



In Defence of Dynamic Interpretation Tradition at the ECtHR

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Published in:
The Universal

Publication date:
2018

Document version
Publisher's PDF, also known as Version of record

Document license:
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Citation for published version (APA):
Molbæk-Steensig, H. (2018). In Defence of Dynamic Interpretation Tradition at the ECtHR. *The Universal*, 2(1), 37-50.

THE UNIVERSAL

Human Rights Challenges in a Transforming Europe

– Perspectives from Then and Now

HUMAN RIGHTS REVIEW

VOL. 2 2018

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LAYOUT BY MORTEN FRØSLEV BRUUN

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Introduction

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1. About The Universal

Human Rights as a scholarly endeavor has, in recent years, generated interest across a variety of academic disciplines, such as history, law, political philosophy, ethics, international relations and sociology. The historical trend however, has been to separate such fields into mutually exclusive approaches and perspectives that perpetuate academic cloistering. In addition, there exists a tendency for high quality student and graduate research to go unnoticed and unpublished. Consequently, new avenues for the distribution of integrative ideas and approaches originating from a range of scholars are required.

Think Rights seeks to meet these demands by publishing the Universal, a peer reviewed journal devoted to interdisciplinary research on human rights issues. One of its foremost objectives is to provide a platform from which students (BA, MA and Ph.D.), recent graduates, and researchers can publish high quality research from an array of academic backgrounds and experiences. Essentially, by inviting students to an inter-disciplinary inter-university debate on human rights, we hope to further its locus on the academic agenda while deepening our insight into its nuances.

2. Foreword

STEVEN JENSEN

Human Rights Challenges in a Transforming Europe Perspectives from Then and Now

Human rights do not come natural to Europe. We may have been led to believe so after decades of experience that seemed to affirm this connection. The important role that human rights played for the peaceful end of the Cold War in Europe following the adoption of the 1975 Helsinki Final Act by the Conference on Security and Cooperation in Europe (CSCE) and in the European reunification process after the fall of Communism in 1989 helped make human rights central to modern European life and politics.

In the 1990s, the European Union declared human rights to be part of European values. It was a decade where national, regional and international human rights promotion and protection witnessed a remarkable expansion both in Europe and globally. This coincided with a new wave of democratisation that aimed to consolidate the political foundations upon which human rights protection could flourish. These developments seemed to confirm the principles from the Preamble of the European Convention on Human Rights from 1950, where the participating states reaffirmed:

“their profound belief in those fundamental freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the human rights upon which they depend.”

Human rights and democratization were an integral part of the so-called Copenhagen Criteria for EU enlargement agreed by its member states in 1993. The criteria established the required political, legal and administrative types of reform for which the degree of compliance would determine the Eastern European countries possibility to join the European Union. It was this process that paved the way for the EU enlargement which from 2004 brought the former Communist states

membership of the EU. Human rights was by no means empty rhetorics. They were part of a set of standards and principles that defined what a European state was supposed to be in the post-Cold War World.

It now appears that this may be changing. Large parts of Europe seem now to be rethinking their commitment to human rights. Although the European Union itself is still promoting them in both internal and external relations, they are increasingly being defied by political movements and parties across the continent, as well as by some Governments in member states. These dynamics maybe reshaping European politics as we speak, and the critiques and counter-forces are certainly challenging the legitimacy of the EU itself. The question then beckons: Can the centre hold?

We may need to ask ourselves whether the political traditions and democratic foundations in Europe are strong enough to withstand the assertive attempts to undermine human rights, the rule of law and democracy across the continent. Time will tell, but it is fair to ask: Is the jury not out on this? If there is doubt about the outcome here, it is then necessary for us to ask once again one of the questions that the generation tasked with the political, economic, social and cultural rebuilding of Europe after the barbarism, atrocities and utter devastation caused by the Second World War asked themselves: How natural are human rights to Europe?

The Council of Europe, the European Human Rights Convention and a European Court of Human Rights were significant responses that showed that this was answered in the affirmative. The same goes for the integration of human rights into post-war national constitutions such as the German Grundgesetz from 1949 that made human dignity a founding value for the new West German Federal Republic¹. But there was more to the early post-war European responses to human rights than meets the eye. This “more” was connected to how Europe interacted with the rest of the world – just like the modern-day challenges to human rights have an important basis in contestations over Europe’s interactions with the wider world. Globalization was also a factor back then but in a very different historical shape and form.

Soon after the Second World War ended, the Cold War emerged, led by the two dominant super-powers – the United States and the Soviet Union. Europe became divided with an “Iron curtain” based on the political and ideological fault-lines that defined this conflict. However, at this stage Europe’s main interactions with the world were still linked to the colonial territories controlled by the West European states of France, United Kingdom, Portugal, Belgium and the Netherlands, encompassing large parts of Africa, Asia and the Caribbean. This geo-political reality greatly influenced international human rights in the first decades after 1945, and also determined European positions regarding the legal nature and reach of human rights

A significant part of the human rights literature and thinking sees the historical emergence of international human rights from the 1948 Universal Declaration to the fall of the Berlin Wall in 1989 from the East-West perspective. However, for a more representative understanding and fuller appreciation of this history, it is more than overdue to “take off the Cold War lens” and understand the profound importance of the North-South dimension and how this interacted with the East-West competition and struggle for power². This approach places the global history of human rights and Europe’s place in it in a rather different light.

¹Samuel Moyn (2015), *Christian Human Rights*, University of Pennsylvania Press, Philadelphia, p. 96.

²Matthew Connolly (2000), “Taking off the Cold War Lens: Visions of North-South Conflict During the Algerian War for Independence”, *American Historical Review*, vol. 105, no. 3, p. 739-769.

The Universal Declaration of Human Rights was a response to the 1945 UN Charter that made human rights a “Purpose” and “Vision” for the work of the United Nations. At the same time, the UN Charter affirmed state sovereignty and domestic jurisdiction. This was a powerful counter-weight to the universal claims of human rights. These claims were curtailed, as the Universal Declaration was by very deliberate design not a legally binding document. In contrast, The European Convention on Human Rights from 1950 was legally binding for the states ratifying states, but its reach was limited to the Western European states plus Turkey and Greece, that were members of the Council of Europe.

This limited legal scope had its reasons. The Council of Europe and the Convention were legal and political means to assert democracy and the rule of law in Europe against the Soviet-controlled dictatorships in Eastern Europe. But concerns over the limited scope and ambitions for human rights protection and guarantees were also expressed during the ratification debates in national parliaments. What did the European Convention’s legal standards mean for the colonial subjects in the European colonies? How would the legitimate claims for equal rights and freedom be addressed in the non-Western world?

This concern was addressed, for example, during the debate in the Danish Parliament on the ratification of the European Convention in December 1952 - where the spokesperson for the Social Democratic Party expressed his concerns in the following manner:

“I regret the solution that has been reached because maybe the largest transformation in world history is not the rise and fall of Hitler, and maybe not the creation of the expansive Soviet empire, but instead what, ignored by many, happens in these years, namely that the colored population around the world are having an awakening and are demanding freedom and equal rights. When everything is said, they form well over half the population of the world. Seen through the eyes of a democrat it is one of the most joyous developments in the world, but if one does not feel the human solidarity with all of them, who with the same right speak up about human rights, there is reason to be clear that there is also a political danger from this. . . . There is reason for the white world to include the colored in all of our efforts for human rights, there is reason to ensure that one can never justifiably say, that we are talking about human rights but we actually mean white man’s rights.”³

There are echoes from here that we may be hearing again in today’s world, despite the fact that an international legal system has developed in the intervening decades. This evolution, which took off from the 1960’s, did help Europe develop towards more universally oriented human rights commitments. The driver of this trend was to a very large extent the decolonization process that in the 1950s, 1960s and into the 1970s transformed the international system of states and the foundations on which international law, politics and diplomacy were based. It was to a surprising and remarkable extent a group of key countries from the Global South that led and consolidated this breakthrough – especially through the United Nations – and influenced European politics and values in the process⁴. The decolonization process in the mid-20th century has been described as the largest transfer of sovereign power in world history with a profound impact on Europe as well or as Jan Werner-Müller has put it: “Decolonization was a precondition that ‘Europe’ might again be associated with and worthy of an egalitarian universalism.”⁵ It was from this political reality that

³Frode Jakobsen (Social Democratic Party), Rigsdagstidende, 104. ordentlige samling 1952-1953, Forhandling i Folketinget, Bind I, 3 December 1952, sp. 1400. Emphasis added.

⁴Steven L. B. Jensen (2016), *The Making of International Human Rights. The 1960s, Decolonization and the Reconstruction of Global Values*. Cambridge University Press, Cambridge.

⁵Jan Werner-Müller (2010), *Contesting Democracy. Political Ideas in Twentieth-Century Europe*. Yale University Press, New Haven, CT, p. 157.

human rights came to play an increased role in European politics from the 1970s as sketched above. The political results and changes over the ensuing decades speak for themselves.

However, it now appears that Europe is at a crossroads in its commitment to international human rights. Austerity politics, populist movements and the refugee and migrant crisis have accelerated the criticism of both human rights and the European Union. Europe will need to find new answers to the questions surrounding its commitment to both values and political cooperation and integration. The articles in this volume of *The Universal* address exactly these issues. They cover a diverse range of topics reflecting the challenges and responses faced by Europe today. From Bosnia to France, and from the migrants' life in a Danish deportation center to the status and practice of the European Court of Human Rights in Strasbourg, this volume offers glimpses into the realities of displaced people, national and ethnic challenges in post-conflict societies as well as into institutional responses to these crises at a continent-wide level. Human rights matter, and currently face challenges, at all these levels.

The first article "A Life of Temporariness" approaches the reality of male asylum seekers whose permission to stay in Denmark was rejected, and live therefore in the deportation center Sjølsmark north of Copenhagen. This field study presents their experiences, which speak to a larger phenomenon increasingly faced in European countries after 2015. The increase in human displacement implies a great variety of categories from asylum seekers, refugees, migrants, rejected asylum seekers to undocumented migrants - with many of them facing legal limbo. The situation has revived the old claim by the German philosopher Hannah Arendt from her famous book *The Origins of Totalitarianism* from 1951 about "the right to have rights". For Arendt this was a foundational claim. Today, when raised, this phrase increasingly comes with a question mark at the end: Do people still have the rights to have rights? The persons in question live with their lives in suspension, seeking community but not in legal terms regarded as belonging to a political community in the way that Arendt envisaged. The life in temporariness that the authors capture serve as an illustration that we may be producing new forms of statelessness – a problem that was at the heart of the post-Second World War attempts to build an international legal regime that addressed displacement, forced expulsions, crimes against humanity, refugee flows by trying to establish and regulate rules for asylum as well as reducing statelessness through domestic application of international law. The subjects addressed in the field study have "experienced too many disappointments to dare to dream", the article explains, and it is unsure when the temporariness of their existence will end and what type of solution this will entail.

The second article addresses the long aftermath since the most traumatic European event in the 1990s. While the fall of Communism in Eastern Europe was largely peaceful, the disintegration of Yugoslavia was the great exception. The Civil War in Bosnia resulted in genocide, ethnic cleansing, crimes against humanity, mass displacement and large refugee numbers. The multi-year siege of Sarajevo by Serbian forces resonated deeply around Europe as it was in the same city in which the assassination of the Austrian-Hungarian Archduke Franz Ferdinand by a Serbian nationalist took place in 1914. That event set in motion the succeeding events that led to the outbreak of the First World War and served as the spark that enflamed what the Italian historian Enzo Traverso has called "the European Civil War" from 1914-1945⁶.

Europe looked powerless when faced with the Bosnian conflict in the 1990s. The war was only brought to an end in 1995 with the Dayton Peace Accords. The article "The Post-Dayton Dilemma: Examining Inherent Human Rights Contradictions in the Constitution of Bosnia and Herzegovina" tells the story of the consequences of this peace agreement (that certainly ended

⁶Enzo Traverso (2016), *Fire and Blood: The European Civil War, 1914-1945*. Verso Books, London.

the violence) but also froze the ethnic divisions into an administrative and constitutional order from which much needed reform seems insurmountable to achieve. As the authors note, “the dysfunctional system of ethnic segregation and political deadlock that resulted from the Dayton Agreement, offered a short-term solution instead of a long-term resolution to the problems that plagued Bosnia-Herzegovina at the war’s end.” The Constitution of Bosnia and Herzegovina contained excellent human rights provisions while at the same time, it included other provisions that went against these by emphasizing the rights of the three different “constituent peoples” along ethno-national lines. What was articulated as ideals of inclusion have proved to instead enforce forms of exclusion. Like the individuals in the Danish deportation center, the political entity of Bosnia and Herzegovina seem to be confined to a permanent limbo.

The third article shifts attention to one of the main battlegrounds in the debates over the status of human rights in Europe – namely the European Court of Human Rights and its so-called “dynamic interpretation.” The Court has gained increased attention in recent years. In Great Britain there have been calls to withdraw from the system by prominent politicians such as Theresa May (at least before she became Prime Minister in 2016) and Denmark’s chairmanship of The Council of Europe that started in November 2017 had as a declared goal to challenge the Court’s alleged activism and practice of dynamic interpretation.

This is therefore another timely article. It illustrates well that the Court’s practice and the jurisprudence emerging from it is argued in a more nuanced way than its political and academic critics allow for. The article looks at the European Court’s interpretation tradition and related legal principles such as the “margin of appreciation”, “subsidiarity” and the “emerging consensus doctrine”. It offers an antidote to the criticisms directed against the Court. Amongst the different critiques, the authors remark the arguments that claim that the Court is an “inherently non-democratic institution, because the judges are not democratically elected, and the ECtHR has the power to declare democratically created policies to be human rights violations.” The response hereto is that this represents “a reductive understanding of democracy as majoritarian rule” and that individual rights have been designed exactly to address the pitfalls of this type of rule by allowing some fundamental protections.

The fourth article shows how European states continue to take proactive steps to promote and protect human rights. The article “Advancing Human Rights in Global Value Chains: The French Legislation on Corporate Duty of Vigilance” focuses on two complex areas of human rights: regulating businesses and their practices, and the link to the question of extra-territorial obligations. Traditionally, human rights have prescribed relations between an individual (the rights-holder) and the state (the duty-bearer) but the power of businesses especially multi-national corporations have changed the dynamic of human rights violations and the need for protection. The problem, however, has been that international law concerns states and does not directly involve businesses. There have been various attempts to expand human rights to the business but they have at best been voluntary and incremental and this has proved insufficient. The other aspect is the extra-territorial obligations – meaning addressing human rights violations perpetrated by business entities belonging to one state, but with operations geographically located within the territories of other states. This raises important questions about the nature of jurisdictions and the regulatory responsibilities by states for companies either headquartered in their country or operating in a given country but legally positioned and operating from overseas. There is a lot at stake in the regulation of this area. The article describes France’s attempt at legislating obligations for a “corporate duty of vigilance” to avoid disasters such as the one at the Rana Plaza Building in Bangladesh in 2013 (where a garments factory collapsed costing the lives of thousands of workers and leaving victims without compensation). The French law shows that expansion of human rights are still ongoing despite

all the counterforces trying to limit their scope, reach and the holding to account of governments and others for their actions, their policies, their laws, their violations and their discrimination of individuals. It shows that human rights are very much still a factor in European politics even though they find themselves in 2018 at the complicated and uncertain fault-lines of European and global politics.



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3. A Life of Temporariness

NIKITA HOSSEINI, JOSEPHINE AMANDA JØRGENSEN, NADIA CHARLOTTE DAHLGREN
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A Life of Temporariness

Abstract

This article will focus on rejected male asylum seekers, who live in the deportation center Sjælsmark and find themselves in a temporary condition, where they negotiate their own identities while living temporary lives. This paper is based on a field study conducted in Denmark over a period of three months. Through this field study, we have established that our informants live stagnant lives, which are characterized by uncertain futures combined with having been deprived their legal rights. We observed that rejected male asylum seekers negotiate their identities through strategies such as engaging with communities.

Introduction

Kian and I are walking around the big grass field on Deportation Center Sjælsmark. We walk by the doctor's office located on the premises. I ask Kian if he has ever gotten ill while living at the center. Kian replies that he makes sure not to get sick. The only advice the doctors give is to drink water. He tells me a story about a young man, who felt physically and mentally ill. He went to the doctor only to be told that he needed to drink water. Later that evening, the man tried to commit suicide.

