjects. Tasks of educational institutions are as follows: supporting of media products creation (in area of printed media, audiovisuals and new media) with participations of students and teachers as a practical training in media literacy. The last goal, but not least, which was stated in the document was a development of indicators of skills to media usage with assessment of performed quality in school classes and teacher training included.

Conclusion

By Outlining categorized literature view, the author became a part of mainstream of educational reflection on the social purpose of education. The importance of social utility of school knowledge and weaknesses of Polish mind in this area are being emphasized by many researchers. Dorota Klus-Stańska strongly and in different contexts denounces distance between a school program and reality by combining practice with reckless "mixing" of scientific paradigms, making equal a knowledge coming from informative and scientific publications and – with mistakes in knowledge production process itself, which is the result of confusion between methodological guidance and "methodology and strategy thinking".[45]

Using Klus-Stańska's arguments and observations made, it might be beneficial to propose to educators a thorough reflection on the current purpose of the teaching and learning science. Currently decision makers and researchers are harmed equally by: sentimental affirmation of antagonism between a school and civilisational chaos in the name of primary *habitus* and a confidence resulting from excessive trust in a teaching agency. Both trends in specific way stigmatizing media education, in which units distribution is based on a conflict of old (our) teachers' world and a new (their) students' world, that is why no heritage reinterpretation is getting us closer to participation in renegotiation process with a partner – a reality outside of a school.

According to the author, thinking turnaround may begin: a "being in a difference" acceptance[46] and admitting that the relationship is a natural component of the identity of the teacher.[47] Making urgent decisions can facilitate treated with esteemed thesis that "Media education in the modern world is equivalent to read-

[45] D. Klus-Stańska, 'Polska rzeczywistość dydaktyczna – paradygmatyczny taniec św. Wita' in L. Hurło, D. Klus-Stańska, M. Łojko (eds.), *Paradygmaty…*, pp. 62-73.

[46] T. Szkudlarek, *Szkic z filozofii…*

[47] H. Kwiatkowska, *Tożsamość nauczycieli. Między anomią i autonomią*, Gdańsk 2005.

ing and writing skills and lack of basic competence in this area is a major premise of social exclusion".[48]

Abstract

The Author refers the issue of media education in Polish schools, tracking current reform project and the core curriculum. The essential context of the work is: current literature, impulsive discourse made by educators after the regime transformation, EU documents, results of current research (among others: social needs of media education, youth activity in the so-called free time, as well as teachers' attitude towards new learning tasks) and system solutions in the field of media education in other countries. Interpretation and critical judgment against cultural changes, as well as trends in education and new society initiatives in Poland tend to conclude that institutional education is the weakest link in the media education of youth and children.

In the field of recognized phenomena: indifference and the vegetative state of formal solutions for media education, epistemological dodges in teachers' attitude, the backwardness of the syllabus and the marginalization of socially useful knowledge, the author postulates as follows: there is an urgent need for an update of ministerial documents and teaching systems, introduction of teacher specializations and a systemic and comprehensive solution in the fie field of media education at all levels of schooling.

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[48] E. Murawska-Najmiec, 'Organizacje międzynarodowe…', p. 78.

Challenges for Human Rights

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Direct Participation in Hostilities and Respect for the Lives of Civilians During Armed Conflicts

Introduction

One of the distinctive characteristics of the contemporary armed conflicts is the proximity of civilians to military operations and their considerable participation in hostilities. Throughout history, civilians have always contributed to the war efforts of the fighting parties, whether through their involvement in arms production, by providing soldiers with food, equipment, shelter or by implementing political objectives closely associated with the military goals. Typically, however, civilians were not present on the battlefield and only a small number of them were actually involved in the conduct of military operations.

In the second half of the 20th century (and in particular in the last decade) and in the first decade of the 21st century situation radically changed –

> a continuous shift of the conduct of hostilities into civilian population centres has led to an increased intermingling of civilians with armed actors and has facilitated their involvement in activities more closely related to military operations. Even more recently, the increased outsourcing of traditionally military functions has inserted numerous private contractors, civilian intelligence personnel, and other civilian government employees into the reality of modern armed conflict.[2]

Moreover, in contemporary conflicts states primarily fight wars against non-state armed groups

[1] The opinions expressed in this article are those of the author and do not necessarily reflect the views of the Polish Red Cross.

[2] International Committee of the Red Cross, 'Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law' (prepared by N. Melzer), pp. 11-12, at <http://www.icrc.org/eng/resources/documents/publication/p0990.htm>, 2 April 2012.

> to stand a chance against states with superior militaries, these groups often violate international humanitarian law, and more specifically the principle of distinction, by refusing to distinguish themselves from the civilian population. Due to the asymmetry of power, blending in with non-combatants is often a critical part of the non-state armed groups' strategy in places such as Afghanistan, Iraq, the Occupied Palestinian Territories, and Somalia.[3]

As a result, civilians are more likely to fall victim to erroneous or arbitrary targeting, while armed forces – unable to properly identify their adversary – run an increased risk of being attacked by persons they cannot distinguish from the civilian population.[4]

Under such circumstances it is necessary to determine who deserves to be treated as civilian and when such person may become a legitimate target under the law. One of the key elements of the international humanitarian law (hereinafter: IHL) which regulates the conduct of armed conflicts is the principle of distinction between civilians and members of the armed forces/combatants as well as between the civil and military objects/sites (accordingly, the law obliges the parties to an armed conflict to observe this principle). As a consequence, only combatants and military objects may be directly attacked in hostilities.[5] The above mentioned participation of civilians in various military operations makes it compulsory to provide criteria for distinction between civilians who directly participate in hostilities and the so-called peaceful civilians. It must be clearly emphasized that according to IHL civilians who "take direct part in hostilities" are not protected against attacks and when involved in any such activities may become a legitimate target of attack. In other words, such persons may fall victim and be killed despite the fact that they are civilians. It is therefore of utmost importance to provide a definition of direct participation in hostilities. Will, for instance, acting as human shield, driving vehicles carrying war weapons, operating field computer, providing reconnaissance services or shelter to the armies of the enemy be considered direct participation in hostilities for that purpose?[6]

However, neither Additional Protocols of 1977 to Geneva Conventions, Relating to the Protection of Victims of Armed Conflicts[7] (nor art. 3 common to Ge-

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[3] T.A. Keck, 'Not all civilians are created equal. The principle of distinction, the question of direct participation in hostilities and evolving restraints on the use of force in warfare', *Military Law Review*, Vol. 211 (2012), p. 115.

[4] International Committee of the Red Cross, 'Interpretive Guidance…', p. 12.

[5] See: P. Grzebyk, 'Pojęcia *osoba cywilna* oraz *bezpośredni udział w działaniach zbrojnych* (wytyczne Międzynarodowego Komitetu Czerwonego Krzyża', *Państwo i Prawo*, No. 2 (2012), p. 60.

[6] Ibid., p. 61. Indeed, "uniform guidelines establishing when and how individuals lose immunity in war are necessary to provide militaries clear targeting guidelines while safeguarding protections for non-combatants". T.A. Keck, 'Not all civilians…', pp. 115-116.

[7] See: art. 51 (3) of Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 12 December 1977,

neva Conventions) provide a clear definition of "direct participation in hostilities" and leave room for doubt and speculations which, in turn, resulted in interpretative abuses to the detriment of IHL principles. Therefore, bearing in mind serious consequences which arise from classifying a civilian as taking direct part in hostilities and for the sake of proper implementation of IHL it is imperative to answer the following three key questions:

1. Who is considered a civilian for the purposes of the principle of distinction?
2. What conduct amounts to direct participation in hostilities?
3. What modalities govern the loss of protection against direct attack?

The attempts were made by the International Committee of Red Cross (ICRC) to clarify those issues, which in 2003 initiated the first, informal meeting of IHL experts relating to armed conflicts. In sum, five expert meetings were held in The Hague and in Geneva between 2003 and 2008.[8] Based on the discussions held and the research conducted in the course of the expert process, the ICRC drafted its "Interpretive Guidance on the Notion of Direct Participation in Hostilities under IHL" (hereinafter: "Interpretive Guidance"),[9] which provides the ICRC's recommendations as to how IHL relating to the notion of direct participation in hostilities should be interpreted in light of the circumstances prevailing in contemporary armed conflicts. In doing so, the "Interpretive Guidance" does not endeavour to change or amend existing rules of IHL, but to ensure their coherent interpretation in line with the fundamental principles underlying IHL as a whole.[10]

The present article addresses the notion of direct participation in hostilities in a manner similar to how the problem was handled in "Interpretive Guidance". Therefore, the following questions have been addressed:

1. What is the definition and status of a civilian in time of armed conflict?
2. What conduct amounts to direct participation in hostilities?

1125 UNTS 3 (Additional Protocol I, hereinafter: AP I), and art. 13 (3) of Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 12 December 1977, 1125 UNTS 609 (Additional Protocol II, hereinafter: AP II).

[8] Each meeting brought together 40 to 50 legal experts from military, governmental and academic circles, as well as from international and non-governmental organizations. The process focused on interpreting the notion of direct participation in hostilities for the purposes of the conduct of hostilities only and did not (or only very marginally) address the legal regime applicable in the event of capture or detention of persons having directly participated in hostilities. N. Melzer, 'The ICRC's Clarification Process on the Notion of Direct Participation in Hostilities under International Humanitarian Law', p. 3, at <http://www.oas.org/dil/esp/XXXVI_curso_The_ICRC_Clarification_Process_Nils_Melzer.pdf>, 2 December 2012.

[9] This document is available online on the ICRC's website: <http://www.icrc.org/eng/resources/documents/publication/p0990.htm>, 2 December 2012.

[10] N. Melzer, 'The ICRC's Clarification…', p. 3. Although the "Interpretive Guidance" is not and cannot be legally binding, in its authors' opinion, the document's conclusions and recommendations may contribute to ensuring that those who do not take a direct part in hostilities receive the humanitarian protection they are entitled to under IHL. Ibid., p. 10.

3. Should there be any restraints on the use of force against civilians taking direct participation in hostilities and thus being exposed as legitimate targets of attack?

In brief, the legal nature of the principle of distinction has been discussed and the question of temporal loss of protection in case of civilians who are directly involved in military operations is being tackled. The analysis of the above issues is to a certain extent based on arguments presented in "Interpretive Guidance" with the stress being put on those IHL elements that guarantee the respect for the right to life even in circumstances of direct participation in hostilities when civilians may become vulnerable to attacks. Furthermore, like in ICRC document, the phenomenon of "direct participation in hostilities" has been subjected to analysis exclusively from IHL perspective, that is, a set of legal rules which seek, for humanitarian reasons, to limit the effects of armed conflicts. The primary aim of international humanitarian law is to protect the victims of armed conflict (persons who are not, or are no longer, participating in hostilities) and to regulate the conduct of hostilities (to restrict the means and methods of warfare) based on a balance between military necessity and humanity. Admittedly, international law of human rights also applies to armed conflicts but the author, inspired by the approach adopted in "Interpretive Guidance", has decided to reflect upon principles and standards of the above law only indirectly.

Let us underline the fact that the present work focuses only on the issue of the respect of civilians' life in circumstances when they are directly involved in hostilities and are bound to lose protection against "direct attack". It is mandatory to remember that during an armed conflict the life of civilians may be exposed to dangers other than resulting from the direct attack – fatalities among civilians may be caused by other, even non-military activities conducted by the parties to an armed conflict (e.g. individuals condemned to death by the occupational authorities).

The Status of "Civilian" under International Humanitarian Law

The status and protection from which the civilians benefit during an armed conflict result from the principle of distinction, which is one of the basic principles at the core of IHL. According to Art. 48 of the Additional Protocol I of 1977, "the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives". Undoubtedly, the principle of distinction also constitutes an integral part of customary international humanitarian law and is recognized as fundamental and intransgressible. As Kenneth Watkin highlights, "distinguishing between combatants and civilians has been, historically and culturally, an important aspect of warfare and has long been recognized as the indispensable means by which humanitarian principles are in-

jected into the rules governing conduct in war".[11] Accordingly, the principle of distinction introduces a clear division into combatants and non-combatants (along with military targets and civil objects). IHL identifies no other indirect categories.

Due to the dichotomous classification introduced by the principle of distinction, the concept of a civilian provided by IHL is negatively delimited; therefore civilians are identified as non-combatants.[12] In particular, according to Art. 50 (1) of AP I, "[a] civilian is any person who does not belong to one of the categories of persons referred to in Article 4 A (1), (2), (3) and (6) of the Third [Geneva] Convention [of 1949] and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian".

In general, within the group of combatants falls, in a broad sense, the category of members of the armed forces (both regular and irregular) as well as civilian population who took up arms in response to the dangers of invading forces (the so called *levée en masse*). Combatants are authorized to directly participate in hostilities and therefore may be considered legitimate targets of attacks (unless they surrender or otherwise become *hors de combat* including due to injuries).[13] Only combatants are entitled to the prisoner of war status and related privileges because the aforesaid prisoner of war status is the logical consequence of the combatant status.[14] Non-combatants (civilians), however, may not directly participate

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[11] K. Watkin, 'Warriors without rights? Combatants, unprivileged belligerents, and the struggle over legitimacy', *HPCR Occasional Paper Series*, Winter (2005), pp. 8-9. See also: 'Legality of the Threat or Use of Nuclear Weapons', Advisory Opinion of the International Court of Justice, 8 July 1996, ICJ Rep 1996, 226, para 434; J.-M. Henckaerts, L. Doswald-Beck, *Customary International Humanitarian Law*, t. 1: *Rules*, Cambridge 2005, rule 1. According to Gary Solis, the principle of distinction is regarded as the "most significant battlefield concept a combatant must observe". G. Solis, *The Law of Armed Conflict. International Humanitarian Law in War*, New York 2010, p. 251.

[12] It should be noted that State armed forces may consist of combatants and non-combatants, including personnel assigned to exclusively medical, religious, or civil defence functions, and that civilians may retain their status although they are integrated, for example, into military aircraft crews. Consequently, membership in regular armed forces clearly depends on formal rather than functional criteria. See: N. Melzer, 'Keeping the balance between military necessity and humanity. A rafour critiques of the ICRC's interpretive guidance on the notion of direct participation in hostilities', *New York University Journal of International Law and Politics*, Vol. 42 (2010), p. 844.

[13] Concerning attacks directed against combatants, Yoram Dinstein rightly notices, that "[t]here are […] a number of caveats: (i) the attack must be carried out outside neutral territory, (ii) it is not allowed when a ceasefire is in effect, (iii) no prohibited weapons may be used, (iv) no perfidious methods of warfare may be resorted to, (v) combatants are not to be attacked once they become *hors de combat* (by choice (surrendered personnel) or because they are wounded, sick or shipwrecked), and (vi) the attack must not be expected to cause excessive injury to civilians". Y. Dinstein, 'Distinction and loss of civilian protection in international armed conflicts', *U.S. Naval War College International Law Studies. International Law and Military Operations* (ed. by M.D. Carsten), Vol. 84 (2008), p. 184.

[14] S.E. Nahlik, 'Status prawny kombatanta', *Sprawy Międzynarodowe*, No. 12 (1988), p. 114.

in military operations; moreover, they are entitled to protection against attacks according to IHL, which entails that a civilian is every person who is classified as non-combatant.

Thus, IHL does not provide a clear and express definition of "a civilian" by determining to whom it refers but rather demonstrates which groups of individuals are excluded from the above category. As an advantage of this approach a separable division is guaranteed according to which an individual is either a combatant or a civilian. One and the same individual may not belong to both categories at the same time or belong to neither of them.[15]

Except for the relatively rare case of a *levée en masse*,[16] civilians do not have the right to participate directly in hostilities.[17] Nevertheless, there are many situations in contemporary armed conflicts where civilians *directly* participate in hostile operations. In such situations they remain civilians but become lawful targets of attacks for as long as they do so. In other words, civilian immunity from attack is lost only where the person takes an active and direct part in hostilities.[18] The above does not entail that taking part in fighting guarantees the combatant status. As far as IHL is concerned, an individual may either be a civilian or a combatant but never one and the other at the same time. Accordingly, it should be noted that civilians taking a direct part in hostilities lose the protection of "civilian" status but not the status itself.[19]

The status of a civilian is therefore clear: he or she is entitled to protection in so far as he or she refrains from participation in hostilities. Civilians lose protection

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[15] See: K. Randzio-Sajkowska, M. Sajkowski, 'Ochrona osób cywilnych w konfliktach zbrojnych' in K. Lankosz (ed.), *Międzynarodowe prawo humanitarne konfliktów zbrojnych*, Dęblin 2006, p. 98.

[16] Civilians who have the status of *levée en masse* are the inhabitants of a territory which has not been occupied, who, on the approach of the enemy, spontaneously take up arms to resist the invading troops without having had time to form themselves into regular armed units. The participants in such *levée en masse* are expected to carry arms openly and to respect the laws and customs of war.

[17] K. Dörmann, 'The legal situation of *unlawful/unprivileged combatants*', *International Review of the Red Cross*, Vol. 85 (2003), p. 46, http://dx.doi.org/10.1017/S1560775500103529.

[18] See: Art. 51 (3) of AP I. See also: J.-M. Henckaerts, L. Doswald-Beck, *Customary…*, rule 6.

[19] K. Watkin, 'Warriors…', p. 11. Nobuo Hayashi describes this status as "[a] conduct-based *ad hoc* liability to being made the object of an attack by combatants of an adverse party using lawful means and methods of combat while participating directly in hostilities". N. Hayashi, 'Continuous Attack Liability Without Right or Fact of Direct Participation in Hostilities – the ICRC Interpretative Guidance and Perils of Pseudo-Status' in J. Nowakowska-Małusecka (ed.), *Międzynarodowe prawo humanitarne. Antecedencje i wyzwania współczesności. International Humanitarian Law. Antecedences and Challenges of the Present Time*, Bydgoszcz–Katowice 2010, p. 60. A contrary view is taken by Yoram Dinstein, who states that "civilians are not allowed to participate actively in the fighting: if they do they lose their status as civilians". Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, Cambridge 2004, p. 27.

against direct attack for the duration of their direct participation in hostilities. In addition, such direct or indirect participation in hostilities may constitute the basis for facing criminal sanctions if such possibility is admitted by the penal laws of a given country. With regard to this aspect "Interpretive Guidance" is comparable to conclusions that might be drawn from the Geneva Convention of 1949 and Additional Protocols of 1977.[20]

In case of non-international armed conflict the concept of a "combatant" does not exist (along with the related notion of a "prisoner of war")[21] – conflict occurs between armed forces of a state and dissident armed forces or other organized armed groups.[22] The term "civilian" still exists (though not defined) as well as protection that such persons may enjoy – according to art. 4 (1) of AP II, „[a]ll persons who do not take a direct part or who have ceased to take part in hostilities […] are entitled to respect for their person […]. They shall in all circumstances be treated humanely", and according to art. 13 (2) of AP II, „the civilian population as such, as well as individual civilians, shall not be the object of attack", with the reservation that such protection ceases with the moment and for the duration of direct participation in hostilities. Considering the above, an individual may become a target of attack if and to the extent he is a member of an organized armed group or takes direct part in hostilities.[23] The concept of "direct participation in hostilities" may be interpreted in a manner corresponding to the meaning it has been given in the context of international conflict whereas doubts may be raised by the membership in "organized armed group" since treaty law lacks applicable provisions to determine such membership.

In the light of "Interpretive Guidance" the notion of "organized armed groups" refers to irregular "armed forces" of a state or non-state party to an armed conflict.

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[20] P. Grzebyk, 'Pojęcia…', p. 64.

[21] M. Sassòli, L.M. Olson, 'The relationship between international humanitarian and human rights law where it matters: admissible killing and internment of fighters in non-international armed conflicts', *International Review of the Red Cross*, Vol. 90 (2008), p. 607. Compare: L. Doswald-Beck, 'The right to life in armed conflict. Does international humanitarian law provide all the answers?', *International Review of the Red Cross*, Vol. 88 (2006), p. 889 ("IHL does not formally recognize the status of *combatant* in non-international conflicts. This is not due to any altruistic articulation by governments of the need to avoid using force against all persons during such conflicts, but rather because of their insistence that rebels must not in any shape or form benefit from any kind of international recognition […] On the other hand, it is accepted that there cannot be an unlimited use of force by governments during such conflicts").

[22] See: Art. 1 (1) of AP II. Under this provision, to be considered an "organized armed group", a group must have a "responsible command", exercise control over territory, carry out "sustained and concerted military operations" and abide by its obligations under AP II.

