

Comments on De Gaay Fortman

Prof. Karin Arts

Erasmus University Rotterdam
and International Institute for Social Studies, The Hague

In his paper *Minority Rights: A Majority Problem*, Prof. de Gaay Fortman observed that “In the real world the ‘minority’ problematique appears to be part of the general setting of ‘us-them’ divides”.²¹ His paper as a whole is a pertinent illustration of the tensions, problems and threats to human rights and democracy that such ‘us-them divides’ and ensuing intolerance may cause. This brings me to my first general response to the paper. It concerns the approach taken in this paper, of labelling the matters that arose in the context of the Swiss constitutional ban on minarets in terms of minorities and majorities, or minority rights and majority problems, or even minority rights and majority obligations. One could say that minority-majority approaches foster difference and divides, which perhaps makes them counter-productive rather than that they emphasize the universality of human rights and equality principles. Would it not be more fruitful to approach the matters at stake in Switzerland – and perhaps similar matters elsewhere – through a non-discrimination or, better still, an equal treatment or equal opportunity approach?

An equal treatment or equal opportunity approach would not be phrased primarily in terms of the particular rights of distinct minority religious communities or individuals, but in terms of the need to respect the universal²² generally applicable freedom of religion of all human beings, whether Muslim, Christian, Jewish, Hindu, Buddhist or non-believer. The non-discrimination principle, and to a lesser extent equal treatment principles, also have a very solid legal basis across international human rights instruments and relevant national law, including many national Constitutions and most global and regional international human rights treaties. They perhaps represent the “alternative approach” to “defining and strengthening ‘minority rights’ ” to which Professor Fortman referred.²³

Despite the critical remarks that were made during the first day of this Conference about the role of law and normative approaches, my next point is a strongly normative one. It relates to the issue of setting international law-based limits to ‘popular sovereignty’ or the voice of the people as expressed e.g. in referenda, peoples’ or civic initiatives. Whether we like it or not, law is an important factor in the formal organization of states and societies, and therefore should be analysed for all its pros and cons, potential and failures. And this is not a comment coming from a

21, P. 13.

22. See also Paul Scheffer’s call for universalism.

23. P. 9.

naïve lawyer who is ignorant about the limits of law and legal approaches. Rather, it is induced by an attachment to pragmatism and by a desire to identify and mobilize as much as possible all potential support sources for change. The issue that I wish to raise here is whether we should, or at least could, not see the non-discrimination principle as a *jus cogens* norm? *Jus cogens* is a very special and highly limited category of international legal obligations to which all states have to adhere at all times, no matter the circumstances. It represents the highest possible level of international law norm which is deemed to be so fundamental in character that it binds all states under all circumstances, regardless as to whether they have explicitly committed themselves to the norms involved. As Professor Fortman noted in his paper,²⁴ the list of norms that qualify for *jus cogens* status is the subject of fierce debate among international lawyers and at times others as well. I would in any case add the right to self-determination to the list that he presented. In case the non-discrimination principle were recognized as *jus cogens*, it would be squarely within the realm of grounds upon which the Swiss parliament could have declared a people's initiative on a ban on the construction of minarets invalid because of its incompatibility with international law.

As indicated above, the non-discrimination principle is solidly formulated across many international and national legal systems. It is included in many global, regional and national human rights instruments. In addition, there is widespread state policy practice in pursuit of non-discrimination and probably *opinio juris* (or a conviction among states) on its mandatory character. This means that the two basic requirements in international law for the formation of customary law might be met. Accordingly, the non-discrimination principle can probably in any case be characterized as a principle of 'ordinary' customary international law which in principle binds all states, except if they persistently object to the norm. The question is whether it also meets the requirements for having risen to the 'extraordinary' category of *jus cogens*? While in theory this is conceivable, in practice this is probably not, or maybe not yet, the case.

Issues in this realm involve relatively technical legal interpretation questions, on which further clarification is needed. Some of these are raised in professor Fortman's paper,²⁵ in relation to the conditions under which the Swiss Constitution allows the Swiss parliament (Federal Assembly) to invalidate people's initiatives, for example in order to protect certain vulnerable groups or individuals in the country. After all, on the surface – and certainly from a public international law perspective – it is difficult to understand why the parliament felt compelled to validate the people's initiative to ban the construction of minarets in Switzerland. This difficulty arises among others from the fact that there is a fairly long list of both national Constitutional, UN and European human rights provisions that leave no room for

24. P. 5.

25. Pp. 4-5.

a generic ban on the construction of minarets (as Professor Fortman sets out and many others have substantiated before and after the people's initiative, and as according to many would be confirmed by the European Court of Human Rights in case the Swiss minaret ban were submitted to it).

It is article 139 of the Swiss Constitution that is at stake here. In its English version, the Constitution apparently formulates the following ground for invalidating people's initiatives: "if it infringes mandatory provisions of international law". Professor Fortman, some authors to which he refers (such as Stüssi), and not least the Swiss parliament, then subsequently interpret this as meaning infringement of *jus cogens* norms. I found this limitation to *jus cogens* rather strange, especially in light of the fact that the Swiss Constitution also stipulates in Article 5, under the title "rule of law", that the Federation and the Cantons "respect international law" i.e. the much wider spectrum of all international law applicable to Switzerland. Besides, Switzerland hosts the United Nations (UN) Office in Geneva which accommodates the focal point for the UN's human rights activities in the form of the Office of the High Commissioner for Human rights, the Human Rights Council and most sessions of UN human rights treaty bodies.