This situation took place while conducting fieldwork over a period of three months in Sjælsmark, a deportation center north of Copenhagen. The meeting with one of our informants, Kian, was thought-provoking in how we as Danish citizens understand the Danish asylum system as well as Denmark as a whole.

In the year of 2015 (BBC 2016), there has been an estimate of one million people, among these migrants and refugees, who have crossed the frontier of Europe. In public discourse, this has been considered as a threat to the European national states both in political and economic terms.

Recently in Denmark, an intense debate has emerged concerning asylum seekers and the proposal of restricted family reunification for refugees. The Danish government's proposal has been used as a tool directed towards refugees with the purpose of making it less attractive to seek asylum in Denmark. The restrictions on the area of asylum such as family reunification and integration have been criticized by the United Nations for being deeply concerning (UNHCR 2016: 2).

But how does it feel to be the object of all these debates and political strategies? Our interest in this question led us to commence research regarding refugees in Denmark (See: Hosseini et al 2016).

Anthropological fieldwork

We decided to conduct fieldwork and participant observations. We believe it is important to show the field of observation and the refugees respect. Hence, we did not want to impose ourselves onto the informants, inasmuch as we wanted to gain their trust and respect. Most of the informants speak Farsi and in view of this, one of the members of our research group played a crucial part in the preliminary contact because of her Iranian heritage and her comprehension of the Farsi language.

We found inspiration in different methodological tools during our fieldwork. For instance, *walking and object probes*, which entail using specific objects like places or musical works, which we encountered with our informants in order to steer the conversation (De Leon & Cohen 2005). E.g. our informants showed us pictures from their lives in their home countries, which we could use to start conversations about specific topics, we wanted to uncover. Additionally, we used grand tour questions when we asked them to describe certain events or activities, so as to give us a better understanding of these (Spradley 1979). For instance, we asked an excessive amount of questions to Milad and Shahin to make them describe in great detail the Thursday practice of receiving financial support from the authorities. This was to ensure, that we would discover all the small but sometimes important nuances of a practice like this.

We spent time contemplating our appearance towards our informants with regard to our gender, social and cultural background so as not to hinder an informal climate of conversation and build up personal trust. We wanted to level the boundaries between us and our informants by letting our informants decide the topics of conversation, however, this left us with questions unanswered. Even so, we determined this to be a suitable way of showing respect and patience towards their vulnerable conditions as refugees. Later in the process, the bond between us grew thicker and resulted in a trustful relationship, in which we could deal with sensitive topics.

The majority of our informants are Kurds from Iran, and a few others are from Iraq. They are all male and between 21-30 years old. They have been in Denmark for approximately one to three years. Our empirical data has been conducted amongst 20 informants of whom we primarily use eight.

Gender relations in Kermanshah are different from what we as Danish women are accustomed to. Like in the work of Jill Dubisch, it is a common belief that male informants from the non-western world do not share the same ideas as their Western counterparts regarding power relations in gender and sexual relationships (Dubisch 1995: 34f). Consequently, and to avoid any romantic misinterpretations, we set up some "guidelines" on how to appear professionally and friendly. This entailed a limited amount of eye contact, no physical contact and wearing more covering clothes than we normally would. Instead of our intentions of creating a safe environment, some of us experienced how transgressing our guidelines could be misinterpreted as a sexual advance. Therefore, when meeting the informants, we were especially aware how we were perceived (Groes-Green 2012: 48; Spradley 1980: 48). Moreover, the issues concerning gender became easier for us to deal with thanks to our Iranian research member's insight. On the basis of her cultural heritage, she achieved a different position than the rest of us. We believe that our informants' distinct behavior towards her relied on both researcher and informants sharing the same codes of conduct. The shared cultural bond resulted in her being referred to as *khahar* (sister). As evident in research by anthropologist

Christian Groes-Green, this type of “sibling behavior” between researcher and informant creates a deeper kind of trust (Groes-Green 2012: 50).

"I have been here too long"

I am sitting on a bench next to Kian. Nørrebro is full of people. People with places to go. Things to do. Other people to meet. Goals and dreams. We look at these people in silence. Then I ask him, what he dreams about. What does he want for his future? He looks at me with empty eyes and states that he has no dreams. I smile at his bleak answer and ask if he really has no wishes for his future life. “I have been here too long to still have dreams about my future” he says while looking at the people of Nørrebro.

Kian’s case is not unique. During our fieldwork, we were met with discouraged attitudes wherever we went. The refugees had experienced too many disappointments to dare to dream. They were all stuck in this situation, which seemed indefinite. This condition was conceptualized in the book *Et midlertidigt liv: Bosniske flygtninge i de nordiske lande* (Schwartz 1998). The sense of temporariness that the refugees felt, according to anthropologists Susanne Utsigt, Kristina Grüenberg and Anders Stefansson, to name a few of the contributors to this book, is apparently still prevailing amongst asylum seekers today. Our informants told us about isolation, stagnation, and the loss of the right to construct their own daily lives. Their lives are controlled exclusively by authorities and legislation, which can be very hard to accept (Utsigt 1998: 106; Grüenberg: 1998: 64f). In the same way, they were all missing a sense of meaning in their lives. Several of the informants expressed how they would love to continue their studies, but were not allowed to do so. Others missed their former jobs. One of our informants, Mahmoud, told us that he was afraid that he had forgotten how to work. He had forgotten how it felt to get up in the morning and have a purpose for the day. Mahmoud had been without a sense of purpose for the last 14 months.

In addition, this loss of purpose and control over their lives lead to the fear of dreaming, as expressed by Kian in the field note above. Several of our informants expressed the feeling of getting old in Denmark. They showed us pictures of themselves before their journey to Europe in order to prove how young they had looked prior to their encounter with the Danish asylum apparatus. We interpret their aging as not only physical. Two of our informants, Kian and Danny, seemed more discouraged than the rest. Kian and Danny’s cases were filled with rejections, and the cases had subsequently been closed. The pair had been in Denmark longer than the rest of our informants. Consequently, they have been living a temporary life and dealing with this condition to a greater extent than the other informants. Their statements were invariably characterized by a greater sense of negativity and despair than the rest of our informants. This tendency was also recorded in Utsigt’s research. In this context, Utsigt makes the point that there can be a strong correlation between an asylum seeker’s mood and the status of their case (Utsigt 1998: 91f).

"They kill us mentally"

As evident in previous research, it can be argued that refugee camps are exposed to social exclusion due to the society’s negative perspective on refugees (Turner 2015: 2f). The asylum seekers are often perceived as flawed individuals, who disturb the peace and order in the communities. This is caused by the notion that every race belongs to a certain territory (Stefansson 1998: 181). Hence, this notion in combination with the conviction that the newcomers’ race is inferior to the majority’s (De Genova 2014: 6), create a hostile environment, which is precisely what our informants felt on a daily basis. Their bodies are embedded with national borders as a result of racial classification and discrimination (De Genova 2014: 6). According to the men we spoke to, this racial barrier was ever present for both the native Danes and the refugees. They expressed a sense of being treated differently because of their “foreign” look. Another one of our informants, Omar, was convinced

that his ethnicity caused native Danes to change their seats on the bus or train if he sat beside them. In a train filled with blond Danes, he blamed his black hair, which made it impossible to disregard his distinct appearance. Like Omar, another one of our informants was convinced that his hair color was the main cause of the poor treatment he received by Danish society. He would point to his head and state that the color was the only juxtaposing feature. "We are all people," he would say resignedly. In addition to a sense of being racially discriminated, our informants felt that life in the camps robbed them of their dignity. An example of this was that the Danish asylum offices only knew the refugees by number instead of by name. When informing the refugees about mail or appointments, their number would appear on a screen. One day we walked by the screen and Milad, an informant, expressed his discontent with the numbers; "We are not treated as human beings. Here we are just a number". Milad's experience is consistent with earlier findings among refugees. Consequently, a sense of loss is experienced with regard to one's selfhood and identity, and it is often a result of the bureaucratic asylum apparatus (Grünenberg 1998: 63). Hence, there is a discrepancy between how asylum seekers view themselves, and how their hosting countries perceive them (Utsigt 1998: 95).

"We were told that Europe cared about human rights"

There is complete silence. Then Milad looks at Nikita and begs her pardon for what he is about to say. "We risked our lives trying to escape. We were told that Europe cared about human rights. But that was a lie. We were told that people were free here. But we are locked up." Milad looks out in the distance. Without blinking he says: "In our countries, they kill us physically. Here, they kill us mentally. I don't know which is worse."

Our informants articulated a sense of disappointment towards Danish society. Several of them had an understanding of Denmark as a country where they would be acknowledged socially and legally on the same terms as native Danes. However, as asylum seekers in Denmark today, they have discovered that this understanding is not consistent with reality. This has resulted in a clash between their notion of Denmark, Danish beliefs and values, and how the Danish state actually operates in handling refugees. Adjunct Professor of Law at Aarhus University Thomas Gammeltoft-Hansen and Professor of Law James Hathaway emphasize the duality that exists in how Europe articulates and praises basic human rights for those who flee their countries due to safety issues, while simultaneously seeking to keep precisely these individuals out of European territory by way of tightening the legislations regarding migration and refugees. This is characterized as a schizophrenic Europe (Hathaway & Gammeltoft 2014: 61).

According to associate professor at the University of Copenhagen, Simon Turner, the refugee camp has a tendency of stigmatizing individuals living in there as not belonging to society (Turner 2015: 4). Our informants have expressed the same stigmatization by feeling unwanted especially by being put in these camps. Additionally, we find it paradoxical how asylum seekers are subjected to the penalty system on equal terms as Danish citizens, but they are not given the same rights in order to navigate in society. Through conversations with our informants, we sensed how this leads them to believe that the Danish society is intent on punishing them. Kian told us how they all on a daily basis get tickets for not having paid for public transportation. Kian and Mahmoud showed us a huge pile of tickets and told us how the DKK 84, they receive every second week is not nearly enough for one bus ride back and forth between Copenhagen and Sjælsmark. This story shows how rejected asylum seekers have limited access into Danish society. Simon Turner emphasizes that European countries are willing to give asylum seekers food and a roof over their heads, however, the EU does not expect the asylum seekers to make political demands (Turner 2015: 5).

Furthermore, our informants have legally entered Danish territory in the hopes of being recognized as asylum seekers on the basis of their sensitive status as politically persecuted individuals or as refugees of war. As described by Hathaway and Gammeltoft-Hansen, they have the right to seek asylum and enter the territory, but they are not entitled the right of being acknowledged as asylum seekers (Hathaway & Gammeltoft-Hansen 2014: 2f). Thus, when the Danish state refuses to recognize these people as asylum seekers, they will, as evident in the abovementioned, be placed in a temporary condition without a visible future.

"Yes, everyone is welcome"

I ask Milad when they are having dinner. He replies, "Today I'll eat maybe at eleven o'clock". Milad tells me about a man and nods towards one of the other buildings: "There is a man in the other building, and he cooks for us". Milad tells us about Ismail, who cooks every day: "Is he cooking for the entire camp?" I ask. "Yes, everyone is welcome."

We experienced how there seemed to be an overall sense of community amongst the residents at Sjælsmark, which was based on the shared position our informants had as rejected asylum seekers. As mentioned earlier, the men experience discrimination due to the categorization, they are subjected to by way of the ethnic markers embedded on their bodies. It is evident to us that the refugees construct their own community as a response to the discrimination described by our informants. Thus, by cooking their own dinner, even though they are not allowed to at Sjælsmark, the rejected asylum seekers try to regain some sense of control whilst challenging the Danish asylum system.

As evidenced above, the identities of the rejected asylum seekers are under pressure because of their position. According to anthropologist Richard Jenkins, identity is social. We constantly negotiate our identities based on how we perceive ourselves, how other people perceive us, and how we perceive other people. We position ourselves and others according to which categories and groups we belong to (Jenkins 2012: 115). Focusing on social identity, we see how our informants identify themselves based on the following categories. The men hold on to categories like religion and ethnicity which they have identified with or dissociated themselves from before being placed in the asylum system. For Kian, religion is very important as this example below indicates. Many refugees convert to Christianity in their encounter with Danish society. There is a common belief amongst the refugees that Denmark accepts Christians and rejects Muslims. For Kian however, the thought of giving up his belief seemed absurd:

Kian and I are walking down Nørrebrogade in Copenhagen. I ask him about his opinion on an acquainted of ours, who is going to be baptized into the Christian faith the following weekend. Kian stops. "If the sky should fall down, I would still not change my religion!" he almost yells. "They can take everything from me, but nobody can touch my faith." He looks at me, eyes wide open. I nod to show him my understanding. "The people who change their religion in hopes of getting asylum has no self-respect!" he continues and sighs.

Jenkins describes how a group membership can contribute to members of the same community, exaggerating similarities internally between themselves and simultaneously exaggerating the differences between members and non-members outside the community (Jenkins 2012: 115). Furthermore, cultural differences confirm the individual's self-ascribed identity, because identity strengthens in heterogeneity (Utsigt 1998: 98f; Jenkins 2012: 105). Moreover, we noticed how the men to some extent verbalized the differences between themselves and other rejected asylum seekers in Sjælsmark when meeting with the informants during the fieldwork. Often, they articulated

differences like religion, language and ethnicity when talking about the membership of smaller communities. As indicated above in the field note, this categorization of others as well as distancing himself from them is a way for Kian to maintain his identity as a Muslim. Likewise, the rejected asylum seekers formed a community and friendships based on their shared religion. Religion seems to be of great significance for the men, and we noticed that it could affect how solid a friendship or a community could become. One of our informants told us that he had formed a friendship with one of the other men, but he emphasized that they could never become close friends since they had different religions.

We also observed how notions of ethnicity were a substantial factor in the common sense of a community. To clarify, we noticed several times how ethnicity became an object of prejudice, and this was significant in how the rejected asylum seekers behaved towards each other in and outside the smaller communities. According to Utsigt and Jenkins, prejudice towards different ethnic origins can be a way of handling various groupings (Utsigt 1998: 99; Jenkins 2012: 115). Often, we observed the notions of ethnicity as fluid and in connection with nationality. Consequently, the national and ethnic differences our informants identify with create or sustain a self-image, which is rooted in different values, qualities and notions (Jenkins 2012: 115).

Conclusion

We have established that our informants live a temporary life characterized by stagnation and isolation. The Danish authorities control the daily lives of our informants, which is hard for them to cope with. They long for a meaningful daily routine with a job or an education.

By placing refugees in a camp, they are systematically excluded from the rest of society. Additionally, our informants felt an exclusion based on their different appearances, which led to a sense of seclusion from Danish society and Danish citizens.

Another effect the Danish asylum system had on our informants was a sense of identity loss. Especially the fact that the refugees were called on by numbers instead of names enforced this. They came to Europe with the hope of finally being recognized and respected as fellow human beings based on the Human Rights significance in European countries. Instead, they were met with exclusion from society and no rights at all. Their notion of Europe does not live up to the reality they experience now. They have no rights and cannot complain with regard to their living conditions, however, they still have to adhere to Danish legislation as native Danes. They are not listened to, but they are expected to listen.

In conclusion, to negotiate this temporary condition, our asylum seeker informants create shared communities, which enable them to push against the power, control, and limitations they have been subjected to by the Danish authorities. In addition, asylum seekers utilize these communities so as to sustain and create their own identities, which are based on categories and groups they enter or consciously do not enter. This enables them to hold on to their sense of self in spite of the pressure they feel from the Danish asylum system.