[23] However, Louise Doswald-Beck states that "even fighting members of such groups would be exempt from attack in situations where they presented no threat and could easily be arrested, [like in] the hypothetical case of a rebel in the process of doing his shopping in the supermarket […]. One basis for this conclusion was that he would be a person not taking a *direct part in hostilities* at that time". L. Doswald-Beck, 'The right to life…', p. 890.

As such, organized armed groups assume combat function and therefore are involved in the conduct of military operations on behalf of one party to the conflict. As opposed to the membership in regular armed forces, membership in organized armed groups is more functional rather than official and according to "Interpretive Guidance" depends on those individuals only who assume continuous combat function. Like in the case of combatants, members of organized armed groups cease to be civilians when they lose protection against direct attack for the duration of performing combat functions.[24]

Exercise of continuous combat function does not imply entitlement to combatant privilege. It has been expressly underlined in "Interpretive Guidance" that this category rather distinguishes members of the organized fighting forces of a non-State party from civilians who directly participate in hostilities on a merely spontaneous, sporadic or unorganized basis or assume exclusively political, administrative or other non-combat functions (e.g. act as a part of a political wing of a given fighting organization).[25] Continuous combat function requires lasting integration into an organized armed group acting as the armed forces of a non-State party to an armed conflict. Thus, individuals whose continuous function involves preparation, execution or command of operations amounting to direct participation in hostilities are considered to assume a continuous combat function.[26]

In conclusion, exercise of "continuous combat function" within an armed group creates a status as a result of which an individual may become a target of attack at any time, even when such an individual is not directly involved in any hostilities at that time.[27] An individual ceases to be a legitimate target of attacks only when he permanently disengages from combat functions – the problem is, however, that it is hard to determine how much time should elapse from laying down arms in order for that individual to be qualified as a civilian.[28]

In contemporary armed conflicts it is not easy to distinguish members of organized armed groups from civilians, regardless their combat functions which are not an easy subject of identification, either.[29] Moreover, it is worth emphasizing that in the co-called asymmetric warfare, due to a significant disparity in power of one party to a conflict, the opposing party – in an attempt to attain their goals – often resorts to violation of IHL, in particular fails to abide by the principle of distinction and ignores measures that might be helpful in distinguishing themselves from civilians, and further, members of such fighting forces intentionally impersonate

[24] See: International Committee of the Red Cross, 'Interpretive Guidance…', pp. 27-36, 70.

[25] Ibid., pp. 33-34.

[26] Ibid., p. 34.

[27] Compare: N. Hayashi, 'Continuous…', p. 57.

[28] See: P. Grzebyk, 'Pojęcia…', p. 65.

[29] See: M.S. Wong, 'Targeted killings and the international legal framework. With particular reference to the U.S. operation against Osama bin Laden', *Chinese Journal of International Law*, Vol. 11 (2012), p. 148, http://dx.doi.org/10.1093/chinesejil/jmr052.

civilians and abuse the enemy's good faith.[30] Such behaviour of a weaker actor of an asymmetric conflict may be of significant military value since varying openly from civilian population and withdrawing from the method of hiding from the enemy might lead to a defeat. The described conduct, however, is a flagrant breach of IHL rules. It must also be noted that the above tactics may lead to weakening of protection of civilian population since the stronger party to a conflict that observes the international law, faces an extremely difficult task of effective distinguishing combatants/fighting groups of an enemy from civilians.[31]

The specific IHL provisions call for the above problem to be justly solved. Under Art. 50 (1) of AP I, "[i]n case of doubt whether a person is a civilian, that person shall be considered to be a civilian". As Yoram Dinstein highlights, "[this] provision is particularly germane to the issue of direct participation in hostilities. It is imperative to ensure that military units tasked with the mission of winnowing out civilians who engage in hostilities will not treat all civilians as targetable".[32] Additionally, Art. 50 (3) of AP I stipulates that "[t]he presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character". Thus, "the presence of civilians directly participating in hostilities among the civilian population does not deprive the population at large of the protection from attack that it is entitled to".[33]

The application of the above-mentioned rules might be problematic on the contemporary battlefield. In circumstances of an asymmetric conflict life and safety of combatants more and more depends on how quickly and effectively an adversary blended in the civilian population is recognized. However, it happens very seldom, indeed that an individual in question is successfully identified as non-civilian, which may lead to a situation when combatants, under the applicable law, should treat a potential adversary as a civilian. The above might cause specific problems when a suicide assassination is involved, the efficacy of which greatly depends on an act of perfidy or betrayal of trust (pretending a civilian by an assassinator and blending in the crowd of civilian population). What aggravates the situation is that doubts concerning the status of an assassinator are usually resolved only when an assassination had already been carried out when any preventive actions are beyond reach. A party to the conflict which duly observes IHL provisions has therefore a limited scope of effective methods of defence against an adversary applying such tactics. Despite the above-mentioned inconvenience, it

[30] Compare: T.A. Keck, 'Not All Civilians…', p. 3.

[31] As rightly noted by Eric Talbot Jensen, the increasing number of victims among civilian population in contemporary conflicts surely results from the lack of possibility to reliably distinguish who, according to the law, may be a legitimate target of attack and who is protected against such attack. E. Talbot Jensen, 'The ICJ's *Uganda Wall*. A barrier to the principle of distinction and an entry point for lawfare', *Denver Journal of International Law & Policy*, Vol. 35 (2008), p. 243.

[32] Y. Dinstein, 'Distinction…', p. 190.

[33] Ibid.

should be underlined that "protecting civilians from violence is an important cornerstone of a successful counterinsurgency campaign",[34] therefore in the foregoing case it is extremely important to rely on intelligence and preventive measures even when it would mean having the armed forces involved in activities typical for law enforcement agencies.[35]

While planning a military operation all necessary precautions should be taken to avoid unjustified suffering. Therefore, while deciding upon planning and attacking a specified target, not only operational capability must be taken into consideration but also binding rules governing the use of force along with IHL regulations and standards. In the light of those regulations, all precautions must be taken to verify *ex ante* that the targeted object is a legitimate military target and even if it is positively ascertained, the kind and degree of permissible force must be proportionate to danger in order to avoid or minimize incidental losses or harms that might be inflicted on civilians or to the civil property. Once it becomes apparent that losses and harms would be excessive in relation to the concrete and direct military advantage anticipated, those responsible must refrain from launching the attack, or suspend or cancel it, if applicable.

As regards civilians, in practice, all feasible precautions must be taken in determining whether the targeted person is a civilian and, if so, whether he directly participates in hostilities. In case of doubt as to whether a person is a civilian, he must presumed to be a civilian; and in case of doubt as to whether a civilian is directly participating in hostilities, it must be presumed that he is not and, therefore, that he remains protected against direct attack.[36]

Actions Which Constitute Direct Participation in Hostilities

Under Commentary on the Additional Protocol I of 1977, the notion of "direct participation in hostilities" refers to "acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces".[37] According to the ICRC's "Interpretive Guidance", acts falling within the

[34] T.A. Keck, 'Not All Civilians…', p. 138.

[35] For example, as noted by Rupert Smith, the reason for engagement of the British Army in Northern Ireland was to support the police forces (such operation was referred to as military support given to civil authorities). The army, therefore, performed an auxiliary function towards civil authorities. R. Smith, *Przydatność siły militarnej. Sztuka wojenna we współczesnym świecie*. *The Utility of Force: The Art of War in the Modern World*, transl. by A. i J. Maziarscy, Warszawa 2010, pp. 13-14, 324.

[36] N. Melzer, 'Keeping…', p. 857.

[37] *Commentary on the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, Article 51, para 1944, at <http://www.icrc.org/ihl.nsf/COM/470-750065?OpenDocument>, 9 September 2012 (hereinafter: Commentary on the AP I).

scope of direct participation in hostilities (DPH) must meet three cumulative criteria, namely:

1. the threshold of harm;
2. direct causation;
3. the belligerent nexus.

Basically, the above criteria demonstrate balanced proportions between the military necessity and humanitarian reasons – rules of fundamental importance from both treaty and customary international humanitarian law's point of view. In practice, those criteria represent rational guidelines for states trying to solve a question whether a certain act qualifies as direct participation in hostilities.

Ad. 1) In order for an activity to qualify as direct participation in hostilities, the harm likely to result from it must attain a certain threshold. This threshold can be reached either by causing harm of a specifically military nature or by inflicting death, injury, or destruction on persons or objects protected against direct attack.[38] It should be noted that "the qualification of an act as direct participation does not require the materialization of harm […] but merely the objective likelihood that the act will result in such harm".[39] Killing or wounding military personnel as well as acts resulting in damage to military objects would obviously qualify. The threshold of harm requirement could also be reached by acts, which may not immediately result in concrete losses, but adversely affect "the military operations or military capacity of a party to the conflict", including sabotage and other armed or unarmed activities restricting or disturbing deployments, logistics and communications.[40]

In the absence of military harm, civilian activities can still amount to direct participation in hostilities if they are likely to inflict death, injury, or destruction.[41] In most cases, this "alternative threshold of harm" would become relevant

> where a party to the conflict directs its attacks not against legitimate military targets but, for example, specifically against the civilian population or civilian objects. While such attacks would invariably amount to grave violations of IHL or even war crimes, the relevant criterion for their qualification as direct participation in hostilities is not that they are unlawful or criminal, but that they constitute an integral part of armed confrontations occurring between belligerents.[42]

Thus, if civilian conduct is not likely to result in military harm (although it may adversely affect public security or health, like the building of road blocks or the interruption of water and food supplies), it is not part of the hostilities and cannot be qualified as direct participation in hostilities.[43]

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[38] International Committee of the Red Cross, 'Interpretive Guidance…', p. 47.

[39] Ibid.

[40] T.A. Keck, 'Not all civilians…', p. 142.

[41] International Committee of the Red Cross, 'Interpretive Guidance…', pp. 49-50.

[42] N. Melzer, 'Keeping…', p. 861.

[43] International Committee of the Red Cross, 'Interpretive Guidance…', p. 50.

To sum up, in order for civilians to lose their protection against attack, they must either harm the enemy's military operations or capacity, or they must use means and methods of warfare directly against protected persons or objects.[44]

Furthermore, it is worth mentioning that

> immunity from direct attack does not preclude the permissibility of the use of force, even on a significant scale, if necessary to prevent the commission of grave crimes. It merely entails that the force used against perpetrators not qualifying as legitimate military targets remains governed by the standards of law enforcement and individual self-defence and not by those of the conduct of hostilities.[45]

Ad. 2) According to the ICRC, there must also be "a direct casual link between a specific act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part".[46] Moreover, "[f]or a specific act to qualify as *direct* rather than *indirect* participation in hostilities there must be a sufficiently close casual relation between the act and the resulting harm".[47] Thus, "mere participation in the war effort does not rise to the level of *direct participation*; the individual's actions must be directly linked to the conduct of hostilities".[48]

It must, therefore, be determined how direct participation in military operations differs from indirect participation, or, in a broader sense, in an armed conflict. According to ICRC the difference is between participation in hostilities and participation in war efforts, which, in a way, is conclusive since only the first of the above cited cases entails temporal suspension of immunity of a civilian.

In the event of conventional warfare conducted between states, fixing a strict boundary between "direct participation in hostilities" and "war efforts" does not seem to pose much of a challenge. Actions of the opponent's army are focused on destroying the adversary's military force in open confrontation; otherwise losses of the opponent will be none. Whereas contribution to war effort could be said to include all activities aiming at increase of military power of a party to the conflict to which a civilian belongs. Such contribution does not directly entail inflicting losses to an opponent. For example, production of hand grenades (or Molotov's cocktails) shall obviously bring increase of military power of a party to the conflict, but as such shall not cause any loss to an enemy – therefore may be classified as contribution to the general war effort. Whereas the use of the foregoing weapons during fights with an opposing party shall result in direct probability of harms and losses which qualifies this act as hostility.[49]

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[44] N. Melzer, 'Keeping…', p. 862.

[45] Ibid., p. 863.

[46] International Committee of the Red Cross, 'Interpretive Guidance…', p. 51.

[47] Ibid., p. 52.

[48] T.A. Keck, 'Not all civilians…', pp. 128-129.

[49] Compare: M.N. Schmitt, 'The interpretive guidance on the notion of direct participation in hostilities. A critical analysis', *Harvard National Security Journal*, Vol. 1 (2010), pp. 30--31; R. Borrmann, 'IKRK-Leitfaden unter Beschuss. Aktueller Stand der Diskussion um die

In ICRC opinion there must be a sufficiently close causal relation between a specific act and a resulting harm. In addition, it must be expressly stated that a given act is capable of bringing about harm "at one causal step" and the distinction between direct and indirect participation in hostilities must be interpreted as corresponding to that between direct and indirect causation of harm.[50] Therefore, an individual conduct that merely builds up or maintains the capacity of a party to harm its adversary (e.g. by recruitment and training of militants, providing ideological or financial support) or which otherwise only indirectly causes harm (e.g. purchase or smuggling of weapons used in fights) should be excluded from the concept of "direct participation in hostilities".[51] Such approach as demonstrated above leads to rather narrow understanding of "direct participation in hostilities", in particular to a conclusion that direct participation refers only to the conduct of military operations and an individual who directly participates in hostilities remains a legitimate target of attacks for only as long as he or she is actually involved in participation.

Ad. 3) According to the "Interpretive Guidance", "in order to amount to direct participation in hostilities, civilian conduct must not only be *objectively likely* to directly cause the required threshold of harm, but must also be *specifically designed to do so in support of a party to an armed conflict and to the detriment of another* (belligerent nexus)".[52] Consequently, "[a]rmed violence which is not designed to *harm a party* to an armed conflict, or which is not designed to do so *in support of another party*, cannot amount to any form of *participation* in hostilities taking place between these parties".[53]

Importantly, the belligerent nexus should be distinguished from concepts such as subjective intent and hostile intent – these relate to the state of mind of the person concerned, whereas belligerent nexus relates to the objective purpose of the act.[54] As Trevor Keck rightly notes, "[t]he reasons for participation in an act do not matter unless the individual is unaware of his or her participation. For instance, a driver unaware that he is transporting a bomb would remain protected. Any direct attack would need to take his death into proportionality considerations. Thus, while the reasons for the individual's participation in hostilities do not matter, the person's *knowledge* of participation does".[55]

The belligerent nexus is significant in order to distinguish an individual's participation in the conduct of war from criminal activities or acts of self-defence

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Auslegung des Begriffs der *direkten Teilnahme an der Kampfhandlungen*' in M. Kun-Buczko, M. Przybysz (eds.), *Bezpieczeństwo w dobie globalizacji. Prawo i praktyka*, Białystok 2011, pp. 239-240.

[50] See: International Committee of the Red Cross, 'Interpretive Guidance…', pp. 52-53.

[51] Ibid., p. 53.

[52] Ibid., p. 58.

[53] Ibid., p. 59.

[54] Ibid.

[55] T.A. Keck, 'Not All Civilians…', p. 143.

against "marauding soldiers".[56] For example, the stealing of military equipment for private use may cause the required threshold of harm, but is not specifically designed to support a party to the conflict by harming another.[57] Similarly, taking advantage of a breakdown of law and order to commit violent crimes would not meet the "belligerent nexus" requirement. Furthermore, civilians defending themselves against unlawful attack or looting by the parties to a conflict do not participate in hostilities by virtue of using force to defend themselves.[58] It is also important to distinguish direct participation in hostilities from violent forms of civil unrest, the primary purpose of which is to express dissatisfaction with the territorial or detaining authorities.[59] As regards the use of force by civilians against other civilians, to become part of the conduct of hostilities, the use of force must be specifically designed to support a party to an armed conflict in its military confrontation with another. For example, such direct attacks on civilians may meet the "belligerent nexus" requirement, provided the use of force is motivated by the same political disputes or ethnic hatred that underlie the surrounding armed conflict and where it causes harm of a specific military nature.[60]

Additionally, the ICRC highlights basic distinction between the conduct of hostilities and the exercise of power or authority over persons or territory. Consequently, the infliction of death, injury, or destruction by civilians on persons or objects in their power – within the meaning of IHL – does not, without more, constitute part of the hostilities. Moreover, even the perpetration of war crimes or other violations of IHL outside the conduct of hostilities is excluded from the concept of DPH. Thus, while collective punishment, hostage-taking, and summary execution of persons in physical custody are undoubtedly prohibited by IHL, they are not part of the conduct of hostilities.[61]

Temporary Dimension of Direct Participation in Hostilities

One of the most controversial issues regarding direct participation in hostilities is how to reasonably determine the time limits of such participation during which a civilian loses protection and may become a legitimate target of attack. According to Art. 51 (3) of AP I, civilians enjoy a general protection against dangers arising from military operations „unless and for such time as they take a direct part in hostilities". Therefore, in each case of participation in hostilities it is absolutely vital to determine when such participation starts and when it ends.

[56] Ibid.
[57] International Committee of the Red Cross, 'Interpretive Guidance…', pp. 60-61.
[58] See: T.A. Keck, 'Not all civilians…', p. 143.
[59] International Committee of the Red Cross, 'Interpretive Guidance…', p. 63.
[60] Ibid.
[61] Ibid., pp. 61-62.

According to the ICRC, the concept of DPH undoubtedly includes the immediate execution phase of a specific act meeting the three requirements of threshold of harm, direct causation and belligerent nexus, but it also includes measures preparatory to the execution of such an act, as well as the deployment to and return from the location of its execution, when they constitute an integral part of such a specific act or operation.[62] In other words, deployments and preparatory measures do not become *independent acts* of direct participation that can *ad infinitum* be preceded by further deployments and preparatory measures, but they are regarded as *an integral part of an act or operation*, which qualifies as direct participation in hostilities because it meets the three above-mentioned criteria.[63] For example, the loading of bombs onto an airplane in preparation for an attack on military targets constitutes a preparatory measure for a specific hostile act and, therefore, qualifies as DPH. Similarly, the delivery by a civilian truck driver of ammunition to an active firing position at the front line, equipment, instruction and transport of combatants, or gathering of intelligence – if carried out with a view to the execution of a specific hostile act – would have to be regarded as an integral part of ongoing combat operations and, consequently, as DPH. Conversely, mere transportation of weapons from a factory to a storage place for later use, general recruitment and training of personnel, and financial or political support to armed actors would constitute general preparatory measures qualifying as mere indirect participation.[64]

As regards the cases of deployment and return, if the execution of a specific act of DPH requires prior geographic deployment, such deployment already constitutes an integral part of the act in question. Likewise, as long as the return from the execution of a hostile act remains an integral part of the preceding operation, it constitutes a military withdrawal and should not be confused with surrender or otherwise becoming *hors de combat*. Thus, both the deployment and return should be carried out as an integral part of a specific act amounting to direct participation in hostilities. Importantly, that determination must be made with utmost care and based on a reasonable evaluation of the prevailing circumstances.[65]

The ICRC also explains the temporary and continuous loss of protection, noting that "[o]nce he ceases to participate, the civilian regains his right to protection […] and he may no longer be attacked".[66] Thus, "civilians lose and regain protection against direct attack in parallel with the intervals of their engagement in direct participation in hostilities".[67] This phenomenon is referred to as the "revolving door" theory and is strongly contested, as it enables insurgents to exploit the law

[62] Ibid., p. 65.
[63] N. Melzer, 'Keeping…', p. 883.
[64] International Committee of the Red Cross, 'Interpretive Guidance…', pp. 56-67.
[65] Ibid., pp. 67-68.
[66] Commentary on the AP I, para 1944.
[67] N. Melzer, 'Keeping…', pp. 883-884.

to the detriment of law-abiding parties.[68] However, in Nils Melzer's opinion, this theory "is […] necessary for the protection of the civilian population from erroneous or arbitrary attack"[69] – its aim is to prevent attacks on civilians who do not, at the time, represent a military threat.[70]

On the other hand, "if an individual becomes a member of an organized armed group (which collectively takes a direct part in hostilities), he would lose civilian protection for as long as that membership lasts".[71] In other words, they lose protection against direct attack for as long as they assume their continuous combat function.[72] Membership in an organized armed group begins in the moment when a civilian starts *de facto* to assume a continuous combat function for the group, and lasts until he or she ceases to assume such function. Therefore, the "revolving door" concept starts to operate based on that membership. Such attitude seems to be sensible taking into consideration the principle of equality of parties to an armed conflict. If, in case of members of organized armed groups, loss of protection would be limited only to the duration of direct participation in hostilities, it would provide members of such groups with a significant operational advantage over members of State armed forces (who may fall a target of attack throughout the whole duration of a conflict) thus causing an imbalance which is necessary to be maintained under IHL provisions. Such imbalance would, in turn, encourage members of organized armed groups to operate as "weekend fighters" or "farmers by day, fighters by night". Therefore, in practical terms, members of an organized armed group may be targeted, even when not personally linked to any specific hostile act – simply due to their membership in such a group, and as long as that membership continues.[73]

To sum up, a civilian who ceases to directly participate in hostilities and a member of organized armed groups of a non-State party who withdraws from continuous combat function, regain full protection against direct attacks. This does not imply, however, that such individuals cannot face criminal sanctions for violation of domestic and international laws. Comments to "Interpretive Guidance" stress that direct participation in hostilities is neither prohibited by international humanitarian law nor criminalized under the statutes of international criminal tribunals but an individual who directly or indirectly participates in hostilities may be prosecuted for violation of domestic laws such as treason, homicide or destruction of property.[74]

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[68] See: T.A. Keck, 'Not all civilians…', pp. 149-150.