In an attempt to get a better understanding of the meaning of the text of article 139 of the Swiss Constitution, I checked the German and French language versions. They refer, respectively, to "zwingende Bestimmungen des Völkerrechts" and "les règles impératives du droit international". Some English language versions, alternatively to the one that was used in professor Fortman's paper, refer to "peremptory international law". All in all it seems to me that indeed the drafters of the Swiss Constitution meant to have only a very high-threshold level restriction on the outcome of popular initiatives, reportedly in an attempt to do full justice to and give ample space for the voice of the people which in the understanding of some Swiss citizens "constitutes the State", or for "popular sovereignty which is the rule of law".²⁶

However, from a public international law point of view, the choice by the drafters of the Swiss Constitution to limit the check on people's initiatives to their compatibility with *jus cogens* only, rather than with all international law applicable to Switzerland, is 'simply' unacceptable. In a public international law perspective, treaties to which Switzerland is a state party – such as the International Covenant on Civil and Political Rights (or international customary law) also lay out binding and thus "mandatory" provisions of international law for the state. Thus, simply ignoring Switzerland's international human rights obligations for the sake of accommodating a people's initiative is not possible. It is a well-established international legal

26. See Anne Peters, 'The Swiss Referendum on the Prohibition of Minarets,' comment on European Journal of International Law, Talk!, by Anne Peters, filed 2 December 2009, <http://www.ejiltalk.org/the-swiss-referendum-on-the-prohibition-of-minarets/>.

fact that national Constitutional arrangements are not acceptable as justifications for violating international law. This has e.g. been confirmed by the International Court of Justice in binding judgements relating to the death penalty practice in the United States of America.

In conclusion on this point, and as argued by several prominent Swiss and other knowledgeable lawyers: the Swiss Constitution is in violation of international law and of Switzerland's existing international obligations and thus will have to be adjusted. Then, interesting questions arise as to how this should be done, in the – perhaps theoretical – scenario where such a change would indeed be initiated in Switzerland. For, constitutional amendments can only occur if supported by a popular referendum. So, the legal story of the ban on the construction of minarets in Switzerland won't be finished for a while.

My third response to professor Fortman's paper relates to his very harsh judgement on the role of the international human rights law treaty machinery. He stated that there "is, however, no international enforcement in human rights treaty law".²⁷ In relation to the UN Committee on the Elimination of Racial Discrimination (CERD), he wrote: "the lack of effective mechanisms for direct enforcement tends to reduce its role to merely reporting on the effectiveness of national institutions" and to "bringing issues to the fore and mobilising shame".²⁸ Later on in his paper he repeats this kind of criticism as regards the lack of an international court of human rights, international legal discourse at large and "modern state law", i.e. national law.²⁹ This then begs the question whether there is any role left for law and legal procedures at national and international levels?

My take on the matter is among others that international human rights law procedures, also where strictly speaking they have no binding but merely recommendatory or advisory powers, are relevant in a much broader sense than the 'enforcement' aspects or binding nature (or rather the lack thereof, to which Professor Fortman referred). An example may be found in an event that I witnessed recently in Geneva during the September 2010 UN Committee on the Rights dialogue with the Sri Lankan government delegation, in the context of the state reporting procedure. The discussion concerned the implications of the recently introduced Constitutional provisions, which enable the current President to serve for as many terms as he likes and for him personally to appoint all persons taking up important offices in relation to legal human rights protection in the country, including judges and the Ombudsman. The debate was rather tense and difficult and has been reported in local media in Sri Lanka. Of course in the end this indeed does not really bite. The delegation can go home and will only have to report back in a few years time,

27. P. 9.

28. P. 14.

29. P. 19.

and if by then nothing much will have been done about the matter, the Committee won't be able to do anything else than mobilizing shame. However, there are many other aspects to the state reporting system under the UN human rights treaties, or for that matter to the Universal Periodic Review reporting procedure in the UN Human Rights Council, that go way beyond enforceable human rights 'verdicts'. I refer to the fact that crucial data about human rights situations on the ground are gathered and become available for policy makers and civil society organizations. I also refer to government-civil society dialogues which more and more often precede submission of UN human rights reports, and the forging of closer civil society cooperation through collective production of so-called shadow reports as inputs for UN bodies. Many small steps together also help to build a road towards change.

Finally, if the international machinery brings no enforceable pronouncements, should those who are interested in using legal approaches then not direct more attention to the role of the national judiciary in enforcing international law? In many countries national judges have the power to apply international law either directly, such as is the case in the Netherlands, or after it has been 'domesticated' through the adoption of national implementing legislation. Here a lot of potential is still untapped. A case in point is the recent role of the Dutch judiciary in relation to the Dutch government policy on expulsion of undocumented children and their parents. Recent jurisprudence has forced – and is likely to do so in more far-reaching ways in the near future – the government to limit the policy of putting to the streets so-called illegal families with children, who have exhausted all legal procedures in the Netherlands but cannot be expelled to their countries of origin either. Dutch judges have established, mainly on the basis of the UN Convention on the Rights of the Child, that for as long as children are in the Netherlands the Dutch state has to provide them with basic care, education, shelter and social security. Most interestingly, recently a Dutch judge has explored the ground for extending basic support to the parents of such children as well, using the child right to family life as a main argument. In one particular case the judge ordered the Dutch state not to turn a parent of undocumented children to the streets until it had presented a credible plan to the judge explaining how the right to family life of the people concerned would be guaranteed in case all support to the parent would be ended. These are path-breaking decisions which can help to bring about change and thus deserve support. Such judgements 'bite', especially in the situation where the 'regeerakkoord' (the written agreement that forms the basis for formation of the current coalition government in the Netherlands) formulates priority for working towards expulsion of families with children. This priority presumably is rooted in the fact that, among others under the influence of international and national CRC-based jurisprudence, it is increasingly recognized that undocumented children build up rights relatively quickly. Much more could be achieved through judicial interventions of the above kind, also in the Netherlands.