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4. The Post-Dayton Dilemma

KENAN SADOVIC, SARAH FREEMAN-WOOLPERT

The Post-Dayton Dilemma: Examining Inherent Human Rights Contradictions in the Constitution of Bosnia and Herzegovina

Abstract

The Constitution of Bosnia and Herzegovina, established by Annex 4 of the 1995 Dayton Peace Accords, directly incorporates elements of the Universal Declaration of Human Rights among numerous other international conventions. International actors, and the American diplomatic effort to draft the Dayton Accords, prioritized principles of universal human rights in an effort to establish peace and stability between the country's three constituent peoples: Bosniaks (Bosnian Muslims), Bosnian Serbs, and Bosnian Croats. However, two decades after the signing of the Dayton Accords, the Bosnian Constitution has been ruled in violation of the European Court of Human Rights due to its inherent discriminatory elements, which ultimately guarantee human rights to select constituent groups while excluding minority groups from the full enjoyment of these rights, including the ability to run for certain political offices such as the country's tripartite presidency. This article has three aims: to outline the unique human rights provisions set forth rhetorically within the Bosnian Constitution; to explore the ways in which human rights are systemically violated in Bosnia and Herzegovina today; and to provide a scholarly analysis of why the current human rights situation in Bosnia and Herzegovina fails to live up to the language of universal human rights introduced at the outset of its post-war Constitution.

The Post-Dayton Dilemma

Between 1992 and 1995, the war in Bosnia and Herzegovina (B&H) sent shockwaves across Europe. Only ten years after Sarajevo hosted the Winter Olympics, and a mere two years after the reunification of Germany, a conflict erupted in South-Eastern part of Europe. The war that engulfed the former Yugoslavia was particularly devastating in Bosnia and Herzegovina, Yugoslavia's most

ethnically diverse republic. The Srebrenica genocide was the single worst humanitarian atrocity committed in Europe since World War II, and the Siege of Sarajevo was the longest siege of a capitol city in modern warfare, lasting a total of 1,425 days (Kalyvas & Sambanis 2005).

The Socialist Federal Republic of Yugoslavia (SFRY) began to dissolve in the early 1990s, following a rise in nationalist sentiment after the death of the Yugoslav President, Josip Broz Tito, in 1980. After Slovenia and Croatia declared independence from Yugoslavia in 1991, the conflict quickly spread to neighbouring Bosnia and Herzegovina. The referendum for independence was hosted in B&H on March 1, 1992 with 99.7% of the population voting in favour of secession from Yugoslavia. Not wanting to lend legitimacy to the secession attempt, the referendum was boycotted by the Bosnian Serbs, who refused to be part of the new state of Bosnia and Herzegovina and instead formed the Serb Republic (Republika Srpska) in August of the same year. The ensuing conflict lasted over three years and cost nearly 100,000 lives (Ahmetasevic 2007). More than twenty years after the end of the war, Bosnia and Herzegovina still bears scars from the conflict – from fear and prejudices that pervade everyday life, to the very structure of the country's post-war political system.

This article analyses the ways in which the post-war Constitution in Bosnia and Herzegovina reflects a rhetorical commitment to universal human rights as promoted by the international community, which played a central role in the drafting and passage of the Dayton Peace Accords, of which the Constitution is an Annex. It is necessary to begin by examining the text of the Constitution and exposing several contradictions inherent within the document. The article then explores several areas in which human rights remain at-risk or are flagrantly violated in B&H today, particularly the freedom of the press, freedom of assembly and freedom from discrimination. Finally, this analysis undertakes a discussion of the factors that hinder protection of human rights in B&H today, namely the decentralization of the Bosnian political bureaucracy, an over-concentration of competing organizations in the NGO sector, and widespread corruption and nepotism in both the public and private sectors. The article concludes by offering recommendations for addressing the challenges of protecting the human rights of citizens in B&H, and outlining reforms that must occur if citizens are to enjoy full protection of their fundamental rights and freedoms in the future of B&H.

In order to understand the current state of human rights in Bosnia and Herzegovina, it is important to inspect the agreement that formed the basis for Bosnia's current and tenuous state of peace. In November 1995, Dayton, Ohio was the location of the internationally-brokered peace negotiations that would end the war in Bosnia and Herzegovina. Signed on November 21, 1995, the Dayton Agreement set forth an impressive legal framework that ensured the end to the violence and a pathway towards permanent peace. Dayton established the sovereign state of Bosnia and Herzegovina, consisting of two entities: The Federation of Bosnia and Herzegovina and Republika Srpska, as well as the third, autonomous and internationally-administered Brčko District. The Federation was further divided into 10 cantons, each with its own Constitution, administrative government, and relatively autonomous control over areas such as health care and education (Nardelli, Dzidic & Jukic 2014).

In the wake of the Bosnian War, international actors set out to make the newly formed country a protectorate of sorts. The international community installed the Office of the High Representative (OHR), which monitors the conduct of elected officials in B&H and holds the power to remove them if they do not act in accordance with the Constitution. Since the signing of the Dayton Accords, most important decisions have been made by the OHR, rather than by the elected parliament of B&H (Blanc, Hylland & Vollan 2006). The country is riddled with external influence: the OHR has placed three foreign judges on the Constitutional Court of B&H, and the finance chamber is also regulated by foreign experts (Pajic 1998). The system is therefore overseen as though by a team of patronizing parents, subverting local ownership and reflecting in this need for careful supervision,

the same lack of ownership in peacetime that existed in the peace process itself.

At the time that the Dayton Accords were signed, the agreement was deemed a model of international efforts to involve many parties and stakeholders in the negotiation process. The international community envisioned Dayton as a shining example for securing the individual rights of people belonging to certain groups, while simultaneously meeting the demands of these conflicting groups. However, an analysis of the provisions set forth by the Dayton Accords shows that while the ideals of human rights were present, the way these values were articulated in the Constitution has not been realized in their application on the ground. The human rights situation in B&H today remains threatened by the ethnic discrimination and political decentralization that was enshrined in the state's founding documents and threatens the political and social stability of B&H in the future (Schake 1999).

The Dayton Peace Agreement is striking for its strong rhetorical emphasis on the provision of universal human rights. Likewise, the Constitution of B&H employs the same language, as it is contained in the fourth annex of the Dayton Agreement. Yet it is highly disputable whether the guarantees of human rights are as effective in practice as the architects of the Dayton Agreement intended them to be. This disparity is immediately evident upon analysis of the Constitution. The preamble sets forth a set of declarations that claim to protect the rights and dignities of every person by establishing a pluralistic society:

“Based on respect for human dignity, liberty, and equality, (...) Inspired by the Universal Declaration of Human Rights, the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, and the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, as well as other human rights instruments...” (Constitution of Bosnia and Herzegovina 1995)

While noble in its outset, these provisions are quickly compromised by the Constitution's establishment of an ethnically divided country, demonstrated in the Preamble's last paragraph: “*Bosniaks, Croats, and Serbs, as constituent peoples (along with Others), and citizens of Bosnia and Herzegovina hereby determine that the Constitution of Bosnia and Herzegovina is as follows...*” (Constitution of B&H Preamble). In an effort to meet the demands and protect human rights of the country's three ethno-national groups, the Constitution sets forth ideals of inclusion for the country's three “constituent peoples,” but many of the rights assured to Constituent Groups in the Constitution are not provided for individuals who do not belong within these proscribed categories (Claridge 2010). This fact belies the inherent exclusionary basis upon which the post-war Constitution of B&H was founded.

The controversial notion of basing a country's Constitution on universal human rights while also providing exclusionary recognition to three “constituent peoples” is a central underlying contradiction within Bosnia's post-war political structure. The political system established by the Dayton Accords and set forth in the Constitution decrees that Bosnia and Herzegovina is to be run by the three ethnic groups in cooperation, including a tripartite presidency with one representative for each constituent group (Constitution of B&H, Art. V). This provision was made in order to bolster cooperation between the ethno-national groups that once functioned together, but were divided by the conflict. The primary goal of this power-sharing system was to enable the country to slowly overcome these wartime divisions, and to help the country develop independently after the temporary presence of the international community ended. Once the institutional structure proved effective, the position of the High Representative and other forms of international oversight would be permanently removed (Perry & Keil 2015).

Article 2 in the Constitution on Human Rights and Fundamental Freedoms lists human rights from the European Convention on Human Rights. “*Bosnia and Herzegovina and both Entities shall ensure the highest level of internationally recognized human rights and fundamental freedoms*”

(Constitution of B&H Art. II). Bosnia and Herzegovina was not a member state of the Council of Europe at that time. The Constitution therefore upheld the European Convention on Human Rights without belonging to the international body that enforced it (Sadiković 2012).

The international community sought to include elaborate provisions within the Constitution securing universal human rights. The Constitution does offer protection from discrimination on different bases than ethnicity, including for national minorities. However, implementing the non-discrimination clause in Article 2 is a complex and controversial endeavour. Juxtaposing Article 2 against the Preamble shows how the Constitution advances a conflicting concept of human rights protection. A state cannot be simultaneously based on principles of non-discrimination that guarantee everyone the same individual rights and representation with a country that is *de facto* established and governed along the basis of ethno-national identity.

Human rights for individuals in B&H are overshadowed by the majority of ethno-national groups afforded sole legitimate recognition, because the Constitution allows only these groups to run for many public offices (Constitution of B&H, Art. IV, Art. V). This raises a question about another term spawned by the Dayton Accords and enshrined in the Preamble of the Constitution: the “Others.” “Others” refer to Bosnian nationals who do not identify with one of the three ethno-national groups, or constituent peoples, of B&H. “Others” are mentioned only once in the Constitution, whilst the three constituent ethno-national groups are mentioned numerous times (Constitution of B&H).

The tension between rights afforded to Bosnia’s “Constituent Peoples” and “Others” represents a transfer of power and personal agency within Bosnia’s political structure. The power is taken from “Others” and reassigned to the three ruling ethno-national groups in order to ensure their fair and equal representation (Sejdić Finčić v. B&H 2009). This belies a shift of sovereignty. While it is common practice for citizens to cede their power to the state actors, as recalled in the famous preamble of the United States Constitution, “*We the people*,” the Constitution of B&H sacrifices the powers of minority groups to offer greater power to members of the majority groups. This is written within the same document that cites universal human rights provisions as one of its main foci.

The Constitution of B&H goes on to outline the country’s political structure, setting forth a system in which “Others” do not enjoy the same rights as Bosniaks, Croats or Serbs. Only the country’s three “Constituent Peoples” can run for elected office within the three-member presidency or the House of Peoples of the Parliamentary Assembly (Claridge 2010). Article 4 deals with the Parliamentary Assembly and the formation of House of Peoples. The House of Peoples is headed by five Bosniaks and five Croats, all elected from the Federation, and five Serbs from Republika Srpska. Establishing this system of separation, and the use of ethnic quotas to fill political positions, was intended to promote cooperation and power-sharing between previously warring factions in B&H. However, the system has instead had the opposite effect, leading to political obstructionism between the three ethno-national groups. The three constituent peoples function as their own separate players on all levels. Each ethno-national group deals with their own problems and remains focused on the territory in which they hold the majority. The Dayton Agreement aimed to bridge these divisions and forge a cooperative atmosphere between the country’s “Constituent Peoples,” but the intended outcome has not resulted in protection of citizens’ human rights, equal treatment under the law, and ethno-national cooperation that international actors anticipated.

By now, it is clear that the political system set forth by the Dayton Agreement has resulted in a disparity between the expected outcome of the Constitution’s human rights provisions and the reality in B&H today. People in Bosnia and Herzegovina live within a tripartite “ethnocracy,” a conflict-prone political system in which groups compete for dominance on the basis of ethnicity (Yiftachel 1999, Howard 2012). In B&H, this separates one group from another instead of compelling these groups to work together. The “Others” cannot achieve full enjoyment of their civic rights, excluded as they are from political representation in the House of Peoples and other

political offices. There is simply no equal space for anyone that does not conform or belong to a “constituent” ethno-national group.

Article 5 of the Constitution, focused on the Presidency, faces the same issue. In its provisions, Article 5 states that both entities shall vote on the members of the presidency. One Bosniak and Croat from the Federation along with a Serb from RS shall be elected as members of the tripartite presidency (Constitution of Bosnia and Herzegovina 1995). The chairman of the presidency rotates every eight months. The issue at hand is once again the imperative of having an ethnically-based composition. Only a Bosniak, Croat or Serb can run for presidency, thus excluding all “Others.” The Council of Ministers is likewise composed of elected representatives based on ethnic representation.

Analysing the numerous ways in which ethno-national division is enshrined within the political system in B&H, it is sufficient to say that the Constitution of Bosnia and Herzegovina established a paradoxical state. A constitutional order which guarantees human rights to all citizens in theory, but denies them equal political representation in practice, is an ongoing challenge that cripples Bosnia’s post-war development. As Bosnia’s current leaders look hopefully towards one day joining the European Union, Bosnia cannot afford to trade off individual rights in favour of inter-group stability, especially when that stability bears the high price of maintaining a status quo built upon an ethnic quota system. Yet lawmakers in B&H have a disincentive to reform the Constitution, as their own positions are secured by perpetuating the ethnic quota structure.

This leaves Bosnia stranded. If change is attempted domestically, any attempts to reform Bosnia’s Constitution are met with administrative obstacles and political obstructionism. It is, however, no easier task to initiate these changes from outside Bosnia as international actors lack the will to meddle with the country’s complex internal affairs. Lethargic and frustrated, the people of B&H are growing weary of the country’s political impasse and economic stagnation, leading many to seek opportunities abroad. This has led to an exodus of young educated people, a demographic trend which only exacerbates the current crisis as the country haemorrhages its much-needed talent, skill and human capital. Around 68,000 young people left B&H in 2014 alone, contributing to an already sweeping number of Bosnians living in the diaspora and sending remittances home (Jukic 2013, Mitrovic 2013). Some citizens have taken to the streets in worker strikes, student demonstrations, and the sweeping protest movement labelled the “Bosnian Spring” by international media in 2014, when protests and citizen plenums began in Tuzla in February 2014 and spread to many other cities across Bosnia and Herzegovina. The country faces a crossroads and requires constitutional reform to ensure equal human rights protection of ordinary citizens in daily life. We will now shift to analysing several areas in which human rights are jeopardized in B&H today.

Having firmly established the inherent contradictions within the Bosnian Constitution in regards to ethno-national representation and ethnic quotas in public office, we must now examine how human rights have been protected or violated in practice, contrasting three areas in which the Bosnian government fails to ensure the protection of human rights to its citizens. After examining key examples of how freedom of the press, freedom of assembly, and freedom from discrimination are implemented in practice in contemporary B&H, this article will conclude by offering a brief analysis of several factors that contribute to the disparity between the image of human rights set forth in Bosnia’s founding Constitution and the many failings Bosnia currently experiences in protecting the fundamental rights of its citizens.

To begin, it must be acknowledged that despite the many shortcomings and weaknesses of the Dayton Agreement and the resulting Constitution, many of the basic human rights set forth in the Constitution have been assured and protected under the current Constitution of Bosnia and Herzegovina. Citizens are assured many of their basic rights and are largely granted freedom of movement within the country, freedom from inhumane treatment, freedom of religion, and the rights to property and education. Indeed, the current status of human rights in B&H has been improving, albeit slowly, in the 21 years since the signing of the Dayton Accords. Yet the dysfunctional system

of ethnic segregation and political deadlock that resulted from the Dayton Agreement offered a short-term solution instead of a long-term resolution to the problems that plagued Bosnia and Herzegovina at the war's end. Dayton brought an end to the war, but did not embody a long-view for establishing a functional state capable of guaranteeing rights to all its citizens.

There remain several key areas in which universal human rights are threatened under the current political leadership in B&H today. Systematic violations of freedom of the press, freedom of assembly, and non-discrimination based on ethno-national and religious identity occur throughout B&H. These violations fly in the face of human rights conventions referenced by the Bosnian Constitution, including the Universal Declaration of Human Rights and the European Convention on Human Rights. The following analysis will assess the current human rights situation in B&H within these three categories before offering recommendations and conclusions.

Freedom of the press in B&H faces significant challenges due to the political influence exerted on journalists and media outlets. Public broadcasting stations are fraught with corrupt political influence, under-funded, jeopardizing standards of journalism and independent reporting (Smajic & Latal 2016). The country's public broadcasting system, its three public TV stations – the state BHTV and the two entities' stations, FTV and RTRS, are close to collapse, deemed by one set of BIRN journalists as “a metaphor for the slow disintegration of the country itself” (ibid). While independent news sources are popular, these struggle to survive without financial support from political or business interests. Media sources that try to remain independent can face more serious repercussions. In 2014, police raided the offices of Klix.ba, the most popular news site in B&H, after Klix published an incriminating recording of Željka Cvijanović. Cvijanović, the prime minister of Republika Srpska, was recorded discussing how the ruling Alliance of Independent Social Democrats (SNSD) had bribed two members of Parliament for their support to ensure SNSD would retain a majority in the RS parliament (BIRN 2015). Rather than opening investigations into these documented acts of corruption, the police directed their attention at Klix, searching the offices and confiscating cell phones, hard drives, CDs, and flash drives, leading to an outcry by journalists that their right to protect informants was being violated, and that the freedom of press in B&H was being compromised (Radomirovic n.d.).