[69] N. Melzer, 'Keeping…', p. 891.

[70] See: International Committee of the Red Cross, 'Interpretive Guidance…', p. 70. Compare: T.A. Keck, 'Not all civilians…', p. 151.

[71] Y. Dinstein, 'Distinction…', p. 190.

[72] International Committee of the Red Cross, 'Interpretive Guidance…', p. 71.

[73] Y. Dinstein, 'Distinction…', p. 190.

[74] P. Grzebyk, 'Pojęcia…', p. 71. Compare: Commentary on the AP I, Article 51 (3), para 1944 ("Once he ceases to participate, the civilian […] may no longer be attacked […] there is

Restraints on the Use of Force Against Civilians Directly Participating in Hostilities

In 1975 Professor Jean Pictet wrote: "If we can put a soldier out of action by capturing him, we should not wound him; if we can obtain the same result by wounding him, we must not kill him. If there are two means to achieve the same military advantage, we must choose the one which causes the lesser evil".[75] The above obviously is not to be understood as imposing an obligation, during a military operation, on members of armed forces to proceed in a manner corresponding to that of law enforcement agencies for which the use of lethal force should be last resort. It should be noted that

> combatants are part of the military potential of the enemy and it is therefore always lawful to attack them for the purpose of weakening that potential. The traditional understanding is that no rule restricts the use of force against combatants only to those circumstances in which they cannot be captured. Within humanitarian law this view has been challenged, citing both the principle of military necessity as a restriction on all violence and the prohibition of treacherous killings.[76]

The ICRC expressly supports a notion of "humanitarisation" of warfare underlying that „the right of belligerents to adopt means of injuring the enemy is not unlimited".[77] In truth, in order to forbid infliction of unnecessary suffering a number of international conventions have been adopted prohibiting the use of means and weapons of a nature to cause superfluous injury and unnecessary suffering and to conduct warfare in a way which denies the fundamental humanitarian rules. Despite, however, numerous standards which govern the use of prohibited means and methods of warfare, the specific provisions of treaty law do not expressly regulate the kind and degree of force permissible against legitimate targets. In the absence of the above express regulations, the ICRC suggests that the use of force in an armed conflict be determined by the principles of military necessity and humanity, which „underlie and inform the normative framework of IHL, and therefore shape the context in which its rules must be interpreted".[78]

With reference to the principle of humanity, the so-called Martens Clause, incorporated in both Additional Protocols of 1977,[79] must be noted. The contents of the Clause remain a part of a customary IHL. In the light of the aforesaid clause, which reflects the principle of humanity, "[i]n cases not covered by this Protocol or

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nothing to prevent the authorities capturing him in the act or arresting him at a later stage").

[75] J.S. Pictet, *Humanitarian Law and the Protection of War Victims*, Leiden 1975, pp. 75-76.

[76] M. Sassòli, L.M. Olson, 'The relationship…', p. 606.

[77] See: Art. 22 of GC IV and Art. 35 (1) of AP I.

[78] International Committee of the Red Cross, 'Interpretive Guidance…', p. 78.

[79] See: Art. 2 of AP I and the preamble of AP II.

by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience".

The principle of military necessity which is one of the key principles of IHL, permits only the use of such measures and force and to such degree, which are not forbidden by the laws of war, that are required to bring about the successful conclusion of a military operation, i.e. partial or complete submission of the enemy in the shortest possible time and with the minimum power exerted (which also refers to sparing the lives of own soldiers). What indirectly follows from this principle is an obligation to take into account the humanitarian considerations which forbid superfluous injuries or unnecessary suffering in order to accomplish justified military purposes.[80] Therefore, in the context of direct participation in hostilities, the principle of military necessity as well as humanitarian considerations should underlie determination of permissible kind and degree of force to be used in justified military circumstances.[81]

Taking into account the foregoing remarks and conclusions, ICRC underlines that the use of lethal force in the circumstances of warfare must be based on a balance between military necessity and the principle of humanity. Obviously, the considerations of humanity and military necessity must not override the specific provisions of IHL but should rather constitute guiding principles to be referred to by military advocates, commanders and soldiers whenever legal regulations are unclear or imprecise. In other words, in instances where IHL lacks precision or is not fully formulated, interpretation must consider the need to maintain balance between the principles of military necessity and humanity.[82]

Proper interpretation of the above-mentioned balance, at the time when warfare is in progress, neither grants combatants an unlimited licence to kill nor imposes "a legal obligation to capture rather than kill regardless of the circumstances".[83] Decision as to whether a person being a military target ought to be captured or killed must be based on given circumstances, or measures which are reasonable in the prevailing circumstances. The level of restrictions as regards the use of lethal force may increase with the ability of a party to the conflict to control the area and implement the means of stabilisation. As the ICRC highlights, the restraining function "may become decisive where armed forces operate against selected individuals in situations comparable to peacetime policing",[84] and such circumstances are likely to occur when a party to the conflict occupies the adversary's territory or

[80] International Committee of the Red Cross, 'Interpretive Guidance…', p. 79.

[81] N. Melzer, 'Keeping…', p. 904. For the sake of clarification, the loss of protection against attacks within the meaning of IHL is not to be deemed as a sanction for criminal activities but a consequence of the military necessity in the conduct of hostilities.

[82] T.A. Keck, 'Not all civilians…', p. 154.

[83] International Committee of the Red Cross, 'Interpretive Guidance…', p. 78.

[84] Ibid., p. 80.

in case of an asymmetric conflict, conducting warfare against non-State actors on a territory of a given State.[85]

ICRC attitude towards restrictions on the use of force against civilians directly participating in hostilities seems to be gradually shared by states as epitomised by their practice in the issue in question. At this point it might be worth quoting an excerpt from the Israeli Supreme Court's famous verdict in the so-called *Targeted Killings*,[86] when the Court was to examine whether the policy of *targeted killings* as conducted by the Israeli government against suspected terrorists (recognised by the court as civilians) complied with the law. The Supreme Court's findings in the foregoing matter were as follows:

> a civilian taking a direct part in hostilities cannot be attacked at such time as he is doing so, if a less harmful means can be employed […]. Thus, if a terrorist taking a direct part in hostilities can be arrested, interrogated and tried, those are the means which should be employed […]. A rule-of-law state employs, to the extent possible, procedures of law and not procedures of force […]. Arrest, investigation and trial are not means which can always be used […]. However, it is a possibility which should always be considered. It might actually be particularly practical under the conditions of belligerent occupation, in which the army controls the area in which the operation takes place, and in which arrest, investigation and trial are at times realisable possibilities.[87]

In general, the need to minimise victims among civilians and to impose limits on the use of lethal force is also addressed by the new U.S. counterinsurgency (COIN) doctrine. The U.S. military rewrote its doctrine to respond to the changed military and political realities inherent in counterinsurgency warfare. This document requires that U.S. forces use less force as a means to prevent civilian casualties, and places greater emphasis on the provision of governance, social services and capacity building.[88] Interestingly, the COIN doctrine applicable in U.S. counterinsurgency operations imposes far greater restrictions on the use of force than in conventional warfare. According to U.S. Counterinsurgency Manual, "[i]n situations where civil security exists, even tenuously, Soldiers and Marines should pursue nonlethal means first, using lethal force only when necessary".[89] It should

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[85] As Trevor Keck explains, "restraints on the use of force are not hard and fast, but rather change based on the circumstances – namely the intensity of the conflict, the parties' ability to project power and ultimately, what is reasonable in a given situation". T.A. Keck, 'Not all civilians…', p. 155.

[86] The Public Committee against Torture in Israel v. The Government of Israel, Israeli Supreme Court Sitting as the High Court of Justice, Judgment of 11 December 2005, at <http://elyon1.court.gov.il/Files_ENG/02/690/007/A34/02007690.A34.pdf>, 2 December 2012.

[87] Ibid., para 40.

[88] See: T.A. Keck, 'Not all civilians…', pp. 124, 139.

[89] U.S. Dep't of Army/Marine Corps, Counterinsurgency Field Manual 3-24 sec. 7-36 (15 December 2006), at <http://www.fas.org/irp/doddir/army/fm3-24.pdf>, 2 December 2012.

be noted, however, that the U.S. COIN manual is not a legal document. Rather, it provides guidelines and principles for counterinsurgency operations. Nevertheless, as Trevor Keck pointed out, "the implementation of the COIN doctrine [in Afghanistan] had resulted in significantly narrowing the U.S. rules of engagement (ROE), imposing far tighter restrictions on the use of force".[90] The currently applicable rules of engagement (ROE) put an obligation on the American armed forces operating in Afghanistan to apply "capture rather than kill" tactics whenever circumstances allow. Even if in possession of reliable and verified information as to the current hiding place of a member of Taliban forces, who has been identified as a legitimate target of attack, the U.S. military should rather try and capture such belligerent, unless he is likely to pose a grave threat to life and security of American soldiers.[91]

Conclusions

There is no doubt that the concept of direct participation in hostilities remains highly controversial in contemporary armed conflicts. Owing to the employment in warfare of new technological developments, there are increased possibilities to use lethal force without entering the battlefield which implies that such force does not necessarily require to be activated by a human operator. What is more, in a warfare theatre there is a growing trend among states towards outsourcing of traditional military functions to Private Military and Security Companies in order to enhance the chances for a military success. The most significant challenge, however, arises from the participation of non-State armed groups in contemporary armed conflicts who show no respect for the principle of distinction – members of such groups fail to distinguish themselves from the civilian population by wearing uniforms or their insignia and deliberately intermingle with civilians or use them as human shields counting on a physical barrier which shall prevent an adversary from shooting them. In the light of the foregoing facts, the detailed explanation of the notion of direct participation in hostilities and its adequate implementation remains a significant dilemma.[92] Therefore, ICRC efforts focused on elaboration of detailed guidelines serving interpretation of the notion of direct participation in hostilities, crowned with the adoption of "Interpretive Guidance" must be seen as useful both for military and civil environ-

[90] T.A. Keck, 'Not all civilians…', p. 175.

[91] Ibid. However, Trevor Keck clearly states that "[i]ncreased restrictions on the use of force stemming from the COIN doctrine are likely driven by policy", and not necessarily by IHL or IHRL norms. Ibid., p. 176.

[92] See: R. Goodman, D. Jinks, 'The ICRC Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law: An Introduction to the Forum', *New York University Journal of International Law and Politics*, Vol. 42 (2010), p. 637.

ment, involved in humanitarian aid, maintaining or restoring peace and global security.[93]

It should be underlined that "traditional dual privileged status approach of dividing a population into combatants and civilians is only as effective as the accuracy with which the definition of *combatant* is established and to the extent there is a clear understanding of when civilians lose the protection of their status by participating in hostilities".[94] Therefore, one of the core assumptions of "Interpretive Guidance" defines that only those civilians who exercise "continuous combat function" within an organized armed group or who are continuously involved in direct participation in hostilities may legally be identified as a legitimate target of attack – presuming, in case of doubt, entitlement to protection. Furthermore, individuals directly participating in hostilities only sporadically are civilians, protected unless engaged in hostilities. In order to determine whether a specific act may be qualified as "direct participation in hostilities", States should apply ICRC criteria that comply with both treaty and customary IHL. To lose legal protection, a civilian must perform an act meeting three criteria: 1) threshold of harm; 2) direct causation; and 3) the belligerent nexus. All the cumulative criteria must be met in order for an individual to lose a status of a person protected against direct attack.

Numerous ambiguities that occur in practice as regards the principle of distinction, as well as the need to enhance protection of civilians and to prevent arbitrary killings, cause us to accept the foregoing restrictive criteria. It is worth remembering that targeting individuals who assume political or other functions unrelated to hostilities within an armed group, thus deserve to be recognized as non-combatants, may be regarded as a violation of IHL, expose armed forces to severe criticism and discredit the military operation.[95]

International humanitarian law provides the fighting parties with basic rules and regulations that allow to effectively accomplish military objectives on the one hand and to avoid superfluous suffering and unnecessary victims both among combatants and non-combatants on the other hand. Therefore, it is of utmost importance to maintain balance between the principle of humane treatment and demands of military necessity. In the event of effective territorial control, armed forces should try to ensure security by applying non-lethal means in the first place. Indeed, it would be a gross violation of the rules of law to resort to the use of lethal force in circumstances when arrest or capture is sufficient and more rational

[93] As Nils Melzer highlights, "the ICRC's Interpretive Guidance cannot, and does not purport to, replace the issuing of contextualized rules of engagement or the judgment of the operational commander. Instead, it aims to facilitate the task of those responsible for the planning and conduct of operations by providing useful and coherent concepts and principles based on which the required distinctions and determinations ought to be made". N. Melzer, 'Keeping…', p. 856.

[94] K. Watkin, 'Warriors…', p. 9.

[95] Compare: T.A. Keck, 'Not all civilians…', p. 140.

alternative.[96] In the conduct of military operation, in particular in case of counter-insurgency measures, States should focus on more cautious use of force making their best to balance the fundamental IHL rules – the principle of humanity and of military necessity which, after all, are not mutually exclusive and may successfully be implemented on the contemporary battlefield.

Abstract

During an armed conflict there may be a situation when a civilian becomes actively involved in hostilities, and since this is in contradiction with the international humanitarian law of armed conflict. By doing so, such person risks being deprived of protection they otherwise deserve and may become the target of enemy assault. Here, however, appears a problem: since the international humanitarian law does not provide a precise definition of "direct participation in hostilities" and fails to specify what activities may be described as connected with or forming its part. An attempt was made by the International Committee of the Red Cross to provide the above definition in Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law (published in 2009). Despite numerous critics, the foregoing document should be considered as essential and necessary especially at the time of the "war against terrorism" or in the case of the so-called asymmetric conflicts. By defining three obligatory prerequisites that must be met in order for an event to qualify as "direct participation in hostilities", the International Committee of the Red Cross more clearly specified the case of "direct participation in hostilities", putting an end to free choice of interpretation that may cause death of innocent or neutral persons not involved in warfare actions. Accurate interpretation of the above-referred notion – which is the core topic of the present article – may contribute to more effective protection of civilians against direct attacks and help enforce respect for their life during an armed conflict.

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[96] Ibid., p. 178.

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The Role of Human Rights Protection in Combating Human Trafficking

The Case of the Greater Mekong Sub-Region

1. Introduction – the Nature of Human Trafficking

1.1. What Constitutes Human Trafficking and What Does Not?

Human trafficking is the trade of human beings and their use by criminals to make profit. In other words, it means recruiting, harbouring, transporting, providing and obtaining a person through the means of force, fraud and coercion for compelled services or commercial sex acts. The widely accepted definition originates from the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (also referred to as the *Trafficking Protocol*) which was signed in Palermo, Italy in 2000:

> Trafficking in persons shall mean the recruitment, transportation, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power, or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.[1]

The main document on trafficking, the *UN Trafficking Protocol*, entered into force in 2003, as a supplement to the *Convention against Transnational Organized Crime*. Accordingly, these two documents need to be read together in order to understand fully the international legal framework for combating trafficking. The Protocol held that governmental responses should incorporate the "3P" paradigm: Prevention, Criminal Prosecution and Victim Protection. *The Protocol* is the first global, legally binding instrument on trafficking in

[1] United Nations. Office on Drugs and Crime, 'Trafficking in Human Beings', 2006, at <https://www.unodc.org/pdf/Trafficking_toolkit_Oct06.pdf>', 4 January 2013.

over half a century and the only one that sets out an agreed definition of trafficking in persons.

It is also equally important to recognize what human trafficking is not. First of all, human trafficking is not smuggling. Migrant smuggling needs person's consent and it is a crime against state, whilst trafficking is a crime against a person – the victim. Smuggling is commercial and trafficking has an exploitative character. The relationship between a trafficker and a victim continues in order to maximize economic gains from exploitation. Secondly, human trafficking should not be equated with sexual services or forced sex work. The exploitation does not always mean sexual exploitation and turning people into sex-slaves. There are also other forms of human exploitation including: forcing or tricking adults and children into prostitution, begging, or work in sweat shops, domestic servitude and manual labour. Children sometimes might be also forced to become child soldiers. Finally, modern slavery affects men equally to women and children.

1.2. Extent

Some researchers tend to trivialize the aspect of extent, claiming that due to the illegal nature of trafficking, it is impossible to verify the number of trafficked people. On the other hand, those researchers still include in their papers some estimates, which are of undocumented origin. Steinfatt, Baker and Beesey[2] refuted this kind of approach and observed that "in attempting to trace the «estimates» back to the methods that produced them, it appears that many and perhaps most may be little more than wild guesses, or even pure fabrications".[3] Moreover, they argued that

> this process of asking people who work for an NGO or governmental agency in a specific content area how big they think a problem is may be likened to asking expert baseball players of long standing to estimate the number of persons currently playing baseball in their country. Being expert at baseball does not imply knowledge or credibility concerning the number of baseball players.[4]

Furthermore, Steinfatt et al proved by their research that it is possible to count the number of women and girls who were trafficked. This innovative method of realistic estimating, applied in Cambodia, utilized taxis and moto-dup drivers who carried customers to brothels. Unfortunately, their method, the *geographic mapping technique*, only applies to individuals trafficked for sexual exploitation.

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[2] T.M. Steinfatt, S. Baker, A. Beesey, *Measuring the Number of Trafficked Women in Cambodia. 2002, Part I of a Series*, Bangkok 2002.

[3] Ibid., p. 2.

[4] Ibid., p. 4.

As for the newest estimates, quoted in the 2012 *Trafficking in Persons Report*, published annually by the U.S. Department of State, the International Labor Organization (ILO) estimated that 20.9 million people are victims of forced labour globally. This estimate includes victims of trafficking in persons; however, the number of victims of forced labour as a result of trafficking in persons remains unknown (U.S. Department of State, 2012).

1.3. Common Misconceptions with Regards to Modern Slavery

Human trafficking is a relatively new research topic although slavery, that it is a continuation of, is ancient. In fact, the institution of slavery is an old as our civilization and has begun about ten thousand years ago when nomadic tribes learnt agriculture and a large labour force was needed. Slavery was described in the Old and New Testament of the Bible, as well as in the Koran, as a natural feature of social life.[5] However, human trafficking fuelled by the globalization, is complex and far from being generic. Recently trafficking has become increasingly multifaceted and thus puzzling for many. According to Matthew Friedman, Regional Project Manager of the United Nations Inter-Agency Project on Human Trafficking (UNIAP), there are a few essential myths that had an impact on addressing the problem of human trafficking.[6] First of all, Friedman argues that the actual risk factors are not poverty or the lack f education but the inability to access legal migration channels and to utilize educational skills that the future victims already possess. Another crucial risk factor is "inability to access emergency medical loans or quick money when family members fall ill".[7] Furthermore, human trafficking networks in Southeast Asia are often 'domestic' and loosely organized by villagers rather than by the members or key criminal syndicates like Chinese triads or Japanese *yakuza*. Also, despite the fact that trafficking occurs in Southeast Asia mainly in the context of forced labour I factories, fisheries, plantations and constructions, some national laws still limit the definition of trafficking to women and children. Moreover, Friedman claims that to solve the problem of modern slavery the anti-trafficking initiatives should focus on exploiters and enslavers, not only on traffickers.

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[5] D.L. Smith, *Less Than Human. Why We Demean, Enslave, and Exterminate Others*, New York 2011, p. 106.