The right to free assembly is also at risk in B&H, as seen by the excessive force and unlawful detention exercised by state police during the 2014 protests. Human Rights Watch documented 19 cases of the use of excessive force in Tuzla and Sarajevo, and called for an investigation of police violence against journalists covering the protests (Human Rights Watch 2014). It is impossible to know how frequently police officers have detained protesters unlawfully if press coverage is suppressed and journalists intimidated in this way. This threat to free assembly and free expression discourages citizens in B&H from protesting and expressing opposition to government leaders, and creates an atmosphere of intimidation that stifles civic engagement and constructive dialogue on political reforms. Basic freedoms and security are also jeopardized by the corruption of police forces in B&H, which make police officers more likely to accept bribes and weakens the rule of law (Arslanagic 2010).

Finally, the tenets of the Constitution in B&H violate the human right to non-discrimination on the basis of ethno-national and religious identity. In 2000, the ruling by the Constitutional Court of Bosnia and Herzegovina secured equal rights for the previously-mentioned “Constituent Peoples” of B&H, protecting rights for members of the country's dominant ethnic groups but further entrenching the divided social and political structure in B&H. As noted by Pajic (1998, p. 132), “the entire political structure of the country is based on a quite contrary principle: the principle of exclusive ethnic representation, of the three ‘constituent peoples’ only, at the expense of individual rights.” The ethno-national divisions inscribed within the Constitution lead to legal and political deadlock and a hardening of opposing group identities (Mansfield 2003). These divisions are passed down in a segregated education system, called Two Schools Under One Roof, and children

who are ethnic minorities often have less access to resources and quality instruction. The divided education system in B&H is problematic for its discriminatory nature, but also because it bears the potential to reignite violence by stoking the flames of the country's past conflicts. Children learn different historical narratives from divided educational texts, for example, which promote "us-them" terminology and ethno-national discrimination from the early primary school years (Torsti 2009). One way this system reinforces division is in the way textbooks frame recent wartime events in terms of historical continuity: one Serb textbook states that the "Serbian people were *again* forced to defend their honor with weapons" (Pejic 1997, p. 7, italics added in Torsti 2009) while the Bosniak book refers to how the "Serbian-chetnik genocide against Muslims *has* deep roots" (Imamovic et al 1994, p. 96, italics added in Torsti 2009).

The current Constitution of B&H protects the rights of "constituent peoples" while largely denying individual rights for those who do not identify with one of the three main ethno-national groups. This was ruled a violation of the ECHR by the European Court of Human Rights in 2009, when a Roma activist, Dervo Sejdic and a Jewish man, Jakob Finci, challenged the discrimination within the Bosnian Constitution in which some elected offices, including the tripartite presidency, can only be held by a Bosniak Croat or Serb, as explored in the previous constitutional analysis. By virtue of having signed the ECHR, B&H is obligated to implement the judgments and recommendations of the ECtHR, although it has yet to do so. Furthermore, the Bosnian Constitution requires revision before Bosnia and Herzegovina can join the European Union; the lack of implementation is all the more significant after B&H submitted its application to join the EU in February 2016.

These examples demonstrate ways in which the Bosnian Constitution set forth an ambitious set of provisions to protect universal human rights and collective rights of its constituent peoples, yet embodied an inherent contradiction by structuring the country's political system along ethno-national lines and protecting groups based on their identification with these limited, proscribed categories. To conclude, it is important to explore several additional factors that contribute to the disparity between Bosnia's human rights-focused Constitution and the flaws in implementation of these provisions: decentralization of the Bosnian government, ineffectiveness of Bosnia's non-governmental sector, and the rampant corruption and nepotism that have ravaged the Bosnian public and private sectors.

Decentralization in Bosnia's post-war political structure has played a role in hindering a coordinated response by multiple actors at different levels of government in addressing human rights abuses that persist throughout the country. The Bosnian state has 13 distinct governments, along with a Constitution for every single canton, entity, and district. A federal and decentralized country, it may give the illusion that B&H functions like the cantonal system in Switzerland, but the reality is quite different. Because of these vast layers of administrative division, the general public and the government itself is faced with tackling an incomprehensible bureaucracy in order to achieve any substantive change. Public service delivery is severely compromised by the disparity between the normative framework governing B&H and the implementation of local government practices in reality (Bojicic-Dzelilovic 2011).

Furthermore, the entity-level and cantonal divisions in B&H create a system in which the majority of political actors are acting in their own ethno-national group's interests, diminishing loyalty for the state of Bosnia and Herzegovina as a whole. Decentralization not only leads to a lack of coordination in shaping policies and interventions at the local, entity, and state-wide levels, but it has allowed nationalist sentiment to flourish among ethno-national groups that administer their territories in relative autonomy. The lack of a centralized, unifying leadership in B&H, and the international actors who exercise significant control of the country's political and economic system, contributes to citizens' lack of ownership and identification with the state as a whole. Not only does decentralization foster economic stagnation and corruption of public officials, but in a country experiencing such critical rates of "brain drain," a weak sense of identification with the country

only compounds the lack of loyalty young people feel to stay in B&H long-term. These young people often must choose between moving abroad or joining the corrupt and ethnically-divided state bureaucracy to survive. Bosnia's decentralized ethnocratic political system is thus a challenge for implementing reforms in B&H, but also contributes to long-term demographic concerns for the future stability and development of the Bosnian state.

A second factor that hinders addressing human rights concerns in B&H is the over-burdened non-governmental sector. Bosnia has an enormous amount of non-governmental organizations working on similar issues, competing for limited funding and often overlapping in their missions and project designs. A strong, well-coordinated NGO sector could have a positive impact on addressing issues that affect the country's civil society and social development, yet this has not been the case in Bosnia and Herzegovina. After the war, the international community relegated sweeping authorities to the civil sector for brokering the country's transition from a socialist federated state to a democratic country operating a market economy. The NGO sector was therefore burdened with an enormous task. The international community lacked a long-term vision for how these civil society initiatives could strengthen human rights and reconciliation, and ultimately led to a dependency trap of local initiatives on continued international support (Belloni 2001, Bieber 2002). Without central coordination after the war, foreign-funded NGOs in B&H competed for contracts to advance their own mission-specific agendas, hindering cooperation and causing NGOs to follow short-term trends of donor priorities instead of long-term capacity building (Bieber 2002, Martin & Miller 2003). Two decades after the war, this approach has contributed to an ineffective but saturated civil sector. One telling example of NGO inefficiency relates to the disproportionate amount of foreign donors funding provided for educational youth seminars. By targeting youth as more open-minded actors and presuming they are more likely to fulfil donors' peacebuilding agendas, NGOs have focused significant funding on youth-related workshops and conferences. These programmes, however, often reach out to involve many of the same participants, creating a redundant, somewhat elitist sector in which foreign-funded reconciliation programmes cater to the same group of liberal youth again and again, without ever reaching the more nationalistic or disengaged youth in Bosnian society (Micinski 2016). In many ways, therefore, the overburdened NGO sector is ineffective at shaping a civil society adequately prepared to address human rights concerns or advocate reforms in B&H. The NGO realm remains an insular sector, not having achieved the necessary cooperation of the state bureaucracy needed to systemically combat abuses and human rights violations.

Finally, the high levels of corruption and nepotism in the government administration and the NGO sector in B&H weaken efforts to address human rights concerns in the country. Corruption hinders human rights protection in numerous ways, restricting access to basic services like medical care, police protection, and education (Bacio-Terracino 2010). Bosnia and Herzegovina faces high rates of corruption among doctors, municipal officials, police officers, nurses, teachers, social protection officials, and judges, among others (Bosso 2014). Not only does corruption directly inhibit access to basic human rights by withholding direct services in exchange for bribes, but it obstructs the legal mechanisms to enforce laws and prosecute abuses. Corruption within the police forces and judicial institutions in B&H, for example, creates an environment in which police raids on news agencies and unlawful detention of protesters can occur with impunity (UNODC Report 2011). The reasons for this are complex, and while the persistence of corruption in B&H cannot be solely attributed to domestic or foreign factors, the international community's involvement in the country's transition from socialism to capitalism led to a hybrid between outward pronouncements of a liberal agenda supporting "good governance," while international actors have in some ways legitimized the spread of corruption outside the country's formal legal structures (Belloni & Strazzari 2014).

Having analysed several ways in which international actors who drafted the Bosnian Constitution employed ambitious language promoting universal human rights and compliance with international conventions, this article has sought to contrast these proclamations with the reality

in B&H today. By highlighting the contradictions within a Constitution that advocates for human rights while outlining a state structure based on ethnic exclusion and division, we have examined the ways in which the international community imagined a future of ethno-national cooperation and collective group rights for Bosnia and Herzegovina while simultaneously designing a political system that decentralized administrative powers to ensure fundamental protection under the law. This has led to weak central enforcement mechanisms to prevent human rights abuses in B&H today, resulting in particularly concerning violations of freedom of the press, freedom of assembly and freedom from discrimination. The extreme decentralization of Bosnia's political system, along with the competing mandates of the NGO sector and widespread corruption, hinders the development of a systematic approach to addressing the existing threats to human rights in B&H.

It is necessary to develop stronger and more equal protection for citizens in B&H, not solely enforced by outside actors like the High Representative, to improve the human rights situation in B&H. The solutions to these problems require further research, collaboration, and a genuine concerted effort from the many stakeholders and actors involved, both foreign and domestic. Having analysed many of the problems plaguing the human rights situation in B&H, we include with recommendations to streamline overlapping organizations within Bosnia and Herzegovina's non-governmental sector, establishing stronger linkages between civil society organizations and government institutions, and developing better oversight and monitoring procedures to fight corruption.

The government of B&H must also undertake constitutional reforms to address the inherent contradictions embedded in the Bosnian Constitution, namely the exclusion of minorities from political leadership positions. An important step in this process is to build more bipartisan political support for reform, and to foster support from international and domestic civil society actors for the development of non-ethnically aligned political parties who can help steer the country's political climate away from ethnically-exclusive representation. Only after enacting sweeping reforms of this contradictory Constitution can citizens of Bosnia and Herzegovina fully enjoy their rights and freedoms, and achieve the level of human rights promised by the post-war Constitution.

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5. Dynamic Interpretation Tradition at the ECtHR

HELGA MOLBÆK-STEENSIG

In Defence of Dynamic Interpretation Tradition at the European Court of Human Rights

Abstract

The European Court of Human Rights (ECtHR) is under pressure because of non-compliance by ratifying states and negative national discourses. Increasingly, national parliaments, governments, and even national courts are questioning the legitimacy of the dynamic interpretation tradition and the ECtHR's use of the European Convention on Human Rights (ECHR) as a living instrument for progressive improvement of human rights protection.

This article will account for the tendency of non-compliance and review the negative discourses to establish their normative and practical basis. The critique will be set against the historical, legal, and pragmatic background for the dynamic interpretation tradition, asking whether the legitimacy challenge is legitimate.

Introduction

The Council of Europe (CoE) created the European Convention on Human Rights (ECHR) and its court (ECtHR) after the Second World War, with the expressed purpose of furthering European Unity in order to prevent another devastating war. The concepts of both human rights and supra-national control mechanisms were integrated parts of the international rule of law paradigm that was the outcome of the supra-concept of war avoidance (Schulz-Forberg 2011: 40-42).

In post-war Europe, the ECHR and the ECtHR can therefore best be understood as the goal of war avoidance through the toolbox of human rights and European unity. This is part of the reasoning behind the dynamic interpretation doctrine, which is applied in connection with the European consensus doctrine. It was first utilised in the *Tyrer v UK* case on corporal punishment in 1978, where the phrasing highlights the connection between European unity and expanding rights: "*The Court must also recall that the Convention is a living instrument which... must be interpreted*

in the light of present-day conditions. In the case now before it the Court cannot but be influenced by the developments and commonly accepted standards in the penal policy of the member States of the Council of Europe in this field." (Tyrer v UK 1978 para 31).

That is, the ECHR is a living instrument and the ECtHR will therefore take into account developments in the CoE member states when interpreting what the broadly phrased material rights in the ECHR entail. In the Tyrer-case the ECtHR determined that while corporal punishment had not been considered inhumane or degrading treatment when the ECHR came into effect, the contemporary standards in the member states' penal orders suggested that this form of institutionalised violence was no longer acceptable and should therefore be categorised as degrading treatment under article 3.

Furthermore, through the creation of the ECHR, the CoE member states wished to 'maintain and further realise' the rights prescribed in the Universal declaration and move towards a collective enforcement of these rights (ECHR Preamble). The ECtHR's interpretation tradition in which the dynamic interpretation consists of a set of principles on effective protection, subsidiarity, proportionality, legality, and emerging consensus (Greer 2000: 14-22) is thus a pragmatic way of maintaining and further realising the rights prescribed in the ECHR.

The interpretive tradition does not set the ECHR and the ECtHR apart from most international courts as it is in line with interpretive methods as described by the Vienna convention (1969: art. 31), but the broad scope of the ECHR and the ECtHR's compulsory jurisdiction does. With a few notable exceptions, state consent for international court jurisdiction is usually given either on a case-by-case basis or through special agreements where the state decides exactly what jurisdiction it agrees to. The ECHR does not allow for such general reservations or ad hoc acceptance of jurisdiction (ECHR article 57).

The few other international courts that also wield compulsory jurisdiction have been challenged in similar ways, including the Court of Justice for the European Union (Ajos A/S v A, 2016), and the International Criminal Tribunal for Yugoslavia (Prosecutor v Dusko Tadic 1995).

This article will deal with the increasingly vocal challenge to the legitimacy of the ECtHR's dynamic interpretation tradition: a challenge that comes from both public and political discourse, academic discourse, as well as through non-compliance from member states.

The Challenge

Within political discourse, the challenge to the dynamic interpretation tradition appears to be Europe-wide. The current UK prime minister, Theresa May, was in favour of the UK leaving the ECHR when she was still home secretary campaigning for Remain in the Brexit vote (BBC April 27, 2016), though that plan appears to be temporarily put on hold after the Leave vote (Wagner Human Rights News, Views and Info. 10. 8. 2016).

Meanwhile in Denmark, as the state takes on the presidency of the CoE in November 2017, the official direction of the government is to break with the dynamic interpretation tradition (Regeringsgrundlag 2016: 55-56) while the nationalist partner in the Parliament suggest leaving the convention outright (Messerschmidt 2.2.2015). Even the main opposition party, the social democrats, are campaigning against the dynamic interpretation (Bramsen 21.8.2017). Similar murmurs on the legitimate power of the ECtHR over national courts are taking place in Switzerland and Russia, while the Norwegian parliament is debating whether international conventions can be adapted to allow for lesser obligations in relation to refugees (Jagland, General Secretary Council of Europe speech to parliamentary assembly 26.1.2016).

Poland and Hungary's current approach to the concepts of European values and European solidarity as has become evident during the refugee crisis can also be seen as part of this challenge, although it is only by proxy related to the ECtHR. This adverse political reaction towards

international courts in general and the ECtHR in particular, not only from the far right, but across the political spectrum in several West and East European states, suggest a break with the current paradigm of international rule of law and European unity that was envisioned at the outset of the ECHR. The adversaries of the international rule of law utilise for the most part a reductionist understanding of democracy, where a majority can rule supreme without taking into account the rights and needs of minorities, nor the need for and tradition of societal institutions other than executive power.

In addition to the political challenge taking place in the public discourse, there is an increasing log of cases of non-compliance. The most tangible evidence of challenges to the court's normative power is the increasing number of delayed implementations or outright non-compliance with judgements from the ECtHR (Muižnieks 2016). While there are only a few famous cases of direct non-implementation of judgements (Abdelgawad 2008: 64) - including but not limited to *Sejdic and Finci v Bosnia and Herzegovina* 2009, *Hirst no 2 v UK* 2005, and *Cyprus v Turkey* 2014 - the high and increasing number of 'repetitive cases' – cases with very similar complaints in the same countries – indicate that structural problems have not been dealt with (Forst 2013: 1).