[6] M. Friedman, 'Human Trafficking in the Mekong Region. One Response to the Problem', *Focus*, Vol. 67 (2012), at <http://www.hurights.or.jp/archives/focus/section2/2012/03/human-trafficking-in-the-mekong-region-one-response-to-the-problem.html>, 25 November 2012.

[7] Ibid.

2. Background of the Study: Human Trafficking as an Issue at the Crossroads of Human Rights, Human Security, and Social Development

Human trafficking, the modern-day slavery, is not only a serious violation of human rights but also a crime against humanity that poses perennial threats to human security. In other words, human trafficking is an issue at the crossroads of human rights and human security, which means that these two individual – oriented regimes overlap each other in the trade in flesh. The protection of the rights of a victim, *inter alia*, the right to personal liberty (freedom from slavery) and the right to move, is at the core of the human rights-based approach. It also takes in women's rights as human rights and labour rights as a confluence of structure and agency. Proponents of this framework believe that a deep human rights approach can facilitate analysis and ameliorate response by combining protection with empowerment and acknowledging the interdependence of social rights and personal freedoms.[8] Likewise, they insist that rethinking trafficking requires moving our orientation from sex to slavery, from prostitution to power relations, and from rescue to rights. However, human trafficking is not limited to the abuse of human rights of a trafficked person. Along with political security, it also gravely undermines human security. Human trafficking affects human security in the way that it contributes to the spread of a disease, demographic decline, and humiliation of women; deprives children of education and leads to the destruction of communities.[9] Consequently, "the victims of human trafficking suffer hunger, are more frequently victims of HIV/AIDS and their existence is defined by repression and every known form of deprivation".[10] Finally, it can be argued that human trafficking is also a development issue. The conventional approach links vulnerability to trafficking to poverty, gender inequality, unemployment, and a lack of education.[11] I wish to argue that inseparability of human trafficking and development is valid only when we redefine the concept of "poverty" and look at it not as a state of insufficient income or a lack of it but as phenomenon of "depravation", described by Robert Chambers, a renowned development scholar.[12] The notion of deprivation goes far beyond lack of income and is marked by "social inferiority, isolation, physical weakness, vulnerability, seasonal deprivation, powerlessness, and humiliation".[13]

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[8] A. Brysk, A. Choi-Fitzpatrick, *From Human Trafficking to Human Rights. Reframing Contemporary Slavery*, Philadelphia 2011.

[9] R. Skeldon, *Myths and Realities of Chinese Irregular Migration*, Geneva 2000.

[10] Ibid., p. 60.

[11] World Bank Development Report, *Development and Climate Change*, 15 September 2009, at <http://web.worldbank.org/WBSITE/EXTERNAL/EXTDEC/EXTRESEARCH/EXTWDRS/0,,contentMDK:23062354~pagePK:478093~piPK:477627~theSitePK:477624,00.html>, 24 November 2012.

[12] P. Uvin, *Human Rights and Development*, Bloomfield 2004, p. 123.

[13] Ibid., p. 123.

3. The Greater Mekong Sub-region: the Concept of the Mekong Geo-body

The Mekong River lies at the core of the Greater Mekong Sub-region (GMS), which constitutes of the six countries being crossed by this magnificent river: China (specifically Yunnan Province and Guangxi Zhuang Autonomous Region), Myanmar, Laos, Thailand, Cambodia and Viet Nam. GMS is a natural economic area bound together by the Mekong River, covering 2.6 million square kilometres and a combined population of around 326 million. The Mekong is being perceived as a river of mysteries for its extremely rich biodiversity, only second to the Amazon, and the enormous ethnic and cultural mixture of the more than 100 million people who live in its basin. The English name 'Mekong' has been derived from "Mae Khong" ("mother of rivers"), a term of Thai-Lao origin; however it has been called different names in other GMS countries. For instance, the Vietnamese refer to it as "Cu Long" ("Nine Dragons") and the Chinese call it "Lancang Jiang" ("Turbulent River"). The Mekong has not only been a primary source of livelihood for the communities living along its banks and a sacred river with cultural and spiritual significance but also an entity offering a huge potential for commerce and tourism. Nonetheless, the way it is being developed has also many controversial dimensions. The Mekong, only two decades ago an almost untouched river, is gradually becoming a construction site for giant Chinese dams and engineering works in its upper stretches. John Vidal, the Guardian's environmental editor, described the "Mother of Rivers" as "one of the most dammed [rivers] in the world", threatening the livelihoods of nations inhabiting the downstream areas and fully dependent on the river for food, water and transport.[14]

The concept of the GMS is often being depicted as a notion artificially created for the purpose of development cooperation. At the same time, a number of researchers stress out the historical evidence pointing to shared origins, natural and social conditions. Accordingly, they argue that people of the Mekong speak languages, belonging to four big language families: Sino-Tibetan, Thai, Mon-Khmer, and Austronesian that show many similarities in terms of structural features.[15] Apart from linguistic evidence, the archaeological findings about the existence of ceremonial bronze drums all over the region of Mekong and the prevalence of identical Buddhist architecture from the snowy Tibetan Plateau in the upper basin to the tropical landscape of the villages in the down one are relevant illustrative examples indicating that the GMS is more than a modern construct serving a distinct purpose.[16]

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[14] J. Vidal, 'Dammed and dying. The Mekong and its communities face a bleak future', *The Guardian*, 25 March 2004, at <http://www.theguardian.com/environment/2004/mar/25/china.conservationandendangeredspecies>, 24 November 2012.

[15] M.S.J. Diokino, V.C. Ngyuen, 'Introduction. Mother of Waters' in iidem (eds.), *The Mekong Arranged and Rearranged*, Chiang Mai 2006, pp. 1-15.

[16] Ibid.

Originally, mid-19th century French colonists shaped the concept of Mekong as an entity, and its legacy is still apparent nowadays. In 1957, four countries in the lower stretch of the river: Laos, Cambodia, Thailand and the former Southern Authorities of Viet Nam established the Mekong Committee during the 13th session of the Economic and Social Committee for Asia and the Pacific (ESCAP) to deal with the wide-ranging development of water resources and related resources in the Lower Mekong Basin. It was followed by the formation of the Interim Mekong Committee (IMC) in 1978 to coordinate the work of the riparian countries on the sustainable and environmentally sound development of the Mekong's water resources. Due to the internal political turmoil, Cambodia was left out of this interim organization. Finally, in 1995 the Mekong River Commission (MRC) succeeded the old Mekong Committees by signing the Agreement on The Cooperation for The Sustainable Development of The Mekong River Basin. MRC included Cambodia, Lao PDR, Thailand, and Viet Nam, maintaining regular dialogue with the two upper states of the Mekong River Basin, China and Myanmar. Nevertheless, the first regional initiative on a larger scale was the conception of the Greater Mekong Sub-region in 1992, including all the six countries that the Mekong runs through. The idea of creating GMS was conceived by the Asian Development Bank (ADB) to enhance regional development.

The term "Greater Mekong Sub-region" itself is a multilayered one. Diokino & Ngyuen imply that the word "Greater" has connotations of China's membership in the GMS in contrast to other regional bodies: MRC and the ASEAN Mekong Basin development Cooperation and that the term "sub-region" demonstrates the fact that the GMS is a sub unit of a larger body, being Southeast Asia.[17] China participates in the GMS only through the two of its poorest provinces – Yunnan Province and Guangxi Zhuang Autonomous Region. Yunnan is situated in the far southwest of China, bordering Myanmar, Laos and Vietnam. Located in the southern part of the country, Guangxi is bordered by Vietnam in the southwest. Yunnan and Guangxi have respective populations of 45.7 and 46.0 million, which makes them comparable to those of Ukraine and Spain. Yunnan is spanning approximately 394,000 square kilometres, being slightly bigger than Germany. Guangxi is about half smaller, occupying 236,700 square kilometres. Jim Goodman argues that, "in a sense there are two Chinas".[18] He divides China to the Middle Kingdom encompassing the central and eastern provinces and the Periphery of the borderlands. The Middle Kingdom China is inhabited mostly by Han people, comprising 92% of the country's population, who inherited a few- thousand years old refined culture. The remaining 8% of China's population consists of 55 minorities and resides upon 60% of the land.[19] Yunnan Province itself is home to 25 different ethnic minorities and Guangxi is inhabited by 9 nations with 14 million of Zhuang

[17] Ibid.

[18] J. Goodman, *Yunnan. China south of the clouds*, Hong Kong – New York 2009.

[19] Ibid.

people – the largest minority ethnicity of China. Importantly, the minorities in spite of modernization and economic reforms launched by the Deng Xiao Ping in 1978 still preserve their traditional lifestyle. During the Great Leap Forward and the Cultural Revolution, the ultimate goal of the Maoist government was to assimilate the minorities, turning them into Han-style communist citizens. However, the Deng government along with economic liberation reversed Party policy on minorities. Women in rural areas can again wear the ethnic costumes once forbidden by the Mao administration, villages freely organize festivals and cherish their tribal tradition, and the ethnic pride is clearly back to Yunnan.

4. Approaches to Combating Human Trafficking in the GMS and Shifts in Relevant Paradigms

Along with the economic liberation, commercial growth and cross-border trade, Yunnan Province and other member states of the GMS are becoming a perpetual motion region. Needless to mention, opening the Mekong borders has also led to various adverse effects such as human trafficking, drug trafficking, the spread of HIV/AIDS and sexually transmitted diseases, and environmental degradation.

Eradication of human trafficking in the Greater Mekong Sub-region (GMS) has been on the agenda of the member governments, international agencies and NGOs for nearly two decades. In 2004, the six countries sharing the Mekong River adopted the agreement of the Coordinated Mekong Ministerial Initiative against Human Trafficking (COMMIT), which focuses on creation of new multilateral and bilateral partnerships to combat human trafficking in the region. The major outcome of this initiative is the *Memorandum of Understanding on Cooperation against Trafficking in Persons in the Greater Mekong Sub-region*, a guiding document for victim-centered and rights-based approaches to counter trafficking. On a larger scale, the regional commitment in expressed in the *ASEAN Declaration against Trafficking in Persons, especially Women and Children*.[20] The GMS countries are also among 50 participants of the Bali Process (2002), which is a collaborative effort to work on practical measures to facilitate combating trafficking in persons in Asia-Pacific. However, critics argue that since the Bali Process is non-binding it cannot be expected to take significant action.

Through a number of interviews conducted by the author of this paper with relevant stakeholders in the GMS region (UNIAP, IOM, Save the Children UK officials, etc.) between February and September of 2012, it can be assumed that

[20] ASEAN Declaration Against Trafficking in Persons Particularly Women and Children, Vientiane 2004, at < http://www.asean.org/communities/asean-political-security-community/item/asean-declaration-against-trafficking-in-persons-particularly-women-and-children-3>, 24 November 2012.

the Bali Process did not play any significant role in tackling the problem of trafficking and that the majority of informants were not exactly aware of the existence of the ASEAN Declaration. On the other hand, COMMIT seemed to be the chief and successful mechanism in the process of addressing the problem of trade in humans. The COMMIT Process is governed by the 6 national COMMIT Taskforces, each comprised of government officials from the ministries most relevant to the fight against human trafficking – including police, justice, social welfare, and women's affairs.

The fundamental issue in tackling trafficking is to instigate a common vision. No single government or organization is able to deal with trafficking alone, and a harmonized cooperative response is crucial. However, "community building and identity formation in the GMS are at a very early stage and have not generated any commonly agreed norms and rules that would be able to structure and channel the actions of governmental actors".[21] Interestingly, four of six GMS countries are still one-party states. Vietnam, Laos, and Burma are cautiously although at different pace following the Chinese model in search to combine capitalist development with continuing political monopoly by the Communist Party.

Developing a unified counter trafficking response is being challenged by shifts in relevant paradigms. In a sense the debate on trafficking in locked in a stalemate between two broad approaches: the conventional "sexual violence" approach which equates trafficking with sexual exploitation of women and children and the "irregular migration" approach, also recognizing men as victims and linking trafficking to illicit and irregular migration.

4.1.

"Sexual violence" approach – the proponents of this approach are often feminist researchers, who advocate for anti-trafficking interventions focused predominantly on the issue of sexual exploitation of women and children, and emphasize prevention.[22] In other words, in the academic literature trade in human beings is often associated with the increasing demand and supply of women and girls either in the sex industries or in the mail-order- bride business. Furthermore, this approach can be additionally split into two conflicting outlooks of the legitimacy of the sex industry: prostitution as trafficking (in a sense that it generates sale of women and children and thus shall be criminalized) versus commercial sex work with consent (with emphasis of securing the welfare and rights of sex work-

[21] J. Dosch, 'Managing Security in ASEAN – China Relations. Liberal Peace of Hegemonic Stability', *Asian Perspective*, Vol. 31, No. 1 (2007), pp. 209-239.

[22] K. Barry, *The Prostitution of Sexuality*, New York 1995; L. Brown, *Sex Slaves. The Trafficking of Women in Asia*, London 2001; T.D. Truong, *Sex, Money and Morality. Prostitution and Tourism in Southeast Asia*, London–New York 1990.

ers to eliminate trafficking). The "sexual violence" argumentation mainly employs the concept of gendered discrimination, sexism and marginalization, and stresses poverty as the chief cause of trafficking in persons. The researchers who advocate this approach focus on operational issues and their efforts to tackle the problem of human trafficking do not go far beyond the protection of victims' human rights to prevent treating them as illegal migrants, prosecuting and deporting to their home countries. Furthermore, the advocacy of prevention measures "at source" and awareness-raising campaigns can be perceived as moves to avert migration; in other words, put limitations on the right to move. Needless to say, the immediate assistance and protection of victim's human rights is absolutely essential; however, it is a short-term solution.

4.2.

"Irregular migration" approach – it links trafficking to the movement of people and defines it as the worst form of illegal migration.[23] In accordance with this line of thinking, trafficking in persons cannot be divorced from the issue of irregular migration patterns, being a sub-set of it. "In fact, the majority of trafficking of girls and women takes place for purposes other than for sexual exploitation".[24] Main trafficking patterns, concerning voluntarily migration and labour exploitation in factories, private households, fisheries and agricultural plantations, receive insufficient attention. Besides, due to the fallacy that men willingly migrate while women and children are trafficked, the issue of trafficked boys and men was seldom addressed.[25] In the result legislation and cross-border cooperation failed to adequately protect victims of trafficking. Currently it is essential to redefine human trafficking and view it as a function of labour migration and the exploitation of a young person's vulnerability. "Human trafficking is not just an issue of sexual exploitation but a social development problem closely related to the economies and labour markets of vulnerable people confronted with these realities. It is in many cases linked to deeply rooted habits relating to work and the movement of people".[26] The central issue in grappling with the crime of selling humans is the admission that what makes it attractive to migrants and lucrative for traffickers is the contradiction between migratory pressures and national immigration policies. "Human trafficking cannot be understood in isolation from the broader topic of

[23] R. Skeldon, *Myths and Realities…*

[24] J. Bjork, K. Chalk, *10 Things You Need to Know about Trafficking*, [Bangkok] 2009.

[25] Ibid.

[26] International Labor Organization, 'Meeting the Challenge. Proven Practices for Human Trafficking Prevention in the Greater Mekong Sub-region', 1 December 2008, at <http://www.ilo.org/ipec/Informationresources/WCMS_IPEC_PUB_9170/lang--en/index.htm>, 20 November 2012.

migration, because trafficking exploits restrictive migratory policies and the desire of humans to travel to seek a better livelihood".[27]

Looking at human trafficking as modern sexual slavery (the first approach) encompasses human rights framework, but often focuses on the violation of women's rights enshrined in the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW) and thus is arguably narrow in scope. In addition, the rights of victims of sexual exploitation falling into the category of undocumented migrants are defined in *the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*. Nevertheless, the convention is not proposing new human rights for migrant workers, but is restating basic human rights to draw the attention of the international community to the dehumanization of migrants. The "irregular migration" approach also places the human aspect at the centre, however, by rethinking migration policies and addressing the factors underlying the demand for trafficking, it identifies trade in humans as a development issue and a human security threat. Human trafficking has been regarded as a transnational crime and thus cannot be understood simply as an isolated or national phenomenon. The human security threat in case of trafficking in persons is posed by such non-state actors as organized crime groups, e.g. the *yakuza* in Japan or the triads of China. To improve human security endangered by the occurrence of transnational crime it is essential to internationalize through the United Nations (UN) regimes. The significant impact that the *Protocol to Prevent, Suppress and Punish Trafficking in Persons* adopted in 2000 by the United Nations General Assembly (supplementing the *UN Convention against Transnational Organized Crime*) had on the treatment of human trafficking victims in Japan is a good case in point.[28] On the other hand, the "sexual violence" approach often functions as "rights-based approach", where the objective of protection is rescuing victims and, after a vague process called "reintegration", returning them to the same environment that pushed them into the trafficking matrix. Broad human rights framework is instrumental in assisting the victims of trafficking; however, the human security framework due to tackling the structural causes of trafficking appears a more coherent one. Nonetheless, when bringing up the notion of human security, it is crucial to examine the dichotomy of national security and human security, which highlights the drawbacks of state, approaches.

[27] S. Cameron, E. Newman, *Trafficking in Humans. Social, Cultural and Political Dimensions*, Tokyo–New York 2008.

[28] A. Kondo, 'Japanese Experience and Response in Combating Trafficking' in S. Okubo, L. Shelley (eds.), *Human Security, Transnational Crime and Human Trafficking. Asian and Western Perspectives*, London–New York 2011.

5. Research Findings: the Disparities in the GMS Anti-trafficking Responses

Owing to recent political and economic reforms, the GMS witnessed a dramatic rise in the number of migrants on the move not only in the region but also in South-East Asia. As it can be argued that trafficking in persons is a function of migration, trade in people has become a major social issue in this part of the world. The main destination countries in the GMS are Thailand and China, while Cambodia, Laos, Myanmar and Vietnam are generally countries of origin for human trafficking. At the same time, they also happen to be transit countries. Vietnam – China cross-border trafficking is becoming progressively diversified in structure, with the majority of identified cases involving Vietnamese women and children trafficked for sex work, forced marriage and forced labour (UNIAP 2011). Vietnamese baby boys are trafficked for illegal adoption, although it is only the "additional supply" to the internal baby trafficking that is occurring in China on a massive scale. As indicated in foreign media, the prevalence of China's one-child policy for over three decades is commonly blamed for creating the market in babies.[29] On the contrary, there is a notion that the baby trade has a much longer history and is a cultural phenomenon. Already during the rule of Qing and Ming dynasties babies were adopted by families in Fujian or Guangdong provinces in belief that the more children in the family, the higher chance for a secure old age. "Illegal adoption has more to do with the Chinese social insurance system than with the one-child policy".[30] Chinese women and children are trafficked to Thailand, as a destination or a transit place to countries out of the GMS, primarily for the purpose of sexual exploitation. The cases where males would be falling victims to cross-border human trafficking are mostly unheard in China though it does not mean that it is not taking place.[31] Another magnet in the region for the irregular migration, followed by human trafficking is Thailand. Thailand is a key destination country for victims of trade in flesh from Myanmar, Cambodia and Laos due to its economic development and thriving labour market. Although the trafficking of women and children for sex industry sectors should by no means be overlooked, the research data suggests that male trafficking might surpass female trafficking in scale and the level of human rights violations, often without any assistance. Men and male teenagers are trafficked for forced labour in fisheries, agriculture and livestock, construction and seafood processing. Moreover, in the instance of fisheries, Thailand often happens to be a transit country. There are documented cases of Cambodian young men ending up in Malaysia, Indonesia, or recently, even as

[29] CBS News, 6 July 2012.

[30] He Ye, 'Anti-trafficking project manager at Save the Children UK', Kunming office, personal communication, 30 August 2012.

[31] Ibid.

far as in South Africa.[32] As the root causes of trafficking in the GMS are various and often differ from country to country, modern-day slavery is driven or influenced by a plethora of social, economic, cultural and other factors. Many of these factors are specific to individual trafficking patterns and to the countries in which they occur. As the factors are not generic, the approach to mitigating trafficking seems to differ from a country to a country. The most evident example is the disparity of approaches in China and Thailand. Chinese government, although predominantly focused on criminal investigations and prosecutions, has in the recent years increased its attention to trafficking of women and children nationwide. In Yunnan province there are ongoing campaigns raising awareness of women and children of their rights. This attitude is most apparent on the national level. The new National Plan of Action on Combating Trafficking in Women and Children (2008-2012) "has been developed in order to: effectively prevent and severely combat the criminal activities of trafficking in women and children, actively provide assistance and give appropriate aftercare to rescued women and children, earnestly safeguard the legal rights and interests of women and children"[33]. Consequently, it can be concluded that China's approach is in a way closer to the rights-based approach then to the human security one. However, the trafficking of males for labour exploitation remains absent in Chinese legislation and underreported. Thailand, on the contrary, has introduced a new law: *The Anti-Trafficking in Persons Act* (2008)[34] and thus "expanded the definition of human trafficking to include adult men, repealing the 1997 anti-trafficking law that restricted victim status to women and children".[35]

As already has been mentioned in the previous section, during the interviews conducted by the author in Cambodia, Laos, Thailand and the Yunnan Province of China,[36] it was significant that the majority of informants (selected staff officials employed at UNIAP, IOM, local and international NGOs) confessed that they were not very familiar with the ASEAN Declaration against Trafficking in Persons especially Women and Children. However, they all found the Coordinated Mekong Ministerial Initiative against Human Trafficking (COMMIT) extremely effective as an instrument in the multilateral cooperation. COMMIT was a milestone in China's pursuit to join the international society as a responsible partner. For other member states signing the Memorandums of Understanding (MoUs), agreements

[32] Mom Sokchar, program manager, at Legal Support for Children and Women, Phnom Penh, personal communications, 24 April 2012.

[33] *China National Plan of Action on Combating Trafficking in Women and Children (2008-2012)*, at <http://www.humantrafficking.org/publications/612>, 24 November 2012.

[34] *The Thai Act*.

[35] A. Olivie, 'Identifying Cambodian Victims of Human Trafficking Among Deportees from Thailand', United Nations Inter-Agency Project on Human Trafficking, December 2008, at <http://www.no-trafficking.org/reports_docs/commit/commit_cambodia%20deportees.pdf>, 3 October 2012.

[36] The author conducted the interviews between March and August 2012.

between law enforcement agencies and IOs/NGOs, was very essential in formalizing continuing cooperative relationship; however, there are also drawbacks of this system. It is ironic that the repatriation process is faster without the MoU in case of China and Thailand.[37] Normally, the victims tend to spend even up to two years in shelters, waiting for the prosecution of the traffickers and the compensation before the formal repatriation. This phenomenon demonstrates the fact that excessive human rights protection can also be a drawback.

Another significant observation was that the protection policy employed by the GMS governments along with the *victim*-centered approach addresses only the supply side and therefore turns out to be one-dimensional. Considering the number of vulnerable people in GMS region, the supply pool is boundless and traffickers can always switch from one community to another one. As long as there is a demand, a supply of desperate people deprived of viable life options will be always arranged. Besides, the issue of safe migration is smoothly omitted and prevention campaigns carry a *hidden* message: stay home and don't migrate or otherwise you will end up in bigger trouble. In other words, current prevention campaigns can be perceived as initiatives averting migration.

6. Conclusion

In the aftermath of the Cold War and during the era of democratic transitions, the nexus between democracy, human rights and economic development has been crucial to understanding regional human rights discourse, however, the nexus between human rights, human security and social development has seldom been addressed in studies on trafficking in persons. Customarily, security and economic development have been high on the agenda of international relations of Southeast Asian countries. The increasing salience of international human rights and spreading of the UN human rights regimes have brought about new responses by ASEAN states, although human rights have been a subordinate issue compared to security and economic challenges in the majority of cases apart from such extreme infringements of liberty as the Tiananmen Square brutal crackdown of 1989. "Although virtually all foreign policy instruments have been used by states in pursuing international human rights objectives, from private diplomatic initiatives up to the use of force, the means used are usually verbal and symbolic".[38] Recently, the aspect of growing interest in eradicating human trafficking by authoritarian states such as China (and Burma) appears controversial in the light of the fact that these regimes are known by notorious violations of human rights. The notion of human

[37] Ratirose Supapom, Interim Regional Children on the Move Project Coordinator, Save the Children UK, Thailand office, personal communications, 2 August 2012.

[38] J. Donnely, 'An overview' in D.P. Forsythe (ed.), *Human Rights and Comparative Foreign Policy*, Tokyo–New York 2000.

trafficking being at the crosscut of human rights, human security and social development may be a viable path to explain unexpected assertiveness of otherwise illiberal regimes. Finally, the failure to employ human security concept along with a comprehensive human rights framework as a guarantor of safe movement of people and protection of labour rights will result in counter-productivity of anti-trafficking interventions. Moreover, it is essential to promote the recognition of human trafficking as a social development issue strongly related to migration laws that threaten human security and violate human rights equally of women and men.

Abstract

This study is looking at human trafficking as a human rights concern as well as a social development issue strongly related to migration laws. Trafficking in persons means more than an organized movement of people for profits as it involves coercion, force and deception for the purposes of exploitation. Accordingly, trafficking is a severe violation of human rights of a trafficked person and thus applying a rights-based approach is fundamental to adequate addressing the problem of modern slavery. At the same time, human trafficking is a crime that hampers sustainable development in many aspects. It is often associated with poverty, social exclusion, social justice and rule of law. This paper argues that in order to tackle trafficking and protect the rights of trafficking victims, the anti-trafficking policies must be strongly linked to wider measures to promote human development. On top of that, trade in people is a global and regional problem that cannot always be addressed at a national level; therefore international, multilateral and bilateral cooperation can be critical to eradicate this issue.

This paper is exploring the Greater Mekong Sub-region (GMS) as a case in point exposing such cooperation in many dimensions. GMS is a natural economic area bound together by the Mekong River, comprising of six countries: Cambodia, China (Yunnan and Guangxi provinces), Laos, Myanmar, Thailand and Vietnam. Although the GMS can be perceived as a new frontier of Asian economic growth, 30% of the 240 million inhabitants still fall under the poverty line. Due to uneven development, the irregular movement of unskilled migrants is rampant, often resulting in human trafficking. On the other hand, anti-trafficking interventions have serious implications on human development. Too often human rights education employed in awareness raising campaigns as a main prevention measure has potentially negative consequences on development. For example, it can be argued that some initiatives instead of empowering disadvantaged populations avert migration and limit people's freedom to seek opportunities to improve their welfare.

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The Double Jeopardy of the Disabled in a Dysfunctional Education System in Nigeria: A Violation of Human Rights

Introduction

Nigeria is a major oil producing country and the Niger Delta region which houses most of the oil is not surprisingly, highly prone to health hazards as a result of continuous environmental degradation arising from oil exploration and exploitation. Similar conditions that are injurious to public health abound in most parts of the country, for example a humanitarian aid group, Doctors without Borders, are concerned that lead poisoning had claimed the lives of over 4,000 children in Zamfara State since 2010 and left 2,000 others at great risk. This has arisen as a result of the unregulated activities of illegal miners and the inability of the relevant authorities to rein then in. It is also believed that some types of emulsion paints with very high dangerous toxic effect are now commonly used in homes across Nigeria.[1] This also can be a cause of disability. Other causes of disability, regardless of the part of the country include but not limited to lack of access to quality health care, poor motivation, insurgency especially in the North, road accidents and polio.[2]

The centre for Citizens with Disabilities, a non-governmental organization says that 19 million Nigerians have a form of physical disability in 2012 whereas the National Population Commission's Census of 2006 puts the disabled at 3.2million. If both groups are right, it then means that the number of disabled is on the increase. Unfortunately it is not possible to ascertain what percentage of this population is of school age. Obviously there are people in the school age bracket who are disabled and the focus of this paper is to highlight their plight in the Nigerian education system particularly in the light of United Nations Convention on the

[1] 'Editorial', *This Day*, 23 May 2012, p. 19.
[2] L. Baiyewu, '19 million Nigerians are physically challenged', *Punch News*, 6 May 2012.

rights of persons with disability. The convention presents a new perspective on how to deal with disability issues. If possible, recommendations which may ameliorate what amounts to human right violation will be made.

The Nigerian National Policy on Education

The need for a national policy on education came about as a result of the 1969 National Curriculum Conference which was attended by a cross-section of Nigerians. The conference was a culmination of expressions of general disaffection with existing education system which had become irrelevant to national needs, aspirations and goals.[3] Certainly the policy thrust of the colonial administration was such that promoted the interest of the colonial power so was not a viable tool in building the newly independent state of Nigeria and indeed, the newly independent states of Africa. In that situation, no attention was paid to the disabled, rather the system was considered to be elitist and too literary oriented. The pedagogy was not diversified to carter for all conditions of learners. This is an example of Obanya's[4] 5point chain process in which he argues that politics (issues relating to how to maintain the smooth functioning of society) determines all other human development activities i.e. policy, programme, process and product. The focus of the National Policy of Education therefore was intended to be a radical modification of the inherited colonial education system to enhance the relevance of curricula, to reflect national cultural heritage, and inculcate skills needed in various sections of national socio-economic development. Overall, it aimed at expanding educational opportunities and universal access to primary education yet only a causal mention of the disabled was made in the first, second and third editions of the policy- an evidence of the existence of colonial vestiges. The 2004 edition of the policy paid some attention to the disabled and this became more elaborate in the 2008 edition which clearly dedicated section 7 to Special Needs Education – a formal special educational training given to people with special needs. This group of people are classified into three categories:

1. **The physically challenged**, who are impaired (physical, sensory), and whom because of this impairment cannot cope with conventional school/class organization and methods without formal special education training and facilities. They include

a. Visually-impaired (blind and the partially sighted);
b. Hearing impaired (deaf and the partially hearing);
c. Physically and health impaired;

[3] Federal Government of Nigeria, *National Policy on Education*, Abuja, Nigeria 1977.

[4] P.A.I. Obanya, 'Good Politics for Good Education', a paper presented at the 10th Ukfiet International Conference on Education and Development, 15-17 September 2009, Federal Government of Nigeria, *National Policy on Education*, Abuja, Nigeria.

d. Intellectually disabled (educable, trainable, bed ridden);
e. Emotionally imbalance (hyperactive, hypoactive/the socially maladjusted/behaviour disorder);
f. Speech impaired;
g. Learning disabled (have psychological/neurological educational phobia or challenges;
h. Multiple handicapped.

2. **The gifted and talented people** (children and adults) with very high intelligent quotient and are naturally endowed with special traits and therefore find themselves insufficiently challenged by the regular school college/university programmes
3. **Slow learners**.

This paper will focus on one of the five aims which cover Special Needs Education and this is "to pursue a programme of inclusiveness and access in education".

Inclusive Education

Interestingly inclusive education was first introduced in the 4th edition of the National Policy on Education as part of the aims of Special Needs Education. By pursuing a programme of inclusiveness, Nigeria is towing the growing popular view that educating students with disabilities alongside their peers without disabilities in ordinary schools can provide them with the opportunity to learn in natural, stimulating setting which may also lead to increased acceptance and appreciation of differences. Bryant, Smith and Bryant[5], Salend, Lipsky and Gartner[6] interpreted inclusion or inclusive education as the philosophy and practices of educating students with disability in general education setting. The practice is justified by the understanding that every child is an equally valued member of the school. It presupposes that children with disabilities will benefit from learning in regular classrooms, while their peers without disabilities will also gain from being exposed to children with diverse characteristics, talents and temperaments. Such scenario is expected to enhance social cohesion etc.

Inclusive education requires that essential resources be moved to the child with disability rather than place such child in an isolated setting where resources and services are located.[7] This paradigm approximates to normal condition for growth and development; an approach which is typical of the home where the able are not separated from the disabled.

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[5] D.P. Bryant, D.D. Smith, B.R. Bryant, *Teaching Students with Special Needs in Inclusive Classrooms*, Boston, MA 2008.

[6] S.J. Salend, *Creating Inclusive Classrooms. Effective and Reflective Practices for all Students*, Upper Saddle River 2001; D.K. Lipsky, A. Gartner, *Inclusion and School Reform. Transforming America's Classrooms*, Bartimore 1997.

[7] D.D. Smith, *Introduction to Special Education. Making a Difference*, Boston, MA 2007.

While the research on the benefits of inclusive education is still ongoing, this paper recognizes its potential to carter for a wide variety of abilities. First, inclusive education can de-emphasize the development of only the cognitive domain as attention is given to the development of other areas. It is worth emphasizing that human beings have different psycho-socio – physical endowments and every unique endowment is needed for genuine individual and societal development on a sustainable basis. As inclusive education aims at providing Education for All (EFA) so it must also address a variety of special endowments (or talents) available within a population. Bringing the excluded into the school system is important but more importantly is the heavier burden of developing in them knowledge, skills, competencies and values which will be required to function in situations created by an ever changing societal environment. In other words, inclusion in education cannot be limited to access alone. Education for All must take care of a lot of "ALLs". Since education systematically nurtures human potentials, it is important that no potential is allowed to be stunted through an education process that is limited to addressing only the intellectual.

Education must be concerned with intellectual and non-intellectual learning outcomes. The former deals with the purely intellectual (cognitive) dimensions of learning and ranges in hierarchy from memory – memorization to reasoning and application of knowledge. In promoting quality learning, effort should not be limited to the lower mental process of memorizing and recalling; but it should go from these to emphasize the higher mental processes of reasoning, analysis and application. The non-cognitive outcomes on the other hand are concerned with "who the person is" and deal more with character formation, moral ethical behaviour, values and attitudes; as well as physical development (Psycho-motor skills).[8] This development of the head, heart and hand (the cognitive and the non-cognitive) which has been peddled in the Nigeria's educational landscape, starting with the first National Policy on Education has gone on without much positive result.

Since the inception of Western education in Nigeria, education measured intellectual quotient of the individual and neglected other abilities yet the knowledge economy which governs today's world of work requires a combination of intellectual and non-intellectual skills. All education efforts therefore should be geared towards maintaining this balance. The table below is an illustration of the two complementary outcomes required in contemporary times.

In summary, inclusive education has the ability, in an ideal education system, to draw out the best in all its students regardless of their physical challenges. Thus it is a veritable instrument in achieving Education for All (EFA) which itself does not disregard "those who cannot" (the disabled).

[8] P.A.I. Obanya, 'Eight Practical ways of moving Education forward for sustainable Human Development', a paper presented at BRACED Commission Education Summit, Port Harcourt, 15-17 November 2012.

Table 1: Hard versus Soft Skills in Education

Conventional (Hard) Skills	Contemporary (Soft) Skills
Cognitive Intelligence	Emotional Intelligence
Self Expression Skills (oral, written, etc.)	Character Formation Skills (for strengthening the total person)
Logical Reasoning Skills (for analysis and problem solving)	Intra-personal Skills (for individual to understand his/her personal strengths and weaknesses, as well as possibilities/potentialities)
Computational Skills (for mathematical reasoning)	Intra-personal Skills (for understanding and "teaming" with others)
Design/Manipulative Skills (for purely technical reasoning and action)	Lifelong Learning Skills (knowledge-seeking skills)
Conceptual Skills (for generating ideas and translating them into "action maps"	Perseverance Skills (for seeing ideas and projects through to fruition)

Source: Report of Presidential Task Team on Education (2011).

Some Pre-Requisites to Inclusive Education

The success of inclusive education will depend on a number of considerations which include:

1. Child-Centred Education Practices (UNESCO, 1994). This means that teachers must ascertain the academic, social and cultural standing of each of their students in order to determine how best to facilitate learning.[9] To this end, these teachers will need to acquire skills in curriculum-based assessment, team teaching, mastery learning assessing learning styles, cooperative learning strategies, facilitating peer tutoring, or social skills training. Since children have varied learning styles or multiple intelligences[10] both general and special education teachers must plan and coordinate classroom instruction in order to pay more attention to each child's needs, interests and aptitudes.
2. In recent years the principle of universal design[11] has evolved to describe physical, curricular and pedagogical changes that must be put in place to benefit

[9] C. Gildner, *Enjoy Teaching. Helpful Hints for the Classroom*, Lanham, MD 2001.

[10] H. Gardner, *The Unschooled Mind. How Children Think and How Schools Should Teach*, New York 1991.

[11] Centre for Universal Design, *University design*, Raleigh, NC 1997, at <http://www.fme.gov.ng/pages/cati.asp>, 20 March 2012; R. Waksler, 'Teaching Strategies for a Barrier-free Classroom', *Journal on Excellence in College Teaching*, Vol. 7, No. 2 (1996), pp. 99-111.

people of all learning styles without adaptation or retrofitting. The absence of an enabling environment will obviously inhibit the participation of persons with disabilities in an inclusive education environment.[12]

Human Rights, Education and Disability

The connection between human rights, education and disability can be easily established. Human rights are commonly understood as inalienable fundamental rights to which a person is entitled simply because he or she is a human being (www.wikipedia.com) and education is one of these rights which must not be denied to anyone, not even on account of disability. The International Convention on the Persons with Disability therefore recommends inclusive education as a means of achieving the full development of human potential and sense of dignity and self-worth. Thus the disabled are not excluded from the general education system on the basis of disability, neither are they to be excluded from free and compulsory primary and/or secondary education. By reason of inclusion, the quality of education given to this vulnerable group must be the same as others in the communities in which they live. They must also be taught lifelong and social development skills to facilitate their full and equal participation in education and as members of the community. To this end, provision will be made for the learning of Braille, alternative script, augmentative and alternative modes, means and formats of communications and orientations and mobility skills, and facilitating peer support and mentoring; facilitating the learning of sign language and the promotion of the linguistic identity of the deaf community etc. The Convention further states that to ensure the realization of this right, states parties shall take appropriate measures to employ teachers, including teachers with disabilities who are qualified in sign language and/or Braille, and to train professionals and staff who work at all branches of education. Such training shall incorporate disability awareness and the use of appropriate augmentative and alternative modes, means and formats of communication, educational techniques and materials to support persons with disabilities. The convention concludes that to ensure that persons with disabilities are able to access general tertiary education, vocational training, adult education without discrimination and on an equal basis with other, reasonable accommodation must be provided for them. Since this is the highest advocacy on the rights of the disabled, it does means that neglect of any of these will amount to violation of their rights.

In Nigeria, there is no constitutional and legal provision for the enforcement of the right to the education of the disabled so many disabled persons are hidden

[12] E. Steinfeld, J. Duncan, P. Cardell, 'Towards a Responsive Environment. The Psychosocial Effects of Inaccessibility' in M.J. Bednar (ed.), *Barrier-free Environments*, Stroudsburg, PA 1977; S.P. Harkness, J.N. Groom Jr., *Building without Barriers for the Disabled*, New York 1976.

away, stigmatized and hardly exists in any official way. The failure of the system that denies the disabled education, particularly the education that recognises and meets their special needs as well as integrate them in society on equal footing, equal life opportunity is certainly a violation of their rights.

Assessment of Education in Nigeria

His Excellency, Mr. President, Dr. Goodluck Ebele Jonathan inaugurated a Presidential Task Team on Education (PTTE) on 5th January, 2011. The Team mandate to propose strategic measure to revamp education and address specific burning issues was contained in eight terms of Reference (TOR) and these are:

1. Terms of Reference.
2. The Task Team was charged with the following concrete and specific Task.
3. Refocus and restructure existing policies at all levels of Education especially the concept and implementation of the 6-3-3-4 system of Education.
4. Determine the best institutional arrangement for the management, regulation and coordination of Education at all levels.
5. Propose a sustainable funding arrangement and transparent management of resources for Education.
6. Examine all laws militating against the delivery of qualitative education and
7. Propose required changes/amendments.
8. Examine the ethical issues in Education and steps necessary to restore ethics and values in Education at all levels.
9. Develop programmes and projects that will attract talented persons to the teaching profession, while retaining and motivating teachers.
10. Propose such measures necessary for the improvement of the teaching and learning environment to create greater access to Education and enhance intellectual achievement across the board.
11. Propose any other relevant step/recommendation which in the opinion of the Task Team will reposition the education system nationwide.

The need for a task team was unanimously agreed upon at the Presidential summit held on the theme Restoration, Reclamation and Sustenance of Quality and Ethics in Education, held in October 2010. It was the consensus of opinion at that summit that if education must take its rightful place in the development of the nation Nigeria must move away from endless deliberations to concrete, strategic and ameliorative intervention. Cataloguing specific dysfunctional traits in education will be an endless litany hence this paper has simply presented the Federal Government overall concern over the malaise of education in Nigeria. Therefore if the able are hardly receiving quality and functional education, the disabled are likely to be doubly jeopardized.