In 2016, two thirds of new cases were repetitive cases (ECtHR annual Report 2016: 15). In order to deal with the caseload caused by this, the court established the Pilot Judgement procedure in which it freezes repetitive cases, identifies the structural problems behind them, and advises the states on how to alleviate the problem (Factsheet Pilot Judgements 2016). While the official objective of the Pilot Judgement procedure is to assist the member states in solving systematic problems, the discourse that accompanied UK non-compliance in the *Hirst v UK* and *Greens v UK* cases is an indicator that some states may be choosing not to comply, rather than simply failing to comply.

Since the court relies on states to implement its judgements, a tendency for wilful non-compliance is a threat to the court's normative power and legitimacy. The most recent report from the Committee of Ministers suggest that while the ECtHR's challenge in regards to caseload appears to be easing, the number of repetitive cases keeps rising, and the payments of just satisfaction is not completed in 35 percent of cases, up from 29 percent in 2015 (10th Annual Report of the Committee of Ministers 2016: 9-10). At this point, it should be noted that there is a plethora of reasons for non-payment that do not necessarily indicate wilful non-compliance, including, but not limited to, difficulties locating recipients of just satisfaction.

Lastly, there is a challenge to the dynamic interpretation in academic and judicial discourse. These challenges utilise either a normative argument for subsidiarity, which comes with an understanding of democracy as opposed to human rights, or they rely on a pragmatic argument that the power of the ECtHR is challenged by non-compliance, and a greater use of the margin of appreciation doctrine and lesser use of the dynamic interpretation/emerging consensus doctrine could alleviate this.

In the following, I will present the ECtHR's interpretation doctrine in greater detail, followed by a review of the mainstream academic normative and pragmatic challenge, and finally adopt a critical view of these normative and pragmatic challenges.

The ECtHR's interpretation tradition

Since the power of the ECtHR to enforce its judgements relies on states adhering to its decisions with an expectation that other states also do so, it is a threat to the ECtHR when states fail to carry out its decisions. This is an argument for employing the subsidiarity principle in cases where there is a risk that the state might not comply. At the same time, the court will lose legitimacy and appear biased if it does not find in favour of the applicants in cases with clear human rights violations.

An example of this critique is the dissenting opinion of Judge Marcus Helmon in the Cyprus v Turkey case from 2001. Here the ECtHR had accepted the Turkish military courts (TRNCs) as domestic remedies – a decision Helmon thought would hurt the ECtHR’s legitimacy, “. . . it is a mistake of the court to accept the TRNC in Turkey as domestic remedies because they are clear unlawful practices that are not in accordance with international legal standards” (Judge Helmon’s party dissenting opinion, subtitle The European Convention on Human Rights, para 2)

The public discourse on what constitutes a clear human rights violation is changing over time. The Christine Goodwin v UK case from 1995 is one of the most famous cases of this. Goodwin was not the first transgendered person to challenge the state on her right to identification as another gender than the one assigned at birth, but the ECtHR reached a different judgement in her case than in previous ones (Rees v UK 1986, Cossey v UK 1990, Sheffield and Horsham v UK 1998). The interpretation took place in the light of recent social and legal developments in order to reach the decision that best ensured the purpose of the court established in the preamble. That is – maintain and further human rights in order to achieve greater European unity.

Thus, the ECtHR stated in the Goodwin case: “*The Court . . . attaches . . . importance . . . to the clear and uncontested evidence of a continuing international trend in favour not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals.*” (Christine Goodwin v UK 1995 para 85). The ECtHR could not have made this decision when it was first established in 1959 because the recognition that there is such a thing as a transgender person is more recent than that. The reasoning for having the dynamic interpretation is thus that the ECHR has to be adaptable for a changing world. Not only in terms of new protected groups or changing social structures, but also in more technological terms, such as including electronic communication in the scope of article 8 on privacy, or internet portals as freedom of the press within the scope of article 10 (Ahmet Yildirim v Turkey 2012, Times Newspapers Ltd v. the United Kingdom 2009).

The ECtHR’s dynamic interpretation tradition that has made the above-mentioned expansions of the scope of the ECHR possible relies on the Vienna Convention’s article 31, which states that treaties should be interpreted in the light of their object and purpose and taking into account its context including its preamble (Vienna Convention on the law of treaties 1969: Art. 31). The ECtHR’s expansive capabilities are however still subject to certain restraints, including commitment to the text, the margin of appreciation, and the emerging consensus doctrine (Dothan 2016: 515-516).

The margin of appreciation

One of the restraints on the dynamic interpretation tradition at the ECtHR is the margin of appreciation doctrine. The doctrine was developed early on in ECtHR case law, first with regards to derogation in times of emergency (Lawless v Ireland no 3 1961), and later in general (Belgian linguistics case no 2 1968 para 10 (Subheading: Interpretation adopted by the Court)). The margin of appreciation doctrine emerges from a host of pragmatic and normative assumptions:

1) There is a legitimate balancing act between the rights of the individual, and the interests of the community: “*The Court considers that the general aim set for themselves by the Contracting Parties through the medium of the European Convention on Human Rights, was to provide effective protection of fundamental human rights. . . The Convention therefore implies a just balance between the protection of the general interest of the Community and the respect due to fundamental human rights while attaching particular importance to the latter.*” (Belgian Linguistics case 1968: para 5 (Subheading: Interpretation adopted by the Court)).

2) Different communities may have different interests. This was considered in the A, B, and C v Ireland case (2010: para 185), where the prohibition of abortion was viewed in the case of the two first applicants as within the state’s margin of appreciation, because it was based in specific

religious and ethical values in Irish society and there was no Europe-wide common understanding of when life begins.

3) The margin of appreciation comes from an administrative consideration, where as a rule the ECtHR reviews procedure rather than facts. This is in part because the ECtHR is far removed from the situations it deals with, both in time and geography, and in part because the national courts are part of the ECtHR system and both can and should apply the rights directly. This was explored in the Handyside case, where the state argued for a wide margin of appreciation: “... *it is in no way the Court’s task to take the place of the competent national courts but rather to review under Article 10 (art. 10) the decisions they delivered in the exercise of their power of appreciation*” (Handyside v UK 1976: para 50).

Moreover, the margin of appreciation doctrine has a normative foundation in the principle of subsidiarity. Subsidiarity is the idea that decisions should be taken as close as possible to the people they affect, in part because the decisions can be better localised and in part because the decision-makers are closer by and can be subjected to local democratic control.

There is, however, a logical limit to the reach of the margin of appreciation in the ECtHR’s application. The principle cannot be used when the state has miscalculated the balance between the rights of the individual and the interests of society, when its cultural specificities cannot be reconciled with the protection of fundamental human rights and European standards, or if the domestic procedural protections are not in order. In the cases mentioned above it is thus important to note that in the Belgian linguistics case, the court did find in favour of the applicants, because while the state did have the margin of appreciation to weigh the rights of the individual against the interests of the community, it had granted too little weight to the individual. In the A, B, and C v Ireland case, the court found that while the state had a wide margin of appreciation in the case of applicants A and B, there was still a violation of applicant C’s rights under article 8, because her life had been endangered by the anti-abortion laws, and this was not within the margin.

Given the complexity of the principle and the risk of diminishing the ECtHR’s reach, why does it apply the margin of appreciation?

Practical

In terms of practicality, the ECtHR has employed the margin of appreciation to cases where access to facts is difficult to come by. In cases on the right to family life, the court has ruled that the state has a wide margin of appreciation in deciding on custody of children. The reasoning is that the state authorities are closer to the people concerned and thus know better. The court will review the procedural protection but not the material assessment in custody cases. When parental access is denied entirely, the interference is intensive enough that the state does not have a wide margin of appreciation (Sommerfeld v Germany 2003: para 63, 64 and 66).

Another practical reason is to battle the large backlog of cases at the ECtHR. At the Interlaken conference in 2010 the Council of Europe adopted an action plan for reducing the backlog that among other measures relied on the national implementation of the convention to be interpreted by domestic courts (Interlaken Declaration 2010: PP 6, (6), Action plan B.). The overall idea is that the ECtHR is swarmed with cases, but by invoking the margin of appreciation doctrine, the cases are referred back to the less burdened domestic courts, which are then in charge of applying the ECHR.

Pragmatic

The political or pragmatic reason for the margin of appreciation has to do with the nature of international law. Ultimately, the legitimacy of the ECtHR relies on the signatory states carrying

out its sentences, and when they do not, the ECtHR's soft power suffers. One of the things the states are supposed to gain from adhering to the court's decisions is that other states do the same.

In Bosnia and Herzegovina, where the constitution was found to be in violation of art 14 on discrimination in the *Sejdic-Finci* case (*Sejdic and Finci v Bosnia and Herzegovina* 2009), the ECtHR has more enforcement power because the EU has conditioned membership on compliance with the judgement. Positively, this helps to enforce judgement in a country where gaining the necessary majority in all chambers to change the constitution is difficult, but negatively, it can also create an unequal power dynamic between ratifying states that are subject to conditionality and those that are not. Potentially, this inequality could undermine the local perception of the ECHR's legitimacy in a similar way to the perception of the legitimacy of the EU conditionality in the accession process (Molbæk-Steensig 2015: 13-21). By referring cases back to domestic courts, the ECtHR avoids these threats to its legitimacy, although it must weigh this against the threat to its legitimacy that comes from not finding a violation of human rights in cases where it is necessary.

Normative

The normative reasoning for adhering to the subsidiarity principle in general and the margin of appreciation in particular is connected to both state sovereignty as an inherent quality, and to the issue of democratic mandate. The argument is that because state authorities in the form of parliament and government are democratically elected, and the judges of the ECtHR are not, the ECtHR should employ the principle of subsidiarity whenever possible. In addition, states with better democratic institutions should be granted a wider margin of appreciation than states that are still struggling (Christoffersen 2014: 82).

Moreover, a legalist argument is that the ECHR exists because the signatory states have conferred sovereignty to it through ratification. This means that the ECtHR cannot have any more power than has been conferred to it. This is a fundamentally dualist view of international law. It is the same principle the Danish Supreme Court established in the *Maastricht* case in 1998, where it determined that the Danish constitution does allow for transfer of sovereignty to the EU, but it does not allow for transfer of constitutional power, because it is the constitution that allows the transfer of sovereignty in the first place (UfR.1998.800.H). From this perspective, state sovereignty is the starting point, and thus international law and international treaties only apply to the extent that sovereignty has been conferred to them. This view may be in opposition to progressive interpretation mechanisms, because progressive interpretation can be seen as extending the court's reach after conferral of sovereignty. The reasoning does not grant human rights any fundamental quality different from international treaties on trade, borders or other agreements. This differs of course from monist understandings of international law, where the creation of states is an international endeavour which is why international law is necessarily above national law (Kelsen 1992[1934]:111).

Challenging the argument for subsidiarity in human rights application

There are several potential problems with the dualist view and normative reasoning for the principle of subsidiarity. First, human rights in the universal declaration, on which the convention is based according to its preamble, have a philosophical basis in an inherent human dignity (Universal declaration on Human Rights: Preamble). This notion gives human rights a special significance in international law and thus puts the individual ahead of the state; if not in general, then at least in the treaties and conventions themselves where it is also part of the letter of the law. Power politics, pragmatics, and practical limitations may prevent this, but that should be of no consequence in a normative discussion. The philosophical background for human rights in new natural law makes the individual the unit of analysis, and the principle of subsidiarity should rather be employed to protect the individual from abuse than to grant the state impunity: "[...] *even the authority of the*

states is justified on the basis that such powers benefit individual persons' interests better than alternative institutional structures." (Føllesdal 2013: 61)

Second, the political progression in international relations is moving towards an individual-based rather than a state-based morality. As an example of this, the responsibility to protect (R2P) doctrine agreed on at the UN summit in 2005 relies on the notion that states have a responsibility to protect their citizens from human rights abuses (2005 World Summit outcome document art. 138). And when they do not, the international community has a responsibility to intervene through collective action, peacefully when possible, but with force if necessary (art. 139). If we rely on an understanding of democracy as practically and normatively good because more people take part in the decisions and thus reduce the risk of errors and bad decisions that benefit only a minority, it is a relevant point that the R2P was endorsed by all UN member states, a large majority of which has democratic elections.

Third, and perhaps most importantly, while democracy represents greater numbers of the population than any other known system of government, it still has the pitfall of majoritarian abuse of minorities and individuals that human rights are specifically designed to correct. An understanding of democracy that does not include minority protection is reductionist, anti-pluralist, and prone to populist and majoritarian surges. Some groups, such as ethnic or sexual minorities have lesser influence over the political decisions whilst also being at risk of abuse. There are also groups which do not have the right to vote at all, including foreigners, children, and in some countries prisoners. These groups are very much affected by state decisions, in many cases more than members of the vote-carrying majority, but have no democratic influence; "... *Some may argue that foreigners and prisoners are properly excluded from the political process; but this does not mean that their rights can be freely abused.*" (Dothan 2016: 13).

Eyal Benvenisti has similarly argued in detail that a majoritarian/minority view should be applied to the margin of appreciation. A wide margin is thus appropriate when the policies affect the entire population, such as with restrictions on hate speech, but not when the policies affect only a minority: "*Majorities often monopolize political power with little more than half of the votes and thus use the democratic processes as means to secure their interests at the expense of the minority. In view of this inherent deficiency in the democratic system, national policies warrant no deference when minority rights and interests are implicated.*" (Benvenisti 1999: 847-849).

The emerging consensus doctrine

The emerging consensus doctrine can be viewed as a method for determining when the margin of appreciation doctrine can no longer be applied. The emerging consensus doctrine thus regulates when the ECtHR uses dynamic interpretation. It is intimately connected with the goal of European Unity and assumes that when there is an emerging consensus in Europe, the states are more likely to comply. This makes it possible for the ECtHR to suspend the margin of appreciation doctrine, and further human rights protection and collective enforcement as prescribed in the preamble.

Utilising comparative law as reasoning for improving conditions is neither an innovation by the ECtHR nor a particularly controversial methodology. States have been doing this before European integration by utilizing comparative law in the legislative process. For example, when Denmark adopted its first democratic constitution in 1849, it declared that this move was inspired by Norway's transition to democracy in 1814 (Fabricius Møller 2014: 540). When the constitution was amended in 1953 to include several new rights and organisational changes, but most importantly to lower the age of suffrage, the reasoning by then prominent law scholar Alf Ross, was that most other countries in Europe had lower age of suffrage, and therefore Denmark should too (Ross 1948: 5).

A potential issue with the emerging consensus doctrine is that it assumes a continuous movement in the European consensus towards more freedom rather than less, and towards greater European unity rather than disintegration (ECHR: preamble). While this assumption may be correct in the long run, the current negative discourses on the ECHR and ECtHR as presented in this article may challenge this in the short term. Furthermore, the notion of a movement towards European unity or the EU equivalent ‘an ever closer union’ appears threatened by Brexit and far right nationalism on the rise in Poland, Hungary, the Netherlands et cetera. With this in mind, it is relevant to review how the emerging consensus doctrine could fare in a climate where the consensus is not necessarily going towards expansion of the convention.

Progressive development in a time of regression

The ECHR has provisions in place to prevent abuse of rights. Article 17 prescribes that one person’s rights cannot be used to abuse another’s rights, nor the values of the ECHR, “*Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.*” (ECHR art. 17).

Article 17 is a testament to the creation of the ECHR as a response to the crimes against humanity committed during the Second World War. This has been used especially to limit the protection of free speech under article 10 to not include the right to hate speech and incitement to violence (Pavel Ivanov v Russia 2007: para 1, Garaudy v France 2003). Thus, both cases mentioned above denied the applicants the right to have their hate speech against a minority protected by the ECHR. In the Ivanov-case, the applicant sought to have his texts and speeches which portrayed the Jewish minority in Russia as an evil and incited violence against them protected under article 10, while the in the Garaudy-case the applicant sought to have holocaust-denial protected under article 10. Both cases were declared inadmissible.