Education of the Disabled in Nigeria

From the dawn of independence down to the present Nigeria recognised the need for special education services for children with disabilities[13] but this has never been effectively translated into programmes and processes. At best a few residential primary schools for disabled children were established in some states of the federation. Also a cursory look will show a slight increase in the attendance of disabled students in secondary and tertiary institutions. Yet the number of the disabled appears to be on the increase as noted earlier in the introduction. Therefore where the number of disabled children and youth is far greater than the educational opportunities available to them, a large number will be educationally handicapped. Indeed, Ajuwon[14] asserts that less than 10% of these children currently have access to any type of formal or non-formal education. This has serious implications on human rights violation as it does on the attainment of Education for All (EFN).

Other challenges to the education of the disabled include the dearth of special education teachers. Many special education teachers are dually trained; that is they hold a certificate that qualifies them to teach as special education teachers and teachers of other school subjects. Many a times they are posted to teach the other subjects, decisions that are economically and politically motivated.

Gross inadequacy in the provision of infrastructure in educational institutions has contributed to incessant and prolonged strike actions.[15] If the normal school setting is not well provided for, the near complete absence of up-to-date teaching devices, lack of purposefully built structures with ramps, appropriate toilet facilities etc for the disabled is no news. Cultural biases and superstitions as to the causes of disabilities are still rife among the populace. The result is isolation and stigmatization- unfavourable conditions for education.

Recommendation

Considering the failure of past educational reforms in Nigeria, here are some recommendations that can avert the failure of inclusive education in Nigeria.

1. Bandwagon syndrome: Nigeria must desist from the penchant to want to do what others are doing because it is in vogue, and worse still, doing it without

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[13] Federal Government of Nigeria, *National Policy on Education*, Abuja, Nigeria 1977, 2004, 2008.

[14] P.M. Ajuwon, 'Inclusive Education for Students with Disabilities in Nigeria. Benefits, Challenges and Policy Implications', *International Journal of Special Education*, Vol. 23, No. 3 (2008).

[15] J. Ezekiel-Hart, 'Reflections on Politics and Policies of Education in the realization of vision 20:2020', *European Journal of Education Studies*, Vol. 3, No. 2 (2011).

proper planning. Planning, in its true sense, should pre-date policy launch. Unfortunately, in Nigeria, policy comes first and the thoughts of how to go about it comes later. The importance of strategic planning cannot be over emphasized, for it is an antidote to most of the failures in education programmes in Nigeria. By its nature, strategic planning can ensure orderly development in education, focus on areas of challenge, prioritize potential high impact area, engage stakeholders in policy dialogues and ensure their ownership of education development endeavours, while channelling resources to areas of greatest need. Since a plan is what has been internalized by the people, a situation that includes everyone in the process would yield better results. At the level of policy development, all stakeholder groups must be involved rather than limit participation to the upper rungs of the social ladder, such as government agencies and education sector technocrats. This exclusion creates apathy in some stakeholder groups such as students and teachers and it perpetuates popular misconceptions about the policy as a product dictated from the top. This top-bottom approach leaves a gap between "them and us". A side by side approach is recommended.

2. Data on the disabled: For inclusive education to be meaningful, Nigeria must have a data base detailing the number, characteristics and geographical location of pupils to be included in inclusive education. The number of specialists who will support their instruction, how much in-class and out-class collaboration between special and general education teachers etc must be documented. Absence of data and the un-usability of whatever exists is a truism in Nigeria. Adequate, correct and useable data will give direction and level of progress.
3. Development of positive attitude: In a country where superstitious beliefs explain causes of disabilities, government through public enlightenment work in school and out of school needs to change peoples' attitude that stigmatizes and isolates the disabled. Myths and fears about children with disabilities which inhibit normal interaction must be eliminated. In the process of changing attitudes, it is recommended that successful and well-placed persons with disabilities in the society be used as agents of attitudinal change. An example that readily comes to mind is the advocacy by Epelle Foundation on the welfare of albinos, Epelle himself being an albino
4. Sound empirical research: Specific details of how inclusion will affect various types and degree (mild to very serious) of disabilities is imperative. Equally important is how inclusion will affect pupils without any disability. In determining the general classroom atmosphere, the research should go further to prescribe the knowledge, skills and attitudes teachers of inclusive education classes who are not necessarily special education teachers must have. Presently, pre-service teacher education programs do not have such provision and in-service programs are anything but structured and coordinated
5. Purposeful building: In erecting new school buildings, the principle of universal design to school building should be applied to make room for flexibility in

use, low physical effort, appropriate size and space and all other parameters that make such designs universally useable. Where possible, existing buildings can equally receive some modifications although the cost implication may be far higher.

6. Mutual respect: It is expected that inclusion will generate various shades of opinions, with varying degree of intensity to their stands. While some parents may be sceptical of the quality of attention their disabled children may have, the teasing that the other children may mete out to their children, parents of children who are not disabled may not even want their children to mix with the disabled. All shades of opinions must be respected and not be discarded. Depending on how such situations are managed, such biases can be minimized or eliminated.
7. Funding and Political will: Sustainable funding arrangement and transparent management is hereby advocated. Among other things, the imbalance between recurrent and capital budgets must be corrected. Over the years, the bulk of education sector budget is devoted to servicing the system (recurrent expenditure) to the relative neglect of developing the system (capital expenditure). Education in Nigeria is in dire need of development and to forestall a total collapse, urgent, increased and accelerated capital budget allocation is required. The mother of all considerations is the political will to follow through.

Summary

Arising from several international conferences and protocols such as Jomtein 1990 and Dakar 2000 are policies for Education for All (EFA), which stress the provision of educational opportunities for all irrespective of social and physical conditions. Inclusive education is an offshoot of these policies and it appears to have the potentials of enrolling those who have the propensity of being excluded from education. But access must be accompanied by equity, quality, relevance and efficiency. How inclusive education will meet these requirements will be left to serious research.

As a fractured society which is disoriented in various ways, Nigeria is still grappling with strategic reforms at all levels of her education system. The introduction of inclusive education without adequate research, planning and the political will to execute it will only be good on paper as it has been since 2004 when it was first introduced in the National Policy on Education. The physically disabled has continued to be doubly jeopardized as their right to education is greatly violated.

Abstract

In response to a system of education which Nigeria considered irrelevant to national needs, aspiration and goals, the National Policy on Education which she hoped would do better in meeting developmental needs of a new independent nation was formulated. Like the education acts of the colonial era, the policy did not take into consideration the physically challenged. A revised 2008 edition of the policy included inclusive education as one of the objectives of the education of the physically challenged. While inclusive education is gaining global recognition, little or no attempt is being made to provide it with the enabling environment in Nigeria. Thus the disabled are excluded from education in spite of what is documented in the National Policy. No doubt, this amounts to violation of human rights to education. The gravity of the violation becomes more pronounced in the face of the outcry for Education for All (EFA). It is further noted that there are many "Alls" apart from providing access which inclusive education should address. The 2011World Disability Report reinforces the need for disability to be taken seriously as a development issue and to be mainstreamed as part of all development activities. This paper will therefore suggest ways of enhancing inclusive education and how this in turn will mitigate the violation of human rights.

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Female Genital Mutilation and Human Rights in Uganda

The Nexus between the Cultural and Universal Norms in Uganda

Introduction

This paper is "a rethinking and a redefinition" of the nexus between Female Genital Mutilation and Human Rights with specific focus on cultural and universal norms in Uganda since the country has got contentious issues on diverse and incompatible cultures. Female Genital Mutilation (FGM) is the procedure which involves partial or total removal of the external genital organs (genitalia) or other injury to the female genital organs for cultural or other non-therapeutic reasons.[1] Human Rights can be referred to as "claims" that have achieved a special kind of endorsement by the legal system through wide spread sentiment (International Order). Any important attachment to them is that they are binding since they enjoy the backing of the law (International and municipal).

According to World Health Organization progress report (2006), there are at least four known methods of undertaking Female Genital Mutilation that include; excision of the clitoris with partial or total excision of the labia minora, excision of part or all of the external genitalia and stitching/narrowing of the virginal opening, piercing or pricking of the clitoris or burning of the clitoris and the surrounding tissue, excision of the prepuce with or without excision of part or the entire clitoris.

Female Genital Mutilation just like Human Rights is believed to have been practiced for a long time now. Some scholars believe that FGM was first practiced among the Egyptian mummies some 5000 years ago.[2] While others trace the origin

[1] World Health Organization, *Sexual and Reproductive Health Research. Progress*, No. 72 (2006).

[2] U. Elchalal et al., 'A ritualistic female genital mutilation. Current status and future', *Obstetrical & Gynecological Survey*, Vol. 52, No. 10 (1997), pp. 643-651, http://dx.doi.org/10.1097/00006254-199710000-00022.

of FGM in ancient Rome where metal rings were passed through the labia Minora of women slaves as a means of preventing them from procreating and in the United Kingdom during the 19th Century, surgical removal of the clitoris was an acceptable method of managing epilepsy, sterility and masturbation.[3]

According to WHO survey, FGM is practiced in more than 28 countries in the world. It is also practiced among some immigrant communities in the United Kingdom, France, Germany, Italy etc. But some countries in Africa, Asia and the Middle East are renown for practice FGM notably; Somalia and Guinea with a prevalence rate of 99%[4] in Africa followed by Egypt at 97%, Djibouti 93%, Mali 92%, Sudan 90%, Burkina Faso 77%, Cote ivory 45%, while Asia and Middle East, countries that are known to be practicing FGM are Saudi Arabia, Yemen, Indonesia, Afghanistan, India, Iraq among others and in Eastern Africa, Somalia and Djibouti lead by 98% and 93% respectively, Eritrea follows with 89%, followed by Ethiopia at 80%, Kenya 32%, United Republic of Tanzania 18% and Uganda at 1%.[5]

Female Genital Mutilation in Uganda (Historical Background and Justification)

In Uganda, FGM is practiced among the Sabiny community in the Districts of Kapchorwa, Bukwo and Kween respectively, Tepeth of Moroto District and Pokots of Amudat District in North Eastern Uganda.[6] This practice of Female Genital Mutilation in Uganda like in other parts of the World is deeply rooted historical and cultural as a ritual to initiate girls from childhood to adulthood, preservation of a woman's virginity, increase sexual pleasure for the male, family honour, a sense of belonging to the community (social exclusion), enhance fertility, social acceptance especially for the marriage among others.

Among the 33 million Ugandans, the community that practice FGM is estimated to be 558,449 making it only 1.7% of the total national population thus a minority community in Uganda.[7] Furthermore, out of the 558,449 community members, the male are estimated to be 277,237 as compared to be the female who are estimated to be 281,212 of the total community population thus making the male a minority sex composition.[8] The Sabiny tribe is estimated to be 331,830 out of which male are estimated to be 163,600 and female make up 168,230 of the

[3] N.-B. Kandela et al., 'Spatial analysis of risk factors for childhood morbidity in Nigeria', *American Journal of Tropical Medicine and Hygiene*, Vol. 11, No. 4 (2007), pp. 770-778.

[4] 'Female genital mutilation and obstetric outcome. WHO collaborative prospective study in six African countries', *The Lancet*, Vol. 367 (2006), pp. 1835-1841.

[5] UNICEF global databases, Based on DHS, MICS and other national surveys, 1997-2010; 2011.

[6] Ibid.

[7] Uganda National Bureau of statistics, 2011.

[8] Ibid.

Sabiny. The Tepeth are estimated to be 163,047 out of which 79,536 are the male and 83,511 are female whereas the Pokots are estimated to be 63,572 out of which the male are 34,096 and 29,476 are the female. However in this paper, the focus was on the Sabiny who hail from the districts of Kapchorwa, Bukwo and Kween.

According to available sources from different literatures on female genital mutilation and the Sabiny people, the period of boundary setup in Africa (1884-1885) found the Sabiny already practicing FGM as one of their cultural activities which the United States Department of State has labelled as type 1 and 2 of FGM.

Among the Sabiny, Female Genital Mutilation (FGM) practice initiates young girls into womanhood. It involves the cruel procedure of mutilating the genitals of young girls of 10 years and above, where the clitoris and vital parts of the vaginal opening are literally mutilated with sharp knives as the affected girls are cheered on by their mothers and fathers. This is followed up by some primitive sewing up of whatever has been left of the mutilation. However in the recent years, coupled with domestic and international pressure from the government and civil society organizations, the procedure and practice of FGM has drastically shifted from the earlier cruelly ways and to a lineate technique that involves seeking the consent of the person as opposed to forceful procedures that where earlier witnessed.

Furthermore, with the perpetual poverty and unemployment in Uganda which is even worse in Kapchorwa, Kween and Bukwo Districts that as well harbours the Sabiny people one of the ethnic communities in Uganda to circumcise their women? They are therefore ferociously protective of their culture since it is an environment in which people believe uncircumcised woman is not fit to gather grain from a granary, let alone be married. According to the community elders, FGM is a ritual to initiate the female sex from childhood to adulthood, preservation of a woman's virginity since the Sabiny value the marriage of virgins more, increase sexual pleasure for the male, family honour since families of circumcised females gain local pride in the community, a sense of belonging to the community (social exclusion), and enhance fertility, social acceptance especially for the marriage among others.

At the community level in Kapchorwa, Kween and Bukwo respectively, using the term female genital mutilation can be viewed as being judgmental and condemnatory since they prefer using the term female circumcision. This is because the practice of FGM is a close literal translation from their local languages.[9] This same argument gained momentum in 1996 when the Reproductive Educative and Community Health programme (REACH), a United Nations Population Fund Programme, opted to use female genital cutting (FGC) instead of female genital mutilation which was thought to imply excessive judgment by outsiders as well as insensitivity towards individuals who have undergone the procedure.[10] This therefore

[9] Population Reference Bureau, Vol. 3 (2001).

[10] M.N. Mhordha, *Female genital cutting, human rights and resistance. A study of efforts to end the "circumcision" of women in Africa*, Canberra 2007, p. 5; B. Shell-Duncan, Y. Hern-

explains why in this paper, the words female genital cutting, female circumcision and female genital mutilation were used interchangeable.

As a justification for the practice of female genital cutting among the Sabiny's of Uganda and other neighbouring tribes that circumcise their women, Momoh (2005) asserts that, in societies that practice female genital mutilation, a number of cultural elements are present and to her these include; particular beliefs, behavioural norms, custom rituals, and social hierarchies, religious, political and economic systems. She goes on to write that since culture is learnt and children learn from adults, female genital mutilation has therefore been supported by centuries of tradition, culture and false beliefs which is as well perpetuated by poverty, illiteracy and low status of women in African societies.[11]

Furthermore, in the view of Lightfoot-Klein (1991) customs, the penalty for not practicing which is total ostracism, make up some of the reasons for female genital mutilation. Lightfoot-Klein further argues that, other reasons for female genital mutilation seems to be the same in most African societies and are based on myths and ignorance of biological and medical facts but to some practicing communities, the clitoris is seen as repulsive, filthy, foul smelling, dangerous to the life of newborns and hazardous to the health and potency of the men. In regard to other WHO (2008), the justification of female genital mutilation among the Sabiny of Uganda is manifested in the deep rooted gender inequality that is assigned to the female gender in the practicing community.

Legal Position on Female Genital Mutilation in Uganda

After the perpetual concerns, lobby and advocacy by Civil Society Organizations, Human Rights Campaigners and Women activists in fighting against FGM among the practicing communities in Uganda. Success was achieved on December 2009 when the Parliament passed a law banning the practice of Female genital mutilation which Bill imposed harsh penalties for participating in the practice of FGM.[12]

According to the ban,

> a person convicted of the practice faces a sentence of up to ten years in prison. In the case of aggravated female genital mutilation, when the practice causes death, disability or infection of HIV/AIDS, the punishment is life imprisonment. Anyone who provides aid or anyone who takes part in the practice is liable on conviction to prison

lund, 'Female «circumcision» in Africa. Dimensions of the practice and debates' in iidem (eds.), *Female "Circumcision" in Africa. Culture, Controversy and Change*, London 2006, p. 6.

[11] C. Momoh, 'FGM and issues of gender and human rights of women' in C. Momoh (ed.), *Female Genital Mutilation*, Oxford 2005, p. 11.

[12] G. Barrabe, Monitor Newspaper Publications, Monitor Printing Press, Kampala Uganda, Vol. 276, No. 1125 (2009), p. 43.

term of up to 5 years. In reference to the constitution of Uganda, articles 2(2), 21(1), 24, 27(2), 32(2) and 33,

the Law & Advocacy for women in Uganda v Attorney General, the act was declared that the practice was a violation and evil. According to Beatrice Laganda chairperson of the former Parliamentary committee on FGM Bill, the government had furthermore earmarked 260,417 USD to raise awareness of the law.[13]

As a result of this 2009 positive development in banning female genital mutilation, Uganda nowadays joins the rest of the world to celebrate the International Day of zero tolerance to FGM on 6th February annually. Under the theme "community approach, community involvement in the elimination of Female Genital Mutilation" in the 2012 celebrations of zero tolerance of FGM in Uganda, community involvement was envisaged to change people's attitudes towards a culture that is supportive of the social and economic empowerment of girls and women.

It was further hoped that, communities and leaders would realize that it is education not genital cutting that should be the new alternative for measuring the value of girls and young women. Once girls choose to go to school where they are able to get more information, in the long run they are in a better position to resist this practice. They become exposed to the realities and realize that FGM is harmful and ends their educational life. Through dialogue it was thought that the practicing communities will be educated and taught against FGM.

Therefore, the important argument generated in this paper relates to some cases before the law was passed in 2009 and after the law had been passed where legal consultant in Uganda have got involved in contentious cases that see a clash between Human Rights (Cultural Rights and Universal Rights). In a study that purposively selected respondents who were members of the Sabiny community, or personally affected, and the perpetuators of the practice both men and women, faith based organizations, community based organizations, politicians were engaged as key informants for elite interviewing, conversations, local, national newspaper documentary analysis alongside questionnaires were used to engage the respondents in the study. Thereafter, a balanced comprehensive coverage on analysis and interpretations were considered and the following argumentative results were realized;

FGM and Human Rights

In the study it was found that despite the ban of female genital mutilation the monster still rears its ugly head in the country. This can be attributed to the way the Sabiny perceive female genital mutilation which to be me complicated upon two factors that include; the reasons given for its continuation and consequences

[13] H.T. Atabua, Monitor Newspaper Publications, Monitor Printing Press, Kampala Uganda, Vol. 526, No. 2225 (2010), p. 48.

of not undergoing it. However it is improbable to presume that all the perceptions on female genital mutilation can be exhausted in the study since it depended on the people conducted.

In the process of investigating why the practice still continues amidst the ban, Wilfred Sali, the Local Council 3 chairman of Sinedet, a sub county in Bukwo District cited ill equipped law enforcers. He argued that, much as the local authorities have tried to sensitize the communities about the dangers of FGM at all levels, the practice still thrives in the sparsely populated areas surrounded by mountains and thick forests. He said that local councillors face a lot of hardship as they try to identify the areas where the ritual is been practiced since the communities are aware that they are been hunted and are on high alert and always ready to fight anyone who disrupts the ritual. Sometimes they carry out FGM at nights when authorities have gone back to their homes. Sali still argued that sometimes law enforcement officers sometimes intentionally do not pursue the people practicing FGM because they fear to be killed and others are sympathizers of the practice. In the view of Kipiyo Cheptai, the police inspector of Bukwo District, the law enforcement team is small and not well equipped to patrol all the mountainous areas where the practice thrives.

In the view of Cheptai, it is not easy for the police to penetrate the thick forests of sparse population coupled with the fact that the residents are armed with spears, arrows, machete and guns and since the practice is mainly done at night, one could easily be harmed. He said that on top of the above, the land of the practicing communities is too big, yet the entire area has only one resident state attorney, based in Kapchorwa and handles all the FGM related crimes in the three districts.

Poverty and ignorance was found to be a major contributor to the practice. When a girl is initiated to adulthood, this increases her chances of marriage as well as her parents chance to get bride price. The rigidity of parents has also contributed to the booming of FGM among the practicing communities of Uganda. Following the ban of the practice in Uganda, some parents send their daughters to Kenya, where they undergo genital mutilation.