Article 17 deals with a question that has been posed in constitutional law and theory on democracy long before the advent of the ECHR. Namely, should the rights and freedoms delivered by the constitution/democracy/human rights include the right to attempt to destroy those rights? Popularised in Nordic literature as whether a freedom should be “*For Loki as well as for Thor*” (Ross 1948: 17). The ECHR’s solution is a resounding ‘No’. The rights prescribed in the ECHR do not include the right to destroy the ECHR.

The convention also has article 53 to ensure that the convention cannot be used to diminish rights granted by other national or international law: “*Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a party.*” (ECHR art. 53).

In applicable law, this means that states cannot legislate to avoid adhering to the ECHR, but they can also not use the ECHR to violate rights already prescribed in their constitutions or other international obligations. In other words, there is no legal option to diminish rights in a political climate of regression or isolationism.

The Charter of fundamental rights for the European Union (EUC) has employed this interpretation of progressive human rights protection in its provision on the relationship between the EUC and the ECHR. The EUC allows itself to offer better protection for the individual than the ECHR, but never lesser: “*In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.*” (EUC art. 52(3)).

The above suggests that the ECtHR can ensure a progression towards better protection of the rights on the ECHR over time. However, it also raises a question: How can progression towards greater human rights protection be ensured in countries where the constitution does not include a provision similar to art 52(3) in the EUC?

ECHR's power states

The rights of the ECHR should be incorporated in the legislative process and its administration since the best protection of human rights is not to give remedy when they have already been violated, but to not have them violated in the first place. Furthermore, art. 13 of the convention establishes that the national authorities are to remedy if a right has been violated, and article 35 establishes that the ECtHR will not review cases that have not already exhausted domestic remedies. This means that on the judicial side, the states should also provide human rights protection themselves.

When ratifying the ECHR, states agree to ensure that their national legislation is compatible with it and its case law. The ECHR does not demand a specific way to ensure compliance with the convention as long as rights and freedoms are ensured. This means that incorporation of the text of the convention into domestic law is neither demanded, nor in itself sufficient (Caligiuri, Andrea & Nicola Napoletano 2010: 126).

Countries with newer constitutions often incorporate the convention as reference to a constitutional rule (Caligiuri, Andrea & Nicola Napoletano 2010: 129) – a solution similar to the provision in the EU Charter. However, from the ECHR's perspective this is no different from the Dutch solution of applying a monist approach to international law or the Danish solution of incorporating the convention into ordinary law (LBK nr 750 af 19/10/1998). The convention is considered ratified as long as the application of the convention by the legislative, executive, and judicial power ensures the rights; a EUC style constitutional provision is not necessary.

Conclusion

The dynamic interpretation tradition of the ECtHR is a more complex instrument than its political and academic critics would have us believe. It does not simply allow for 'judge-made law', but works through a complex relationship between the principle of subsidiarity made applicable through the margin of appreciation and the emerging consensus doctrine. It exists to further the movement towards European unity and collective enforcement of the rights as prescribed in the preamble, and with it the ECHR can deal with issues that did not exist or were unrecognised at the time of its creation, including both technological and social developments.

The critique of the dynamic interpretation relies on a notion that the ECtHR is an inherently non-democratic institution, because the judges are not democratically elected, and the ECtHR has the power to declare democratically created policies to be human rights violations. This critique is, however, based in a reductive understanding of democracy as majoritarian rule. Individual rights, both in terms of historic and domestic citizens' rights, and international human rights are designed exactly to alleviate the pitfall of majoritarian rule in democracy. It is therefore a feature of the dynamic interpretation doctrine that the margin of appreciation is appropriate in cases where the political decisions affect the entire population, but not when majoritarian rule abuses minorities. The *SAS v France* judgement from 2014 where the ECtHR ruled that it was within France's margin of appreciation to prohibit face-concealing clothing in public, although the prohibition affected almost exclusively a religious minority, appears to go against this principle that the margin of appreciation cannot be used when policies affect only a minority. The dissenting judges also noted this (*SAS v France* 2014: Dissenting opinion by judges Bussberger and Jäderblom para 20). Therefore, the use of the margin of appreciation doctrine in this case could be seen as a pragmatic use rather than a normative use.

In addition to the normative and legal arguments to consider, the ECtHR has to take its position of power into account. This is the pragmatic argument for the margin of appreciation. If the ECtHR makes judgements that are controversial enough in the member states that the member states do not enforce them, it threatens the power of the ECtHR, which relies on the expectation of state compliance. With the increasing number of events of non-compliance the ECtHR could well be taking this into account.

This pragmatic view of the margin of appreciation is, however, problematic since the ECtHR will also risk losing power if it does not consistently apply the ECHR or if it appears biased. The margin of appreciation doctrine is thus not a way for the ECtHR to lie low in a period of populist isolationism, and neither is a break with the dynamic interpretation doctrine, which has allowed the ECtHR to remain relevant and up to date with technological and societal developments.

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6. Human Rights in Global Value Chains

VANINA ECKERT

Advancing Human Rights in Global Value Chains: The French Legislation on Corporate Duty of Vigilance

Abstract

On 21 February 2017, the French Government enacted a legislation on corporate duty of vigilance, as a means of addressing human rights abuses arising from transnational companies' activities in France and in foreign countries where they operate. This legislation also aims at providing victims with effective access to remedies in these countries. Thanks to this legislation, France has been the first country to make human rights due diligence mandatory in accordance with the United Nations Guiding Principles. Although this standard is ambitious on many levels, the corporate duty of vigilance is the product of the long consultation process which makes it a compromise between conflicting corporate interests and victims' rights. Therefore, this paper starts by analysing the legislative process and political arguments that shaped the corporate duty of vigilance, and explains how it impacted its final framework and scope. It demonstrates that on the one hand, the holistic and extraterritorial dimension of the corporate duty of vigilance makes it an innovative standard covering most of human rights abuses occurring in global value chains. However, the disproportionate burden of proof on the claimant maintains a status quo for victims who still have limited access to redress, and the absence of a deterrent sanction maintains transnational corporations' impunity for human rights abuses resulting from their activities overseas. Therefore, the corporate duty of vigilance seems to have lost its practical value in the process and failed to fulfil its initial goals to address human rights abuses in global value chains and provide victims with effective remedies. However, this legislation should be seen as a first step towards businesses' responsibility to respect human rights wherever they operate. Indeed, the legislation on corporate duty of vigilance is just a first step for France that is expecting to gradually extend its scope, and initiate a movement among its European neighbours leading to a human right due diligence standard

at the European Union level.

Introduction

In April 2013, the collapse of the Rana Plaza building in Bangladesh, used in the production of clothes for large European and American brands, cost the lives of thousands of workers and left victims without any means of compensation¹. Following the incident, the French Government initiated a legislative proposal² aimed at addressing transnational corporations' impunity for human rights abuses occurring in their global value chains³. On 21 February 2017, the legislation on corporate duty of vigilance and so-called 'Rana Plaza legislation', was finally adopted by the French National Assembly, after four years of intense consultation⁴.

In its final version⁵, the legislation requires large French companies employing at least 5,000 persons in France, or at least 10,000 persons in France and abroad to set up and implement a so-called "vigilance plan"⁶. This vigilance plan should comprise reasonable vigilance measures aimed at identifying risks and preventing severe violations of human rights and fundamental freedoms, health or security risks, and environmental damage, arising throughout global value chains⁷. With the adoption of the legislation on corporate duty of vigilance, France is the first country in the world to make human rights due diligence mandatory, and integrate the United Nations Guiding Principles on Business and Human Rights (UNGPs)⁸ into its domestic legal framework. It provides a legally binding value to businesses' obligation to respect human rights (Pillar II of the UNGPs)⁹ in accordance with France's own obligation to protect human rights (Pillar I of the UNGPs)¹⁰, while providing victims of business-related human rights abuses with the legal means to access remedies (Pillar III of the UNGPs)¹¹. However, during the legislative process, the draft law faced criticism by representatives of both companies and civil society organizations. Seen as a disproportionate burden for French companies or as an insufficient commitment to protecting victims of economic crimes by others, the draft law became hostage to opposing groups of stakeholders threatening its final adoption¹².

Therefore, we can wonder whether the current French legislation on corporate duty of vigilance provides a useful basis for effectively addressing human rights abuses committed throughout global

¹Business and Human Rights Resource Centre, *Auchan Lawsuit (re garment factories in Bangladesh)* (August 27, 2014) <<http://business-humanrights.org/en/auchan-lawsuit-re-garment-factories-in-bangladesh>>.

²Proposition de loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre [Draft law on the duty of vigilance for parent and ordering companies] 2013 (Assemblée Nationale [French National Assembly]) 1524.

³United Nations, 'The corporate responsibility to respect human rights: An Interpretive Guide' (2012), p.8: "A business enterprise's value chain encompasses the activities that convert input into output by adding value. It includes entities with which it has a direct or indirect business relationship and which either (a) supply products or services that contribute to the enterprise's own products or services, or (b) receive products or services from the enterprise."

⁴Proposition de loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre, texte définitif [Draft law on the duty of vigilance for parent and ordering companies, final text] 2017 (Assemblée Nationale [French National Assembly]), 924.

⁵This paper will mainly analyze the law on corporate duty of vigilance as in its final version adopted by the National Assembly on 21 February 2017, prior to review by the Constitutional Court: See 4, Draft law, n. 924 (2017).

⁶See 4, Draft law n. 924 (2017), Article L.225-102-4.-I.

⁷See 4, Draft law n.924 (2017), Article L.225-102-4.-I.

⁸United Nations, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' (2011) [UNGP].

⁹See note 8, UNGP (2011), Pillar I, pp. 3-4.

¹⁰See note 8, UNGP (2011), Pillar II, pp. 13-16.

¹¹See note 8, UNGP (2011), Pillar III, pp. 27-28.

¹²More information at: Vanina Eckert, *The French Attempt to Legalize Human Rights Due Diligence: Is France Leading the European Union in Business and Human Rights?*, October 2016, Lund University Publications Student Papers, <<http://lup.lub.lu.se/student-papers/record/8893265>>, 4.1, p.26-33.

value chains, or whether it lost its practical legal value in the process.

First, this paper will highlight that despite the genesis of the corporate duty of vigilance being slow and chaotic, the final adoption of this ambitious law has been a symbolic step forward in advancing human rights in global value chains (I). Second, it will argue that despite its high moral value, the effects of the corporate duty of vigilance may be limited in practice (II).

I. The Slow Genesis of an Ambitious Corporate Duty of Vigilance

The draft law on corporate duty of vigilance has faced many obstacles on its journey towards its final adoption. Therefore, it is fundamental to be aware of the context and consultation process under which the duty of vigilance was created (A), in order to understand the whole dimension and framework of this innovative standard (B).

A. The Product of a Long Consultation Process

In June 2013, France launched a “CSR Platform” aimed at developing a large consultation process involving representatives of businesses, trade unions, civil society organizations, and public institutions, to build a pro-active, in-depth business and human rights plan¹³. In this context, the left-wing parties within the National Assembly initiated a draft law¹⁴ with a wide duty of vigilance for French companies, and a mechanism of presumption of liability in favor of victims. This mechanism was very innovative as in case of damage, the company was presumed to have committed a fault. The burden of proof was not on the claimant to prove the company’s liability, but on the company to prove its innocence by showing that it had set up and effectively implemented a vigilance plan to prevent adverse impacts on human rights. However, this first version of the duty of vigilance was deemed imprecise and dangerous for businesses, with a risk of unlimited liability, and it failed to be adopted by the National Assembly in 2013¹⁵. The corporate duty of vigilance was jeopardized by a divided National Assembly, where right-wing Members of Parliament representing corporate interests tried to limit the scope of the duty and weaken corporate responsibility, while socialist, ecologist, communist and some far-right Members of Parliament in favor of workers’ rights and business regulation, focused on extending its scope and reducing victims’ burden of proof¹⁶. Therefore, the corporate duty of vigilance’s first ambitions had to be lowered and the draft law redesigned in order to find a compromise between conflicting interests of companies and victims and, in 2015, the National Assembly agreed on a classical fault-based corporate liability with the burden of proof on victims¹⁷. Subsequently, the draft law faced strong rejection by the Senate, whose right-wing majority was strongly opposed to imposing another duty on the private sector¹⁸. The Senate tried to

¹³France Diplomatie, L’Europe, les droits de l’Homme et les entreprises [Europe, human rights and businesses] (July 31, 2015) <<http://www.diplomatie.gouv.fr/fr/politique-etrangere-de-la-france/diplomatie-economique-et-commerce-exterieur/peser-sur-le-cadre-de-regulation-europeen-et-international-dans-le-sens-de-nos/focus-l-engagement-de-la-france-pour-la-responsabilite-sociale-des-entreprises/l-union-europeenne-et-la-rse/article/l-europe-les-droits-de-l-homme-et-les-entreprises>>.

¹⁴See 2, Draft law n. 1524 (2013).

¹⁵Assemblée Nationale [French National Assembly], 14th legislature, Report n. 2628, March 11, 2015 (Potier, Dominique), II. B. 2 and 3, p.32-34.

¹⁶For more information about the obstacles and political arguments shaping the corporate duty of vigilance draft law: See 12, Vanina Eckert, 2016, 4.1, p.26-33.

¹⁷Proposition de loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d’ordre adoptée par l’Assemblée Nationale en première lecture [Draft law on the duty of vigilance for parent and ordering companies adopted by the National Assembly in the first reading] 2015 (Assemblée Nationale [French National Assembly]) 501. More details on the framework of the draft law in section I.B. below.

¹⁸Proposition de loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d’ordre texte rejeté par le Sénat [Draft law on the duty of vigilance for parent and ordering companies text rejected by the Senate] 2015 (Sénat [French Senate]) n.40. Sénat [French Senate], Ordinary session of 2015-2016, Report n.74, October 14, 2015 (Frassa, Christophe-André), p.34-37.

issue a “preliminary motion” aimed at blocking the legislative process within the French Parliament until the European Union could take further legal initiatives on the matter¹⁹. This motion was strongly criticized by other Members of Parliament and was abandoned by the Senate²⁰. In 2016, the Senate tried to replace the duty of vigilance with a non-financial reporting obligation, similar to that of the EU Directive 2014/95/EU²¹. This version of the draft law would in effect have duplicated an obligation that has existed under French law since 2001²², and would have limited companies’ duties to a simple disclosure of their vigilance plan, without any requirement of implementation or effects²³. As the National Assembly and the Senate failed to reach an agreement on the terms of the draft law, the last word was given to the National Assembly²⁴, which finally adopted the fault-based liability version of the corporate duty of vigilance on 21 February 2017²⁵.

As such, it took four years for the corporate duty of vigilance to emerge from this long and difficult path towards a compromise solution. From a very ambitious mechanism with a presumption of corporate liability, through a simple non-financial reporting obligation, to a classical fault-based liability, the duty of vigilance has been stretched and redesigned in order to improve victims’ rights without overloading businesses. Therefore, it is important to keep in mind the context and the process under which the duty of vigilance was forged, to fully understand the current framework and scope of this innovative standard (B).

B. An innovative standard with a holistic and extraterritorial scope

Contrary to other European human rights due diligence standards (e.g. the Modern Slavery Act in the United Kingdom), the corporate duty of vigilance is the first human rights due diligence legal standard with a holistic and extraterritorial scope.

Indeed, it covers most business and human rights issues, without distinction between types of companies, types of damage or rights violated. As such, it applies to any company employing at least 5,000 persons, including their direct or indirect subsidiaries located in France, or those employing at least 10,000 persons including their direct or indirect subsidiaries located in France and abroad. Furthermore, the vigilance plan comprises the reasonable vigilance measures aimed at identifying risks, and preventing severe violations of all human rights and fundamental freedoms without distinction, as well as health or security risks, and environmental damage²⁶. The duty of vigilance is derived from classical French civil law reasoning, aimed at covering all kinds of damage. However, to ensure that companies do not have unlimited liability, the latest version of the draft law includes a list of measures that companies are expected to implement, such as risk assessments including

¹⁹Sénat [French Senate], Règlement du Sénat et instruction générale du bureau [Regulation of the Senate and general instructions of the office], Article 44, para.4, <http://www.senat.fr/reglement/reglement_mono.html#toc123>.

²⁰Sénat [French Senate], Ordinary session of 2015-2016, Report n.74, October 14, 2015 (Frassa, Christophe-André), p.37-52. Assemblée Nationale [French National Assembly], 14th legislature, Report n.3582, March 16, 2016 (Potier, Dominique), p.6.

²¹Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups 2014 (OJ L 330, 15.11.2014, p. 1–9).

²²Law n.2001-420 of May 15, 2001 JORF [Official Gazette of France] n.113 of May 16, 2001 p.7776, text n. 2, Article 116 creating a new Article L225-102-1 in the French Commercial Code.

²³Proposition de loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d’ordre [Draft law on the duty of vigilance for parent and ordering companies text] 13 October 2016 (Sénat [French Senate]) TA n.1.

²⁴See the French legislative process with the last word given to the National Assembly in case of failure to find an agreement between the National Assembly and the Senate: Sénat [French Senate], Proposition de loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d’ordre: Les étapes de la discussion [Draft law on the duty of vigilance for parent and ordering companies: the steps of the legislative procedure] <<http://www.senat.fr/dossier-legislatif/ppl14-376.html>>.

²⁵See 4, Draft law n.924 (2017).

²⁶See 4, Draft law n.924 (2017), Article L.225-102-4.-I.

mapping and mitigation processes, auditing, whistle-blower mechanisms, follow-ups, and reviews²⁷.

Furthermore, one of the most innovative aspects of the corporate duty of vigilance is that the vigilance plan should not only cover potential or actual negative impacts resulting from the company's own activities. It should also include impacts resulting from the activities of directly or indirectly controlled companies, and the subcontractors and suppliers with which it maintains an 'established commercial relationship'²⁸. Therefore, in case damages occur abroad within a French company's global value chain, victims are entitled to seek remedies in France, where the judge has extraterritorial jurisdiction to prosecute the French company for the adverse impacts of its subsidiaries and subcontractors. This new feature is very innovative, as it allows judges to overcome the legal barriers created by the principle of autonomy²⁹, which traditionally grants legal autonomy to each legal entity and prevents controlling companies from being held liable for another company's actions. Under the final draft law, if there is evidence that the company has not set up or effectively implemented its vigilance plan, it may receive a formal notice and a judicial injunction to fulfil its obligations and prevent further damage. If the company refuses to comply with its duty of vigilance or the judicial injunction, it may be held liable and be ordered to pay compensation to victims³⁰. Under the final draft law, it could also be sanctioned with a civil fine of up to 10 million euros³¹, with a possible multiplication by up to three (30 million euros) depending on the circumstances and the severity of the violation³².

Thus, the draft law on duty of vigilance opened a new era for mandatory human rights due diligence, covering all potential human rights abuses occurring in global value chains, and extending extraterritorially, in line with the UNGPs. However, if the corporate duty of vigilance is ambitious and innovative in theory, a more-in-depth study of its framework highlights that its effects may be limited in practice (II).

II. The Limited Practical Effects of the Corporate Duty of Vigilance

Contrary to the 2013 version of the duty of vigilance with a presumption of liability in favor of victims, the final version of the corporate duty of vigilance may have limited practical effects for victims. Indeed, the high burden of proof on the claimant still constitutes a barrier to victims' access to remedies (A). Furthermore, the fine, which was a deterrent and symbolic sanction in case of corporate liability, had to be abandoned on the grounds that it was unconstitutional (B).

A. A Disproportionate Burden of Proof on Victims

The last version of the duty of vigilance set up a high burden of proof on the victim. Indeed, to hold a company liable, the claimant will have to prove three elements: (1) the fact that the company committed a fault by not setting up and effectively implementing its vigilance plan; (2) that damage(s) occurred; and (3) causality, i.e. the link between the fault and damage(s). However, it is very unlikely that victims working for a subsidiary or subcontractor in a developing country would have the means and capability to investigate or access the French parent or ordering company's records to prove that it did not have a vigilance plan. As mentioned previously, this capability gap was initially addressed by the 2013 draft law, which provided for a presumption of fault laying the burden of proof on the company, but this mechanism was replaced by a classical fault-based liability in the 2015 version of the draft law. Moreover, the link between the fault and the damage(s)

²⁷See 4, Draft law n.924 (2017), Article L.225-102-4.-I, 1-5.

²⁸See 4, Draft law n.924 (2017), Article L.225-102-4.-I.

²⁹Code civil [French Civil Code], (2016), Article 1842

³⁰See 4, Draft law n.924 (2017), Article L.225-102-5.

³¹See 4, Draft law n.924 (2017), Article L.225-102-4.-II.

³²See 12, Vanina Eckert, 2016, 4.2, p.36-50.

is a difficult element to prove for claimants and constitutes an additional limitation on a company's liability and victims' access to remedies. Thus, for French civil society organizations, the latest version of the duty of vigilance is just an "upgraded non-financial reporting obligation", as its effects are limited to a corporate duty to disclose vigilance procedures, without effective liability in case it failed to implement them³³.

Finally, the draft law also has limited effects since the burden of proof concerning the extraterritorial application of the law and extraterritorial jurisdiction of the French judge remains on the victims. Indeed, in case damage(s) occurred in relation to the activities of a French company's subsidiary or subcontractor located abroad, the person bringing a claim before a French court or tribunal will have to provide evidence that there is a close connection between the activities of the foreign subsidiary or subcontractor, and the French company³⁴. The claimant will have to prove that the French company directly or indirectly controlled the entity responsible for the damage(s), or that they maintained sustainable commercial relationships, justifying that the vigilance plan should have covered the risks arising from this entity's activities. Moreover, in order to ensure that the French law on corporate duty of vigilance prevails over the law of the jurisdiction where the damage(s) occurred, the claimant will have to prove that it is clear from the circumstances of the case that the abuse is manifestly more closely connected with France³⁵. The claimant can do so by referring to orders and directives from French company to the entity under its control (or its supplier) before the damage(s) occurred³⁶.

Therefore, the burden of proof on the claimant seems to be disproportionate in regard to his/her means and resources in comparison to a transnational corporation. For many stakeholders, this law of symbolic value appears more like an illusion reinforcing the status quo for victims' limited access to remedies more than it addresses it³⁷. Furthermore, the high financial sanction, which was one of the key elements of the mandatory corporate duty of vigilance, had to be removed from the legislation on the grounds that it was unconstitutional (B).

B. A Deterrent Fine Sanctioned by the Constitutional Court

Two days after the final adoption of the draft law, the opponents of the corporate duty of vigilance challenged its constitutionality before the French Constitutional Court. They argued that the new duty of vigilance was contrary to the freedom of entrepreneurship³⁸, as it forced companies to disclose confidential information³⁹, and violated the principle of legality⁴⁰, as the imprecise framework of the duty did not allow companies to foresee their liability⁴¹. On 23 March, the French Constitutional Court decided that the draft law on corporate duty of vigilance did not violate the freedom of entrepreneurship⁴², but found that it was partially unconstitutional as contrary to the

³³Cossart, Sandra and Marie-Laure Guislain, 'Le devoir de vigilance pour les entreprises multinationales, un impératif juridique pour une économie durable, Pourquoi le raisonnement juridique ne peut pas constituer un obstacle aux choix politiques [The duty of vigilance for multinationals, a legal imperative for a sustainable economy, Why the legal reasoning cannot constitute an obstacle to the political choices]' [75] (2015) RLDA 2015/104 Revue Lamy Droit des Affaires Repères n. 5587, p.77. See 12, Vanina Eckert, 2016, 4.3.2, p.56-57.

³⁴Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters 2012 (OJ L 351, 20.12.2012, p. 1–32), Article 8.1.

³⁵Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) 2007 (OJ L 199, 31.7.2007), Article 4.3.

³⁶More information on the extraterritorial dimension of the law at: See 12, Vanina Eckert, 2016, 4.2.1.3, p.42-46.

³⁷See 33, Cossart, Sandra and Marie-Laure Guislain, 2015, p.77.

³⁸Declaration des Droits de l'Homme et du Citoyen [Declaration on the Right of Man and Citizen] 1789, Article 4.

³⁹Conseil Constitutionnel [French Constitutional Council], decision no. 2017-750 DC, March 23, 2017, para. 15.

⁴⁰Declaration des Droits de l'Homme et du Citoyen [Declaration on the Right of Man and Citizen] 1789, Article 8.

⁴¹See 39, French Constitutional Council, 2017, para. 5.

⁴²No violation of freedom of entrepreneurship because its limitations were not disproportionate in regard to the general interest it served, and because the duty of vigilance do not impose on companies to disclose confidential information

principle of legality⁴³.

The Constitutional Court decided that the corporate duty of vigilance was too general and imprecise to justify a heavy sanction, such as a 10 million euros fine⁴⁴. Indeed, according to the constitutional judges, the concept of “reasonable measures of vigilance”, as well as the specific measures listed in the first article of the draft law⁴⁵, are not clearly defined and are too broad for companies to precisely know what their duties are⁴⁶. The fact that these measures can be framed later by a decree does not make it less uncertain for companies. Moreover, the corporate duty of vigilance embraces potential violations of all human rights and freedoms without distinction⁴⁷. These violations can arise from activities of all business partners, which comprises all entities directly or indirectly controlled by the main company, and all the subcontractors and suppliers with whom it “maintains sustainable commercial relationships”⁴⁸. However, this notion of “sustainable commercial relationships” comes with no definition in the draft law, and does not distinguish between companies’ size, activities, or sector⁴⁹. Finally, the draft law did not specify whether the fine would apply to each violation or as a blanket sanction covering multiple violations.

Thus, the 10 million euro fine was deemed too high and incompatible with the holistic and general dimension of the corporate duty of vigilance according to the principle of legality. This sanction, which was the symbolic and deterrent element of the corporate duty of vigilance, was considered unconstitutional and was removed from the text of the draft law. As a consequence, the draft law on corporate duty of vigilance was finally enacted on 28 March 2017, without any guidance on how liable companies should be sanctioned⁵⁰.

Conclusion

This paper shows that the framework and scope of the corporate duty of vigilance is the product of a long path towards a compromise between the protection of victims’ rights and corporate interests. On the one hand, its holistic and extraterritorial dimension makes the corporate duty of vigilance an innovative and ambitious standard, aimed at covering most of the human rights abuses resulting from transnational corporations’ activities in France and overseas. On the other hand, the disproportionate burden of proof on the claimant maintains a status quo for victims who still have a limited access to remedies. The absence of a deterrent sanction once a company is held liable also strengthens transnational corporations’ impunity for human rights violations resulting from the activities of their subsidiaries and subcontractors abroad. Also ironic is the fact that following its entry into force, the so-called ‘Rana Plaza legislation’ only covers 125 companies falling over the threshold of 5,000 employees in France or 10, 000 employees in France and abroad, and excludes from its scope the companies involved in the Rana Plaza incident. Therefore, if the duty of vigilance is a theoretically ambitious standard, it seems to have lost its practical value in the process, and to have failed to fulfil its initial goals of combating transnational corporations’ impunity and improving victims’ access to remedies.

However, this law also constitutes the new basis for further development towards corporate liability for human rights violations occurring throughout global value chains. Although the corporate duty of vigilance has a limited practical value, it constitutes a symbolic step forward for mandatory human rights due diligence in line with the UNGPs. Furthermore, the corporate duty of vigilance is

about their industrial and commercial strategy: See 39, French Constitutional Council, 2017, para.15-19.

⁴³See 39, French Constitutional Council, 2017, para.5-13.

⁴⁴See 39, French Constitutional Council, 2017, para.13.

⁴⁵See 4, Draft law n.924 (2017), Article L.225-102-4.-I, 1-5.

⁴⁶See 39, French Constitutional Council, 2017, para.9.

⁴⁷See 39, French Constitutional Council, 2017, para.10.

⁴⁸See 4, Draft law n.924 (2017), Article L.225-102-4.-I.

⁴⁹See 39, French Constitutional Council, 2017, para.11

⁵⁰Act n.2017-399 of March 23, 2017 JORF [Official Gazette of France] n.0074 March 28, 2017, text n. 1

only a first experience standard intended to be gradually extended to a larger number of companies in the long term, following the example of the non-financial reporting obligation created in France in 2001⁵¹. Moreover, it is also judges' role to develop jurisprudence in this young field, and extend the practical effects of the corporate duty of vigilance by applying an expansive original intent-based method of interpretation in line with the initial spirit of the legislation. The duty of vigilance also establishes a precedent aimed at catalysing similar initiatives among other European countries. While working on the final adoption of the legislation on corporate duty of vigilance, France has intensified its lobbying efforts to encourage initiatives to make human rights due diligence mandatory at the EU level⁵². By doing so, France is expecting to recall the precedent of the non-financial reporting obligation - which was adopted in 2001 within the French Parliament⁵³ and became an EU Directive more than a decade later⁵⁴ - and impose itself as a forerunner for business and human rights in Europe⁵⁵.

⁵¹ See 12, Vanina Eckert, 2016, 5.1.2, p.62-64.

⁵² Read about Daniel Auroi's Green Card to the European Commission on 18th May 2016 and France's lobbying efforts for mandatory human rights due diligence in the EU at : See 12, Vanina Eckert, 2016, 5.2.2., p.68-69.

⁵³ Law n.2001-420 of May 15, 2001 JORF [Official Gazette of France] n.113 of May 16, 2001 p.7776, text n. 2, Article 116 creating a new Article L225-102-1 in the French Commercial Code.

⁵⁴ Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups 2014 (OJ L 330, 15.11.2014, p. 1-9). Read more at: See 12, Vanina Eckert, 2016, 5.1.2, p.62-65.

⁵⁵ See 12, Vanina Eckert, 2016, 5., p.58-69.

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Author Biography

Vanina Eckert holds a Master's degree in International Human Rights Law from Lund University (Sweden). She specialized in 'business and human rights' and wrote her Master's thesis on the French legislation on corporate duty of vigilance, which inspired her paper. She has professional experience in capacity building and project management from diverse governmental and intergovernmental organizations, among which the Danish Institute for Human Rights, the United Nations Global Compact, and the Council of Europe. She is now working in Conakry (Guinea) for the NGO Coginta as the operational, administrative and financial coordinator of the SEFED programme aimed at monitoring and evaluating the 10th European Development Fund projects in the Republic of Guinea.

7. Interview: Homo-nationalism

MICHAEL NEBELING PETERSEN, ALEXANDER BREUM ANDERSSON

Homo-nationalism: Internal and external boundary drawing

Interview with Michael Nebeling Petersen, Associate Professor, PhD at Department for the Study of Culture, University of Southern Denmark. Interviewer: Alexander Breum Andersson, MSc in Public Administration from Roskilde University, co-founder of Think Rights and former editor at The Universal. Currently head of section at the Ministry of Foreign Affairs of Denmark

Alexander: Would you like to tell me a little bit about the general idea of your research on homo-nationalism?