Peer pressure group is another contributing factor to the continuation of the practice. Some girls are driven by peer pressure from colleagues who have undergone the ritual and because they fear to be labelled "incomplete women" they succumb to the pressure. This has been so because of the cultural beliefs of the communities as supported by Steven Anguria, the chairman of Bukwo Elders Association in his argument that:

Culturally, it is believed that if a woman gets married without first undergoing circumcision, she is likely to suffer from various illnesses for a lifetime. Therefore, due to fear of the curse, some women accept to undergo FGM.

Furthermore, some men cannot marry a girl who has not undergone the ritual. This has partly fuelled the practice as some societies scorn girls who do not get married. Some parents reportedly give their girls incentives and traditional medicine to entice them into the cultural ritual. According to Everline Tete, the Woman Member of Parliament for Bukwo District, despite efforts to stop the practice, it

has persisted because of the cultural attitude and failure to value education of the girl-child in addition to the high level of illiteracy among women that hinders them from resisting the practice.

The major findings of the study were the division between the respondents who were interviewed. Major incongruities were witnessed between the Sabiny elders, the youths who live in the remote mountains of Kapchorwa district and other elites. Accordingly, about 40% women, 70% men and 50% youths of either sex living in the remote mountains were still supportive of FGM since to them it is not even mutilation but they preferred calling it female genital cutting which is locally referred to as "Wonsetap Koruk". This in terms of Human Rights has been interpreted differently by different people interviewed whether educated or not. Some few educated argued that, the practicing communities have a right to practice their culture and since they are a minority group in Uganda, their cultural practices should not be witch hunted and this was given more emphasis when at one time the Reproductive Educative and Community Health programme (REACH), a United Nations Population Fund Programme, opted to use female genital cutting (FGC) instead of female genital mutilation which was thought to imply excessive judgment by outsiders as well as insensitivity towards individuals who have undergone the procedure.[14],[15]

Furthermore, the Sabiny male who responded to the study were found to be more comfortable to marry their own women who had undergone the cutting processes since to them, it has a major attachment with traditional values both from the man's clan and the woman's clan as well. Therefore since the Sabiny are fascinated to love and marry ladies whose genitals are cut, about 45% of the female in Kapchorwa were willing to participate in female genital mutilation although they don't like it. For instance, in 2005 about 300 school girls took refuge at Mr Stephen Nsubuga Beewayo (Resident District Commissioner) office in Kapchorwa District during holidays for fear that their parents would force them to go through the female genital mutilation exercise but in 2011 amidst the law been passed, 70 of 300 girls voluntarily took themselves for female genital mutilation practices.[16]

Furthermore, it was found that since the parliament passed the law that made FGM an illegal practice in 2009, the perpetuators changed tactics to work at night as government moved to curb the practice. According to Francis Mwangusho a Programme Director of Kapchorwa REACH a UNFPA outreach project, apart from FGM schedules that were shifted at night, they also performed the activities in scheduled places and under the cover of darkness for fear of being arrested. High prevalence shifted to slopes of Mountain Elgon National Park and the lower areas of Kween District.

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[14] M.N. Mhordha, *Female genital cutting…*, p. 5.

[15] B. Shell-Duncan, Y. Hernlund, 'Female «circumcision»…', p. 6.

[16] C. Obore, Daily Monitor Newspaper Publication, Monitor Printing Press, Kampala Uganda, Vol. 641, No. 3125 (2011), pp. 4-6.

Furthermore, Francis argued that, the community started practicing FGM throughout the year unlike in the past when it was carried out during even years so as to avoid counter measures that have been put in place during even years. Furthermore, the community changed strategy where they started cutting the genitals of those who volunteered without been directly forced or influenced by their parents.

The study found that, the victims of female genital cutting suffered the rest of their lives, in one scenario a respondent who claimed to be 31 years old (Irene Chemisto) a victim forced by her parents to undergo FGM while still in primary two in Bubulo girls school suffered over bleeding and went through operation while giving birth. Since the practice of FGM was carried out by women of no medical background using unsterilized and recycled instruments, the activity has grievous harm which amounts to permanent injuries which is a felony in Uganda's penal code.

Indeed if one analysis the fact that girls between 12-19 years are the ones who undergo FGM after been persuaded by their parents, relatives and the community, it is a grave human rights violation. It is a violation of women's rights as human beings, FGM hinders the women's right to maintain both their social roles and normal and health sexual rights, since they have the absolute right to enjoy their sexual life and it is the society's role to protect them.

When the researcher brought in some cases of human rights perspective during the course of research, the following were some of the responses; the Sabiny community claimed that these consequences have not been experienced among the Sabiny community as reported in the media although to them the negative stereotype against their cultural practice gained momentum only after *Hon. Jane Francis Kuka* who refused to get circumcised was appointed Minister of state for Gender and consequently brought the issue into lime light in 1996.

In the study especially with some elites from the Sabiny communities, they argued that, much as the practice may be seen by other neighbouring communities as a violation of woman and child's right if forced by any of the community members but it is as well a cultural right if a woman consents to the FGM as seen earlier in the study. They continued asserting that since they do not arrange forced marriages in their communities as other communities do, it is the rights of their female colleagues to decide on were to marry by deciding on FGM thus it is not any violation as compared to the homosexuality bill which is a severe human rights issue. One lawyer argued that:

> FGM may be a violation of article 5 in the UDHR 1948 that stipulates; non subjection to torture among other articles but according to him still article 27 (1) on the same UDHR 1949 gives a consenting Sabiny female a right to practice their cultural norms.

She reminded me that with the September 13th 2007 United Nation Resolution (61/295) articles 1-46 give rights to a consenting female to go through the cutting.

Some perpetuators argued that, FGM had been their December calendar events yearly and source of employment and income to them, source of pleasure to the men, and any intention to mitigate FGM will be as well denying their men right to sexual pleasure, right to income, right to identify with their cultural practices.

One respondent who worked in the prime Minister's office in Uganda but a member of the Sabiny culture was very supportive of female genital mutilation and he asserted that much as Uganda may have joined other African countries in outlawing the customary practice, but in some of the countries like South Africa, Serra Leone and Ghana have instead legitimized the practice of female genital mutilation. On the other hand, Nalule Safia Juuko, vice chair of the Ugandan Parliamentary Committee on Equal Opportunities, cautioned that the passage of this law was only a first step. "But of course they realized as Parliament that an act alone could not do so much, given the fact that the practice has been an issue with the Sabiny community for years and years", she said. "So what the Parliament did was to request the Speaker to asked the prime minister on what the government was going to do in addition to passing the act", said Juuko.

She further said that funds need to be allocated to run a sensitization campaign within the communities where FGM was still widespread. She also suggested that a program needed to be set up to provide an alternative income to those who act as the operation's surgeons. She expressed strong support for the level of punishments put into the law since the act provided punishments, where the practicing communities will have to re-think if they go on to practice FGM! She said. However the contention raised by some die-hard preservers of the Sabiny cultural practice argued that some of majority communities in Uganda have their own cultural practices where the clitoris of young girls is elongated to the extent that it looks like a penis for the same reasons as the Sabiny circumcise their ladies and how come the majority community practice is not a human rights violation in Uganda.

The study found out that the Sabiny people who have remained and live in the remote mountains in the district of Kapchorwa, have got no access to basic rights notably right to education, right to decent living, right to information among others. A situation where some of the educated elites and politician 'refers to as a violation of their own rights by the government and wonder how their cultural rights would as well be rebuked, other cases of Human Rights violation in other parts of Uganda is a focus especially by the police and state agents, issues like Right to legal aid, intervention of the executive into the affairs of judiciary but still it should be considered as a human rights violation but not the violation of minority rights.

According to the researchers own assertion, there is misinformation and strong held beliefs that FGM improves moral behaviour of females by reducing their sexual arousal. It is also believed that FGM preserves girls' chastity. The supporters are not aware (or do not want to be aware) that sexual arousal is regulated by a complex hormonal mechanism and directed by the nervous system. On the other hand, human behaviour is based on the reasoning and the individual personal value system not physical features. So both, the behaviour improvement and

sexual control of women through FGM are ethically not accepted. Then why do we reduce their sexual activity and want them to get married and take their social responsibility as wives and mothers at the same time? It is direct and obvious violation of human rights; it is a violation of women's right as human beings. FGM hinders the women's right to maintain both their social roles and normal and healthy sexual life. They have the absolute right to enjoy their sexual life and it is the society's duty to protect this right. We cannot speak about human rights in a society that cannot protect its girls where FGM becomes a normal practice.

Equality, dignity and fairness are the core values of Human Rights instruments and protocols. Thus human rights should be universal unalienable and fundamental. It is equally important that human rights must be practical, real and give access to justice. This all reminds us of the 1997 joint statement produced by the WHO, UNICEF and United Nations Population Fund that confirmed the universal unacceptable harm caused by female genital mutilation where they issues an unprecedented call for the elimination of the practice in all its forms that many governments supported although in real terms very little has been done. What disturbs my understanding is the fact many countries that ignore the total elimination of FGM are signatories of the rights of women and girls that are enshrined by various universal and regional instruments including the Universal Declaration of Human Rights, the United Nations Convention on the Elimination of all forms of Discrimination against women, the Convention on the Rights of a Child and the African Charter on Human and peoples Right. All these documents highlight the right for Women and girls to live free from gender discrimination, free from torture, to live in dignity and with bodily integrity.

Conclusion

In conclusion, globalization may have set standards of how people are to be treated and relate but in reference to the case study which was comparatively premeditated and analyzed by the researcher. It's therefore prudent to assert that "one person's meat is another person's poison". Therefore it is paramount that in Africa, HRE should be advocated for communities to understand their Rights otherwise those individuals, people as well as entire societies, who still believe in the usefulness of female circumcision will continue in the practice and will continue to consider it as a normal process that merits support and continuity.

Personally, I appreciate and respect culture, traditions and social norms but it is paramount to everyone that FGM is no longer seen as a traditional custom and has become instead a health problem of public concern in many countries where it is still practiced. Furthermore, culture alone cannot justify serious damage to female genital organs and no wise defence could be made to preserve such a practice. Therefore, the practice should be totally eliminated since culture itself id dynamic.

Recommendations

1. Educating the rural communities about rights and limitation of their rights should be considered any important element so as to avoid the controversies that always crop in to confuse the focus and principles of Human Rights in Africa. Important to note is that, the agents of all these processes of creating a awareness and providing the social development agendas are members of civil society and various non-governmental institutions. The active participation of civil society in Uganda in cooperation with their counterparts in the western world should be necessary and advocated for in creating public and community awareness.
2. Funding to be extended to the ministry of Gender, labour and social development by stakeholders in Human Rights Education. Governments in developed countries should also make sure that development assistance and cooperation with African states should lay emphasis on issues of FGM instead of asking for too much "governance", they should make FGM sensitivity as conditionally for development assistance. By doing this the FGM will become an integral part of the Development Cooperation Discourse
3. Institutions that advocate for Human Rights in Uganda should focus on all aspects that are seen as threats to Human Rights from all perspectives. For example, other issues of human rights concerns like the elongation of female clitoris among some of the practicing communities, torture of civilians by the law enforcement officers et.al
4. Proper and clear interpretations of the documents of Human Rights should be advocated for in order to avoid legal consultants to confuse the population.

Abstract

Female Genital Mutilation (FGM) is the maiming of the clitoris and vital parts of the virginal opening as a ritual to initiate young girls into womanhood. Whereas Human Rights (HR) as in the perspectives of International Law are those norms embedded in treaties and other forms of international law that requires states or other actors to protect, ensure or recognize certain rights posed equally by all people. In Uganda, one repugnant culture of the Sabiny who live in Sebei District (Eastern Uganda) are still engaged in the practice of mutilating the genital parts of young girls of 10 years and above as opposed to Civil Society Organizations (CSO's) that monitor HR in Uganda.

Notably, much as CSO's and the Government pronounced FGM among the Sabiny as a gross Human Rights violation of article 5 of the UDHR (1948) that stipulates; non subjection to torture etc., but the same declaration, article 27 (1) gives the Sabiny right to practice their cultural norms. With the September 13th 2007 UN Resolution (61/295) recognizing Indigenous knowledge as a source of knowledge, FGM among the Sabiny people is therefore a knowledge that is enthusiastically accepted by the females a cultural right.

Methodology was based on empirical data; the study employed controlled comparison of selected cases to assess the theoretical and practical perspectives and some hypotheses,

selected cases included some primary and secondary actors involved in FGM and notably the Sabiny people, CSO's, Faith Based Institutions, Intergovernmental Organizations, Politicians and the government of Uganda. Purposively, respondents, key informants, elite interviewees and documentary analyses were used. Data was collected through administering questionnaires, conversations, interviews, local, national newspapers, participate journals and memoires, scholarly sources, CSO reports were used to ensure a balanced comprehensive coverage in investigating verifiable facts over interpretations and analysis in order to assembly records of the nexus between the variables under study.

Based on the evidence, the findings realized a major clash between cultural and universal norms coupled with some contradictions in understanding the concept of Human Rights. For instance, more than 70% of the females in Sabiny are willing to participate in the FGM since to them it's an initiation from a girl to womanhood. On the other hand, the Sabiny men are more fascinated to love and marry ladies whose genitals are mutilated. However, non-Sabiny and CSO's are the only critical parties to the practice with a less interest in understanding the dimensions of Sabiny culture. Furthermore, to the Sabiny, FGM is not different from male circumcision. Some argue that, it's a Right of the community to practice their cultures irrespective of how nauseating it may appeal to other societies.

In conclusion, globalization may have set standards of how people are to be treated and relate but in reference to the case study which was comparatively premeditated and analyzed by the researcher. It's therefore prudent to assert that "*one person's meat is another person's poison*". Therefore it is paramount that in Africa, HRE should be advocated for communities to understand their Rights.

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3) Understanding Religion, Peace and Conflicts in the Great lakes Region of Africa and the Middle East.
4) The impact of spirituality on the society's attitude towards violence. A case of the July 11th attack on Kampala 2010.

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Human Rights in the 21st Century

Challenging the Human Rights Language

Presently, the notion of human rights embraces an enormously vast spectrum of issues. A short internet survey of several interviews about the 21st century challenges to human rights show that the notion embraces such issues as poverty, climate change, conflict, science and technology, culture, strengthening civil society, international judicial institutions like the ICC, the right to health, the obsession with the War on terror and national security, social and economic rights, political violence, the complexity of institutional reform, the role of the state, conditions that determine tax, employment, international law, human rights violations by no state actions.[1] This brief list of issues cannot exhaust the problem in any way. Such a list can be easily expanded by arguments about contemporary slavery or the dangerous threats to freedom of speech or freedom of conscience in illiberal democracies. Obviously, the perspective on what the contemporary human rights priorities actually are depends on the perspective from which we see the world. Currently, the term "human rights" appears to be so vast and all-embracing that it has become an imminent part of the globalized international relations dictionary.

What should correctly attract one's attention is the fact that there are no limits, no structure, no selection, nor a catalog of what human rights are at present. One can read about issues from freedom of speech to climate change, from the rights of animals and vegetables as minority groups to the ban on torture. The term is exploited with the same vigor by human rights activists and authoritarian leaders, by state officials and victims of state oppression.

What remains striking is the fact that this catalog is a consequence of the development of the idea of human rights as one of the cornerstones of liberal democracy (together with the rule of law, political pluralism and constitutionalism). Remarkably, the 18th century American and French cornerstone documents[2] for

[1] <http://www.hrahead.org>.

[2] The American Bill of Rights of 1791 and the French Declaration of the Rights of Man and Citizen 1789.

the human rights theory reveal a rather peculiar, from today's human rights activism, perspective of modest and poor documents. Present-day international human rights documents expose a tendency for much broader and comprehensive understanding of the idea of human rights.[3] In that sense, modesty remains the most noticeable and underestimated success of the old 18th century documents. They are the fertile soil which allowed human rights to grow and flourish.

However, when it comes to teaching human rights in the 21st century, the lecturing of human rights is much more challenging and undoubtedly confusing. Contemporary universities offer not only human rights courses, but whole human rights programs, trying to cover the whole spectrum of topics embraced by the contemporary human rights ideology. Unfortunately, this vast spectrum of ideas is not logically coherent and often lacks the logical connection between the basic principles and aims of human rights and the details of particular human rights issues.

Due to the fact that human rights are a positive notion aiming to protect the individual and to elevate his position towards authority, they seem to be the appropriate shield in every case of prospective confrontation between the individual and the state. However, this general conviction has recently lead to a number of misunderstandings concerning the understanding of human rights. It is true that the role of human rights is to protect the individual. However, the scope of issues under the human rights umbrella is so broad that no common moral denominator can be applied. Since particular human rights and freedoms trigger completely different interaction between the state and the individual no template approach can be established. Furthermore, even in the frames of the cradle of human rights, that is the Western civilization, many alternative and even contradictory approaches to particular human rights apply at national level and depend on the society, culture, religion and historical experience of a given nation.

At this point, it seems necessary to pay attention to the basic and fundamental dilemma for the notion of human rights in the 21st century. Namely, what are human rights? At least in the Western Civilization they became a strongly contested ideological term, which clearly defines the political attitudes of those who articulate them. Conservatives in the United States reject the term *in toto* and the right wing in Europe openly acknowledges the limits of multiculturalism. Thus, they actually reject the term replacing it by other sources such as natural law.

On the other hand, the term human rights seems to be kidnapped by the left part of the political spectrum, which uses it to ruthlessly exploit any prospective political agenda. Currently, a good example seems to be the excessive use of the ban on discrimination, which is exploited so extensively and irresponsibly to legitimate the existence of every individual uniqueness, that it becomes a source

[3] It is enough to trace the expanding human rights catalog of the European Convention on Human Rights through its amendments and the unique and rather confusing essence of the European Union Charter of Fundamental Freedoms.

of political sanction even to criticize ideas subjectively recognized as unwise or politically incorrect. That, however, seems to contradict the essence of the idea of free speech. While acknowledging that the exercise of one human right often leads to conflict with another right, it is worth noticing that these rights aim to defend the individual against the state and not against other individuals. However, the contemporary political discourse is studded with and supported by flaming arguments about the superiority of particular individual rights. These political, but often also intellectual disputes and cultural wars tend to neglect the essence of human rights and seem to completely misunderstand why they exist and what purpose they are supposed to serve.

The contemporary globalizing world had direct impact on the language and meaning of human rights. Currently the term is vastly exploited all over the world and if there is one thing its particular uses have in common, it is not the common understanding of particular rights, but rather the fact that by using this term the notions of superiority, importance and attention are triggered simultaneously. If an issue is a human rights issue it requires top priority attention. Furthermore, human rights issues demand immediate reaction, satisfactory for the protagonists. Lastly, human rights claims deprive opponents of equal negotiating position, due to the fact that once accused of disregard for human rights they can hardly generate popular sympathy. Though this mechanism seems to serve the righteous cause in a confrontation between authorities violating human rights, in the case of internal or international ideological political struggle it becomes a pathetic attempt to strengthen particular and biased struggle for privileges. How has the world managed to reach that point?

The Marriage Between Rights

The international career of human rights started after the end of World War II. However, this was not a period of universal, enthusiastic and complete adoption of all human rights. Reversely, in a time of emerging ideological confrontation between the Western world led by the United States and the Eastern bloc controlled by the Soviet Union, human rights also became a victim of political bargaining in the Superpowers' rivalry. The Universal Declaration of Human Rights may serve as the best example in this case. Despite the fact that it lacked direct legal sanction, the Declaration provided a catalog accommodating ideologically biased human rights skillfully balanced in a harmless compilation. This artificial mix of Western liberal rights and freedoms inalienable for the proper functioning of the Western civilization and the Eastern social utopian promises was supposed to be the remedy to the human suffering of World War II. However, it had to combine the Western respect for the individual with the Communist aversion to it. Thus, the international idea of human rights carries the original sin of compromise between incompatible ideological alternatives.

This logical inconsistency was acknowledged when the United Nations adopted the International Covenant of Civil and Political Rights (ICCPR) and the International Covenant of Economic, Social and Cultural Rights (ICESCR) in 1966, clearly dividing the two visions concerning the role of human rights. The awareness of the different meaning and value of particular rights is included in the Covenants implementation. The documents makes a clear distinction between the need "to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant"[4] and to undertake actions "to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means".[5] Without going into deeper analysis of the 1966 Covenants, the sole fact that the ICCPR establishes the Human Rights Committee as an international body supervising the member states' obligations under the Covenant, whereas the ICESCR only binds states to submit cyclical reports to the UN Secretary General,[6] underlines the genuine difference in the philosophy, meaning and implementation of different types of rights and freedoms. State authorities should recognize, implement and unconditionally protect civil and political rights, whereas economic, social and cultural rights remain mere guidelines for state action depending, at least theoretically, on good will, resources and social approval.