Michael: What I found very interesting when I started doing research on homosexual rights and homosexual identity, and also what really intrigued me while I did my research, was the shift that has happened during the last 20 years in the ways homosexuality or gay people are framed in political discourses and in popular culture. I started my research around 2010, about ten years after 9/11 and after the government of Anders Fogh (during which there was a lot of regulation regarding LGBT rights, especially related to homosexual rights). I was interested in this new framing of gay rights. So, one of the first analysis I made was to compare or to juxtapose the political parliamentary proceedings in the late 1980s about registered partnership to the parliamentary proceedings in the 2000s about equality between registered partnership and straight marriage. In the 2000s, there was a big change from the way in which homosexuality was spoken about in the discussions and in the parliamentary proceedings about registered partnership in the 1980s. In the 1980s, homosexuals, and especially homosexual men, were framed as some poor, sick persons whom the state should take care of. Though this was a period where there was a big focus on and fear of AIDS, it still struck me that the ways in which people talked about homosexuality was for contemporary eyes or

ears a very homophobic discourse. Registered partnership was introduced as law under the promise, and with politicians repeatedly stating, that registered partnership was in no way equal to making a family or entering marriage. Many politicians were really afraid that the introduction of registered partnership would damage Denmark's reputation within the Nordic countries and Europe. So one of the rules that were introduced required that both partners were Danish citizens or had lived in Denmark for two years, so people wouldn't come and get married in Denmark. When you compare this to the discussions and the parliamentary proceedings in the 2000s it was quite a different frame. Firstly, there were around 1-3 legislative proposals a year from 2000 and up to 2013, meaning that the topic was present on the political agenda. And secondly, what really was the big change was that the perception of the homosexual person changed from being seen as a poor thing, to being seen as a person who could and should have rights: A citizen. However, it was really hard to pass the legislation because the right wing government and The Danish People's Party (Dansk Folkeparti) opposed to a lot of the proposals. But slowly in the beginning and increasingly over the years, these questions were framed differently in relation to the question of nationality. Gay rights became increasingly related to Danish values, as something that we in Denmark should be proud of. This nationalist framing of homosexual rights is of course used by the left wing parties proposing the law. But it is also used by the parties who are not in favor. They will state something like "in Denmark everyone has the right to live according to the sexuality they want to, and we should be proud of that, as this is something that is really special to Denmark", but still they oppose it for some reason. The discussion of gay rights in Denmark was part of three different kinds of law complexes; the discussions about lesbians and single women's access to medically assisted reproduction, the legislation about adoption and the legislation about gay marriage. And in all three we have all these different proposals so that we have almost a proposal about each of these legal issues every year. It became harder and harder for those who opposed gay rights to find good arguments because if it was a special Danish value that homosexuals were full citizens, then why should they not have the same rights? So in the end, apart from the very Christian spokespersons from The Danish People's Party, it became harder and harder for them to find any good arguments to oppose these changes in legislation. So these very Christian members like Langballe and Krarup¹ became the only ones who held on to the idea that it is a Danish value that the family is a man and a woman and that it has been like that forever. The rest ended up in these legal-bureaucratic arguments that it would be so difficult to change this law because then we have to change The Children's Law, the adoption law and we have to make collateral agreements and we cannot manage it. In the end, in all three discussions – lesbian and single women's access to medically assisted reproduction, foreign child adoption and marriage – the laws were passed because of minority votes in Venstre and Konservative Party. So a big change in perception became evident during the 2000s when homosexuals stopped being seen as a poor, sick person to become a full citizen who should have rights.

And then, there is a different framing of the nation state's relation to homosexuality. It is no new thing that the nation state builds its own story also in relation to its citizens' relationship to sexuality. But it seems that homosexuality went from being something that was not Danish, to becoming a core Danish value in these discussions. And you see similar things happening in The Netherlands, in Germany, in the US in different ways. I interpret this new framing of the homosexual within the nation as related to or somehow reflecting the new political order starting in the 1990s, but being fixed even more by 9/11. In the late 1990s there was a rise of anti-immigration rhetoric in Europe and from 9/11, a new global geopolitical order. So within Bush' rhetoric there were "those who are with us and those who are against us", meaning that those who are against us are not in favor of democracy, the free and modern world, and they are also traditionalist and religious fundamentalist. And this new global structure and its ideology seem to relate to how the

¹Jesper Langballe and Søren Krarup, former members of Parliament for The Danish People's Party (ed.)

nation state embeds homosexuality. By using homosexuality you can juxtapose the nation against those who are then framed as being not in favor of homosexuality. Homosexual figures were a symbol of modernism and urbanism and progress, new ways of doing family, new ways of being a human, new ways of organizing aesthetics and stuff like that. So the homosexual figure becomes this symbol of modernism which then works to frame the Danish state as more modern, but at the same time it reflects an image of this imaginary or real enemy who does not favor homosexuality. So homosexuality became this demarcating figure between the nation and the nation's "Other".

Alexander: And the "Other" being the Muslim World at the time?

Michael: Yes, the "Other" being what we termed "the Muslim World". So these kinds of political constructions and these kinds of imageries of the political construction are also producing fixed imageries of the nation. This is a more orientalist understanding producing "the Other" or "the Muslim World" as an idea. And it became quite obvious that homosexuality was used as a demarcating figure in the 2000s if you look at different ways the homosexual emerge in relation to the state's material about immigration. For instance if a person applies for Danish citizenship or permanent residency he or she needs to take a test to pass not only Danish language, but also Danish culture and Danish ideas. And as part of this test the Ministry of Immigration gives out this DVD where people can learn about Danish values, Danish democracy, Danish history, whatever, and in this video – I think it was introduced in 2010 in Denmark and a little earlier in Holland – you put in homosexuality as something that the immigrant has to learn in order to become Danish and learn about Danish culture. In the Danish video you see two gay men walking into a gay bar holding hands and discussing life and it's very calm. But what is really interesting is that the voice over assumes that the listener, who is the immigrant, has never heard about homosexuality before. And if he or she has heard about it, then he or she definitely opposes it. So you have this very heteronormative understanding of the immigrant as always already heterosexual and supposedly homophobic. And then on the other hand there is the construction of Danishness in which homosexual people can hold hands. Since it was just before the introduction of same sex marriage, they couldn't say that homosexual people could get married, but they could get registered, which is almost the same as marriage. In this way homosexuality becomes this demarcating figure. On the one hand it becomes the symbol of what Danishness is, and what Danishness is not on the other. So there is Danishness understood as homosexuality quite literally embedded within Denmark (and not as in the 1980s when homosexuality was embedded outside Denmark, as something that wasn't in the core of Denmark). Secondly, it becomes something that the immigrant has to accept in order to become Danish. So in order to become a full Dane and citizen you have to like gay people. You see the same in Germany where this kind of figure of course also emerges or pops up within different kinds of political framing and rhetoric.

Alexander: I think it is very interesting – the idea of this being a part of whichever geopolitical structures which are in the world at the time. Because I still think we are experiencing in the current political discourse that the whole figure of Danishness and Muslim immigrant is something where homosexuality is Danish, while Muslim immigrant communities are framed as homophobic. And therefore we need to teach immigrants to respect certain rights in order for them to become Danish. But at the same time we have seen sort of the same figure in regards to Christian countries in Sub-Saharan Africa and Russia, for example, which does not have anything to do with the relation between Christianity and Islam.

Michael: Yes, I don't think it's about Muslimness or Danishness or democracy or something like that. I think it's a question of political framing, just like the case with Sub-Saharan African

countries and Denmark, which then portrays or reflects an understanding of these countries as traditional, in Danish political discourse you would often say "medieval" and Denmark is modern. And you can say the same about Russia, right? And in many of these countries being gay-friendly is then turned into a question of being pro-West, so here is kind of the flipside of the coin, where countries use the gay figure as something that marks what is outside of the nation as something that the nation should not respect. So the homosexual figure becomes a symbol or a way of doing nation building.

Alexander: That's very interesting, because that might also explain why this hasn't been used to divide for example Denmark and the United States although we actually have a fairly big difference in the level of protection of gay rights and that gay people in the United States have actually been fighting to get some of the same rights that we have here, but we haven't used it in the same way.

Michael: I think to some extent there is this global North-West discourse which relates West-European countries to the US as some kind of alliance. I have been analyzing the rhetoric in Denmark and in Norway, and in these rhetoric is found what I and some co-researchers have tried to think of as this kind of exceptionalist logic, in which Denmark and in Norway have this little, little fragile democracy and that proves to be the frontier of the world in relation to gay rights. So in Denmark there seems to be this logical coherence between gay rights, rights of abortion, women's rights and pornography. So, in the Danish discussions you hear people say something like "Denmark was the first to introduce free visual porn, the first really early on to legalize abortion, in the forefront with women's rights, in the forefront with gay rights and the first to introduce registered partnership". So this is a very special unique country, right? And we're kind of caught between the South and the power of the traditionalist religious US, the puritanical US, where you can't show your boobs on Facebook or whatever. This kind of exceptionalist discourse creates a kind of state of emergency. So you have to really protect this fragile highly modern democracy. And this I wouldn't say one-to-one justifies, but kind of works as an argument to legitimize the closing of Denmark to immigrants, to promote the national identity because it's so fragile, because it's very exceptional in the world, because there is this push from both the US and the South. And I think in political debates the logic is very much against the Muslim world and to a lesser extend the African and the Russian world, and to an even lesser extend the US. But you have this kind of nation building in relation to these different kinds of otherness, including the US.

Alexander: If I can stop you at nation building and go on to Europe. Because Europe is very much something we are building as well in terms of identities and in terms of structures and everything else. Do you think that gay rights play a role in that construction too and in what way?

Michael: I don't know enough about European identity... But what strikes me is that it seems to divide – at least in a Danish imagery – what is understood as West European countries and East European countries. So if you look at a country like Poland and the Catholic and pro-family dominant rhetoric in Poland, it's very hard to be a queer family or person. And it seems like these pro-family formations are related to opposing the integration into EU. So kind of a level up of national identity as opposing to Europe, which came to oppose a lot of things, but also included an increased class-difference or stratification of the Polish society. And in Denmark there is a discourse of Eastern Europeans as being more backwards than the West Europeans and you have the same kind of logic with the gay figure as being something that opposes that. So in that way I see how the gay figure plays into Western/Eastern national identities. But at the same time I think it's much more complicated. If you look at the introduction of gay marriage and gay rights to create families in France, we have a different picture than you have in places like Holland and to some

extend Germany, the UK and Scandinavian countries. And then you could say you have a division between the Catholic south and the Protestant north, but then you have a quite different story in Spain which was one of the first countries in Europe to introduce gay marriage. So I think there are two levels in this; there is the level of how gay rights are introduced in the local political economy, and the level of how gay rights are made into political questions. And there seems to be very big differences on the level of policy. The big difference is between the countries' policies in many ways, in both East and West and South and North of Europe. But on a more political imagery level it seems to play a role in the discourses where there is this kind of democratic, modern West, there's the backward East. And in that question women's rights and gay rights seem to play important symbolic roles in these constructions.

Alexander: Okay, then I think I will move on to the so-called refugee crisis and the challenge of migration to Europe. How do gay rights or LGBT rights, which one you prefer to focus on, play a role in how countries deal with refugees?

Michael: It doesn't I would say. But what I think is interesting is that there are these kinds of moral panics about the refugees entering Europa. And there are these kinds of discourses about refugees – you talked about the refugee crisis and you have the image of the floods of refugees, and you have these metaphorical discourses about huge floods of people coming. And within this kind of metaphorical framing of immigration there are these moral panics in Germany about the New Year's Eve², or the incident on Funen, Denmark, where a group of kids or young men from a refugee center had allegedly molested young women at a music festival. They were never convicted for that, but there were some accusations. So that is a common discourse about the refugees. And I think that within a nationalist discourse, the nation is perceived as being under attack or under a tsunami of refugees flowing in. The nation is being hurt, and that harm is seen through the figure of the young woman or the woman and the gay person, who are these fragile persons. I of course do not agree with this kind of rhetoric, I think it is a rhetoric and not reality. But it does the same thing that we talked about before, it assumes that homosexuality is within the nation, and that women and fragile people within the nation state are threatened by people from the South. So you don't talk about LGBTQ refugees, they kind of don't exist in the political imagery because refugees are straight people, they are straight men that are coming, right?

Alexander: But at the same time we have people fleeing actually because they are persecuted for their LGBT identity so what issues do you see there? As far as I remember you have proposed at some point to include asylum in the discussion of these countries that have made some very suppressive laws like Russia did, Tsjetsjenia and countries like Nigeria and Uganda?

Michael: So you have a lot of immigrants from sub-Saharan Africa and from Middle Eastern countries who are coming to Europe because they are LGBTQ and cannot live in their country of origin, that is Iran, Afghanistan, Iran, Uganda, Cameroon which are the most prominent places where it's most difficult to be LGBTQ. But we also have refugees fleeing to Denmark because of their gender identity and sexual orientation from countries like Pakistan, Egypt, Belarus, all over the world. And what we proposed, me and Mads Drud³ in that article about Russia, was that when the Danish officials and politicians criticized the ways in which Russian politics or Russian

²New Year's Eve 2015, around 80-90 women reported "being robbed, threatened or sexually molested at New Year celebrations outside Cologne's cathedral by young, mostly drunk, men" (Chambers, Madeleine (2016): "Germans shaken by New Year attacks on women in Cologne", Reuters, January 5, 2016 (accessed May 21, 2018 at <https://www.reuters.com/article/us-germany-assaults-idUSKBN0UJ1IP20160105>)) (ed.)

³Mads Ted-Drud Jensen, Sociologist and Senior Adviser at Centre for Vulnerable Refugees (Center for Udsatte Flygtninge) (ed.)

law relates to homosexuality – this was after the propaganda law in Russia. So there were a lot of politicians who were making statements that this is too bad, and we have to stop that and so on. And what we proposed here in Denmark was that we could make it easy for people who lived there, LGBTQ people who lived there, to come to Denmark, get asylum, and that would be a way to counter that kind of thing. And I think to a lesser degree I would, and I still think that, argue the same in relation to other countries. Because if you love someone as a gay person in Teheran or Kabul or in Kampala there is no way for you to come to Denmark. It's impossible for young men in Kampala to get a visa to Denmark without a family, so the only way for you to get to Denmark is by crossing the Mediterranean Sea and walking or taking the train up to Denmark. So if the Danish state or if Danish politicians really want to help LGBTQ people in Kampala, in Uganda, and not just through words pulled out of the hat at the Pride or something, then you could make it possible for people to apply for asylum from Kampala or to come to Denmark based on the gender identity or sexual orientation and promise them asylum. But this isn't the case, I mean people from Uganda do not get asylum in Denmark.

Alexander: So just to tie it in with what we discussed in the beginning, so your point is that if a country such as Denmark wants to portray itself as a country which is leading the way and progressive compared to countries which are doing what Russia or other countries do, then the government should act on it by including asylum?

Michael: Yes exactly. And I think that this example shows that some of the hollowness of homonationalist discourse or homonational politics is that it's a very specific way of being gay friendly that emerges. I mean it isn't questioning heteronormativity, it isn't really in this case opening the borders for LGBTQ refugees, Rather, it seems to be this rhetoric and some kind of free speech that you can use to articulate your national identity without really changing your policies.

Alexander: That brings me to the next question because the article that we just discussed was more of an opinion piece, a debate piece, compared to your research I assume. How do you think your work as a researcher plays together with that sort of activism if we can use that term? Are they connected in any way?

Michael: I don't know. I think that especially that Russian piece is easier, but they are not connected. I think that is me making an opinion informed by whatever I know, because I haven't studied the Russian/Danish context. I think it's more difficult when the borders between what is academic work and what is politics becomes more blurred when I discuss my own research, make opinion pieces about my own research.

Alexander: Okay, but you are also involved in LGBT asylum which is an NGO. Does that have anything to do with what motivates you as a researcher? Maybe I can put it that way.

Michael: Yeah, it does. And I think about the connection between that kind of work and my research work, in two ways. I actually see it as my duty and my responsibility as a state sponsored researcher, I'm obliged, I'm supposed to communicate my research to the outside world. So I do that by talking to journalists, writing pieces that are not in academic journals. But I also think that as a researcher who works with these kinds of more, I wouldn't say political, but questions relating to people's lives, I have an obligation to put that research and that knowledge into some kind of function within the civil society and everyday life of people. So I prioritize a lot to do talks and do workshops among LGBTQ organizations and I also think my work within LGBT Asylum, some of it, is taking some of the knowledge I have from my research into the civil society. So that is kind of

educating both the NGO, but also the people we are working with in the NGO, the immigration authorities about the specificities about the LGBTQ identity.

Alexander: And what about the other way around, do you think being explicitly political makes a difference in terms of your academic credibility?

Michael: Yes, I think that was what I was talking about before when you asked the question. I think it's important not to be political in my research. So I try to do my research based on methodological and theoretical standards and not to give a kind of political answer but try to keep that out of it. At the same time I think that doing research is also about making the world a better place. I think most researchers want to do that. I mean if it's medicine, you would take that for granted, right, you take it for granted that the research was supposed to make people live longer, healthier, without pain, whatever. But I also think that as a cultural studies researcher that one of our obligations is that our research relates to the world in order to make it a better place, whatever that means. So I feel obligated to kind of take these questions of nationalism, questions of immigration, questions of what Danishness is, questions of rights and citizenship into my research and base questions on these things. And what I try really hard to do is not to know the answer to the questions, in advance.