What the two Covenants made practically clear and distinctive was subsequently theoretically put in order by Karel Vašak who systematized the vast spectrum of individual and group claims.[7] His division of rights into first (civil and political), second (economic, social and cultural) and third generations of rights, triggers completely different attitudes both from the perspective of the state and the individual. Remarkably, the 1st generation of political and legal rights must be fully implemented in order to speak about human rights at all. The II generation of economic, social and cultural rights can be described as a wish list. Lastly, the third one, focuses on group and collective rights in the most general terms. This logically coherent theoretical division can serve as a very helpful point of reference in human rights education if used wisely. It delivers lists of rights and provides basic know-how concerning their implementation, simultaneously creating a hierarchy of rights requiring the appropriate focus and interpretation of the states.

Naturally, the Cold War international reality twisted this understanding, allowing random and ideologically biased interpretation. The West logically emphasized the importance of the ICCPR and the first generation of rights since they guaranteed full and unlimited respect for the individual, which was contradictory

[4] §2.1. International Covenant on Civil and Political Rights, at <http://www2.ohchr.org/english/law/ccpr.htm>, 3 January 2013.

[5] §2.1. International Covenant on Economic, Social and Cultural Rights, at <http://www2.ohchr.org/english/law/cescr.htm>, 3 January 2013.

[6] See: Parts IV of both Covenants.

[7] See: K. Vasak (ed.), *International Dimensions of Human Rights*, Westport–Paris 1982.

to the utopian communist approach towards the human being. On the other hand the East, led by the Soviet Union, emphasized the second generation of rights as an example of fair, equal and prosperous society. This emphasis aimed to achieve several goals at once. Firstly, to elevate the role of material equality in accordance with the communist ideology. Secondly, to legitimize the suppression of civil and political rights by claiming to provide welfare substitution. Thirdly, to create ideological alternative to the genuinely Western realm of human rights. Remarkably, the Eastern countries were hesitant to sign the ICCPR with its Optional Protocol no. 1 allowing individual complains against the state. Thus they were aiming to diminish the role of civil and political rights and freedoms of the ICCPR to the level of an arbitrary and selective implementation of the ICESCR. The reluctance of the Eastern bloc countries to ratify the ICCPR *in toto* was based on the rational necessity to defend the non-democratic system from the possibilities which the ICCPR Optional Protocol could provide for the suppressed individual, thus undermining the pillars of the communist regime. For this reason, only once the Cold War was over did all the countries from the Eastern bloc sign the ICCPR Optional Protocol.[8]

In conclusion, the Cold War shaped the dual nature of human rights. On one hand they became pillars of the domestic democratic political systems and on the other became the primary tool in the ideological Cold War confrontation. It is significant that even the Cold War "people's republics" gladly introduced chapters on human rights including civil and political rights. However, they skillfully manipulated the language, meaning and understanding of the particular rights in order to adjust them to the forcefully installed ideology thus discrediting the essence of human rights in a political system.

What should be considered the ultimate Soviet success was the exploitation of the Cold War politics to elevate economic, social and cultural claims to the role of political and civil rights. The West was not able to regain the initiative in the human rights agenda due to the fact that firstly, the prosperous western societies saw practical possibilities to internally implement social and economic programs, thus giving legitimacy to the left wing presumption of the state as an active participant and provider of benefits for the individual. Thus official international criticism of such rights would deliver arguments for Western hypocrisy. Secondly, the decolonization process increased left-wing leanings in the international community, since most of the decolonized countries expressed natural sympathy for the economic and social claims directly linked to the feeling of inferiority and exploitation common for the former Western colonies.[9] Thirdly, as a result of diplomatic

[8] For detailed information see: <http://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=en>, 3 January 2013.

[9] Interesting research on the impact of decolonization on the UN functioning was done by Edward T. Rowe, 'The United States, the United Nations and the Cold War', *International Organization*, Vol. 25, No. 1 (1971), pp. 59-78, http://dx.doi.org/10.1017/S0020818300026126.

and ideological confrontation, the Cold War international documents within the UN were usually a result of a compromise between the two superpowers and as such, they had to satisfy both sides. In the particular case of human rights, however, the point is that there is no room for compromise or consensus. From a liberal democracy perspective the first generation of rights cannot be negotiated. It is either implemented fully or human rights simply does not exist. However, this basic presumption had to confront the Cold War political context, which required international consensus embracing both ideological alternatives.

The 1990s and the Pernicious Consequences of the Ideological Superiority of the Human Rights Doctrine within the Western Civilization

The prevail of liberal democracy and the end of the Cold War seemed to prove the political system established on the principles of human rights, rule of law and constitutionalism to be the right one. The prompt rejection of communism in Central and Eastern Europe and the subsequent political and economic transformation strengthened liberal democracy as the only legitimate political system, providing respect for the individual and perspectives for material prosperity.

The spread of democracy also naturally expanded the territory of countries sharing the principles of human rights. Central and Eastern European countries neatly imposed the Western human rights standards by joining the Council of Europe, incorporating the European Convention on Human Rights and introducing new constitutions meeting the basic human rights standards. Thus, these countries were able to improve the political and economic situation at home and to create favorable conditions for individual freedom, desired for approximately half a century.

Remarkably, once introduced, the human rights standards seems to be taken for granted and started being perceived as a boring theory, which does not require further nourishing. Once they exist, they are of no interest anymore. This seems to be the curse of political and civil human rights. Their weakness stems from the already mentioned dilemma of either respecting or not respecting the first generation of rights. It seems that the general presumption goes with the logic that since we acknowledge the existence and respect for civil and political rights, there is no need to waste time on deliberations related to their existence and implementation. Furthermore, the first generation of rights provide the necessary background for vast and practically unlimited political discourse. Freedom of speech allows individuals and social groups to focus attention on particular issues filling the social and political daily agenda. Political association provides opportunities for the selection of social priorities and public mobilization around them. Bans on discrimination, torture and the right to personal freedom remove the personal con-

straints of public activism allowing the individual not to fear state repressions for unpopular, provocative or alternative ideas. Once individuals became aware of the new political environment, they quickly started cherishing the benefits stemming from the existence of human rights. Regrettably, it seems that while focusing on the particular elements, all reflection on why these rights are important promptly disappeared.

However, with the improvement of the economic situation and the rejoining of the Western civilization, the Central European countries also slowly adopted the general societal tendencies and joined the contemporary political discourse focusing on minority rights, social and economic rights and sympathy for radical individualism. Hence, this tendency divided the society across ideological lines between supporters of individualism and defenders of societal values and individual obligations. Unfortunately, at this point the radical individualist interpretation of human rights fitted much better with the left-wing opportunism and state activism supporting minority privileges, than the right-wing social conservatism and self-restraint in times of unlimited possibilities. The all-embracing and seductive presumption of never ending life improvement prevailed over the conservative, and generally perceived as outdated, feelings of societal, political and family obligations. The new marriage between unlimited possibilities and radical individualism resulted in a transformation of the human rights idea into a shield defending the contemporary ideological mainstream. Thus, human rights lost their strongest logical coherence – the fact that they applied to everyone without ideological prejudice.

Furthermore, the secular and postmodernist understanding of freedom was liberated from the totalitarian threat and, at the same time, the need for self-restrain, self-control and prudence. Unchallenged by any prospective threat from alternative ideologies, the Western societies embraced wild individualism undermining all forms of social obligations.

Simultaneously, the high quality social and economic conditions achieved by the Western countries and established during the Cold War became an indicator of a successful society. However, the fact that these "ideal" economic and social conditions were achieved in times of progress and economic boom seems to be neglected. Furthermore, based on the accumulated economic welfare, the Western European societies oddly reinvented the Marxist ideals by redistributing social benefits to all members of the society irrespectively of their origin and social status. What seemed to be appropriate and humane policy while pursuing the ideal of social justice, soon became the source of fundamental social, political and economic problems.

The perspective of material welfare provided by social benefits attracted new waves of immigrants to the Western European countries. It also created the weird presumption that, just like the communists believed, satisfying material demands can suppress the need for political participation. The outcome of this logic was visible during the riots in the French cities of 2005 and the German Chancellor

Angela Merkel's statement about the fiasco of multiculturalism.[10] Decent social conditions allowed tolerable coexistence between the first generation of immigrants and the citizens. However, this coexistence was not followed by appropriate integration. Thus the ghettoisation and social exclusion of immigrants radicalized their offspring, who only knew the Western world but were unable to fully cherish its accomplishments and opportunities.

Simultaneously, the Western European societies, relieved from the external ideological threat of communism, were seduced by the tempting idea of unlimited individual, economic and social development. Promptly, the notions of globalization, tolerance and multiculturalism became the new intellectual goals for Western democracies. They were strengthened by the unrestrained lust for Western financial domination, which brought the concept of globalization as a direct possibility for further enhancement of liberal dominance throughout the world. The ideas of multiculturalism and tolerance became the appropriate ideological framework protecting the unrestrained development of the individual in his most radical forms. Remarkably, by neglecting the other components of social order, the concept of ultimate freedom was twisted into a new form of radical utopian ideology. It established a shield for minority groups and installed new forms of censure, hidden behind the notion of political correctness, which became the sword in the fights against defenders of conservative social and political values.

Thus, the Western civilization completely departed from the genuine role of human rights at the national level, in order to adjust the essential principles of the state to the contemporary opportunities stemming from the open world and dominant position.

The Impact of International Developments in the late 20th Century on the Human Rights Doctrine

At the same time, the international developments of the '90s of the 20th century provided additional arguments for the righteousness of the human rights cause.

Firstly, as it was already mentioned, the successful political transformation of the Central European countries from communism to liberal, free-market democracies provided the best argument that liberal democracy is not only the right system, but also that efforts to adopt it are profitable and increase the security, wealth and well-being of the whole population at a national level.

Secondly, the collapse of the Soviet Union and Boris Yeltsin's subsequent attempts to push Russia towards liberal democracy, together with the Chinese

[10] For more information see: <http://www.guardian.co.uk/world/2012/sep/19/germany-multiculturalism-immigration> and <http://www.dailymail.co.uk/news/article-1355961/Nicolas-Sarkozy-joins-David-Cameron-Angela-Merkel-view-multiculturalism-failed.html>, 10 January 2013.

economic remodeling, triggered an enthusiastic intellectual attempt to declare humankind's achievement of the ultimate wisdom. The time dedicated to the ultimate reorganization of the international order based on respect for human rights was supposed to accomplish the abovementioned task.

Thirdly, the end of the bipolar international order resulted in a number of severe local conflicts that urgently needed the attention of the international community. The bloody dissolution of Yugoslavia, and particularly the horrifying events during the wars in Croatia and Bosnia and Herzegovina were the wake-up call for the international community to use the new international configuration for the establishment of international judicial mechanisms able to impose the ideas of respect for human dignity on ruthless local tyrants. These idealist attempts to introduce international sanctions for gross human rights violations, particularly of several first generation rights, suffered from the realist nature of international relations.

The establishment of the *ad hoc* International Criminal Tribunals for Yugoslavia and Rwanda, and subsequent permanent International Criminal Court were aimed at sending a clear signal that the international community would allow no gross human rights violations to remain unpunished. Additionally, hybrid tribunals were created in Cambodia and Sierra Leone in order to emphasize the international willingness to restore justice and respect for human dignity.

It soon became obvious that these principles cannot be applied everywhere with the same sanctions. The Chechen war of 1994-1996 revealed the selectiveness of international involvement and the case of Rwanda showed that the idealist vision has its very practical limits when the United Nations was hesitant to act despite the widely broadcast genocide on the Tutsis. Finally, the NATO humanitarian intervention in Serbia aiming to punish a sovereign state for the mistreatment of a minority group reached the limits of human rights' international career. Although the NATO mission was declared successful, a number of countries realized that unbalanced emphasis on human rights can have disastrous consequences for particular states who still remain key players in the international relations. Finally, the reluctance of countries like the United States to support the newly born International Criminal Court revealed the limits of the international quest for better life challenged by individual realist calculations.

Surprisingly, this international quest for human rights was suddenly ended by the developments of 9/11, which revealed the weakness of human rights when external threats exist and their comparative vulnerability when confronted with national security. The primarily American, but subsequently generally Western attempts to defend the states and societies from radical Islamism revealed the inapplicability of overextended human rights' ideals in times of crisis and external threat.

Simultaneously, globalization – in itself a product of a liberal world order, weakened the international meaning of human rights. Countries like Russia and China realized that instead of blindly following and adjusting to western values, they could selectively focus on generating financial capital and at the same time

compromise Western style political and social changes, thus reestablishing alternative political regimes able to challenge and confront liberal democracy throughout the world.

They were supported by the Western perspective of never ending opportunities, finding moral approval for the exploitation of cheap labor force in nondemocratic countries. Once the West was able to further enhance its wealth, it blindly turned its back on its own values dazzled by the perspective of never ending happiness. The improvement of relations with nondemocratic regimes, and in particular with Russia and China, accompanied by meager pressure for political reforms, allowed these countries to reinvent or modestly adjust their political systems. Thus, in a mutually beneficial way, without the need for deep political changes in line with the idea of liberal democracy and human rights, non-democratic regimes placed themselves comfortably in the new international reality.

Furthermore, what seems to be omitted is that these regimes managed to accomplish the task of ideological accommodation unachievable even for a superpower like the Soviet Union. They proved that, in contrast to the Cold War experience, fully-fledged cooperation between alternative and incompatible political systems is possible. Since these countries have always emphasized economic and social rights, they have given new and stronger meaning to the second generation of rights, claiming that indeed, the material stability of the individual is much more important than respect for human dignity.

The third world countries also benefited from the 1990s when the new, more politically appropriate term "developing countries" was coined. However, most of these countries were still in favor of the second generation of rights in their postcolonial claims against former colonial powers. Thus, human rights provided an argument for those countries' demands of material compensation, emphasizing exploitation and blaming the Western civilization for their economic underdevelopment. Simultaneously, this position relieved the developing countries from the need of political changes in accordance with Western values, which could have threatened the existing political systems and could have led to fundamental political, social and cultural changes. Hidden behind the slogans of Western neo-colonization and hegemony, developing countries exploited the second generation of rights in order to establish channels of external financial support and to claim that they also strongly support the general trends in international relations. Hence, just like the Soviet Union during the Cold War, they completely neglected the meaning of particular rights.

All these events has impacted the contemporary meaning of human rights. Dictators use the term with the same levity as human rights activists. The sense of unconditional and immediate respect for certain human right is imposed on matters ranging from illegal detention of political opponents to the respect for same sex marriage. The aid to those in need is no longer a moral obligation of those who can help but a legally sanctioned activity, the individual sense of appropriate behavior should be subordinate to the demands special treatment for minority groups.

Internationally, liberal democracies forgot the importance of moral values and principles. The utilitarian approach towards human rights, gladly sacrificed for short-term practical benefits resulting from cooperation with non-democratic regimes, weakens the essence of human rights. The selective suspension of human rights in the framework of the global war on terror, strengthens the feeling of Western hypocrisy, thus undermining the whole human-oriented theory. Such internal and international tendencies will not enhance respect for human rights. Quite the opposite, they will lead to the defeat of a beautiful idea due to its inappropriate usage.

Conclusions

The modern understanding of human rights is a result of the remarkable evolution of a basic idea, indispensable for the appropriate functioning of liberal democracy at a national level. However, the international meaning of the term has drifted away from the core meaning and purpose of the notion. Ingrained in the close observation of the historical development of the relationship between state and the individual, the 18th century human rights documents aimed to draw a clear line between the state and the individual. Furthermore, maybe even more importantly, they aimed at providing an axiological alternative to the feudal social structure imposing artificial inequality. Ultimately, they aimed at arming the individual with a set of defensive weapons effective against transgressions of authority. In order to accomplish these tasks the enumerated rights had to be clear, simple, unbiased, understandable, practical and achievable. They also had to defend the individual in the most vulnerable areas of interaction with the state – politics and private life. Thus, the 18th century human rights catalogs were modest and simplistic, but effective and unambiguous. They were directed internally and did not claim to be the sole source of humankind's wisdom. They had to be theoretically firm and logical in order to survive the confrontation with the *ancien regime*, but simultaneously practical, in order to reinforce the superiority of the new political experiment called liberal democracy.

Currently, this is no longer the case. The human rights catalog is vast and heterogeneous. Issues from personal freedom to veganism are all included in the notion of human rights. Even animals and vegetables appear to have rights under the same denominator. This is the curse of human rights which, once ripped out of their natural nation state liberal democracy environment, become a weak and attractive shelter for every human idea no matter whether expressed nationally or internationally. The contemporary human rights notion is a result of political compromises, utopian ideological visions, open condemnation of any social linkages binding particular societies and unrestrained individual selfishness leading to complete misunderstanding of their purpose.

In order to fix the mistake of treating the human rights as an all-embracing balloon able to embrace more and more individual eccentricities, which will ultimately lead to its explosion, a time should come for terminological and practical discipline. A return to the essence of human rights. Their clear theoretical division and appropriate terminological usage will order the particular human rights debates and decrease the emotional load involved in each of the particular human rights issues.

The temptation to mix up all human rights elevates the position of particular minority privileges, but destroys the logical coherence, sense and meaning of these rights. For this reason, it seems to be absolutely necessary to reinstate the terminological framework describing the role and meaning of each human right. There is no need for a new invention of human rights terminology, but rather for a clear division of the particular rights in accordance with Karel Vasak's division of rights. Then, after the appropriate reinstatement of the forgotten terminology, the present day loud claims for environmental protection, development aid, minority privileges, fight against famine or poverty, improvement of social and economic conditions will hopefully return to the realm of social contract. They will cease to be treated as "must do" rights, which they never were. Despite the ideological doggedness of their devoted defenders, they are a part of a broader social and political context. The fight for particular human rights cannot be righteous, when it turns into an ideological clash disrespectful of the adversaries' arguments. Should the latter be the case, human rights will lose their credibility, meaning and sense.

Abstract

The universality of human rights is a cornerstone of the contemporary international relations. However the last decade provided a number of examples that it is not the only model for individual freedom and improvement of welfare. Reversely, alternative approaches appeared, which proved that the improvement of the living conditions has nothing, or little to do, with incorporating the western values. Thus the human rights doctrine lost one of its most attractive and alluring components. The sources of this defeat lie in the discredit of western democracy in the developing countries. The emerging globalization brought rather growing than diminishing gap between the North and South. Additionally, the political and economic difficulties of the Western countries revealed the weakness of the political system based on individualism, religious freedom and free market, thus exposing the lameness of the Western political and economic proposals. Furthermore, the concept of human rights was included as part of the contemporary attempts for Western domination often considered as neo-colonization.

The concept of human rights itself drifted away from its strongest nexus, which is the popular consent. Instead of embracing the whole society at national level, it is going through a process of transformation towards becoming an efficient tool for decomposition of social structures based on ultimate individualism. These internal developments are confronted by the raise of new important players in the international relations who are much less demanding when it comes to political cooperation. They do not link the mutu-

ally profitable economic cooperation with political actions tending to improve the human rights record. For this reason they become much more attractive and desired partners than the Western democracies. Even more disturbing is the fact that the Western awareness of such developments doesn't lead to stronger and more sound arguments, but to a kind of opportunistic adaptation in accordance with the new reality in the international relations rather than defense of its own values.

The aim of this paper is to reflect upon this macro picture of the international relations and to search for the intellectual reflection on perspective steps that can reinforce the concept of human rights in the XXI century reality.

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Fragment of the book review
Professor Bogusława Bednarczyk

Problems related, on the one hand, with the relationship of legal norms and entitlements, and, on the other hand, with the strengthening of entitlements – still cause much debate, as evidenced by the papers presented to the Readers within this volume. These are texts that touch upon the issues of fairness of the established law and direct attention to human rights (those upheld and those violated) – which, in any case, are a major point of reference, and even have the power to bind the will of the governing bodies that create legal norms, thereby limiting their arbitrariness. These texts are the fruits of a very interesting meeting, held during the Third "Human Rights Education" Congress, which took place in December 2012 in Europe (after the congress in Australia and Africa), in Krakow, Poland (at the oldest Polish university) and in Auschwitz, Poland – where the most notorious Nazi German concentration camps was located during World War II.

Fragment of the Introduction
Professor Bogdan Szlachta

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