

## Human Rights and Democracy: Marking the Boundaries of Community

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### Abstract

Within the New World Order, there is one instance that is deemed responsible for the globalization in human rights, one court whose judgments are reportedly increasingly quoted by national courts all over the world and accepted by them: the European Court of Human Rights has been hailed as a 'sort of world court of human rights'. At the level of general expressions and abstract language, human rights may, perhaps, be universal. But as soon as they turn into actual claims of rights, made in particular contexts to defend or criticize particular distributive choices, they become an effect of politics. There is no authoritative catalogue of rights that would be politically innocent: in an agnostic world, rights cannot be but legislative constructions, constantly referring back to alternative notions of the political good. In every social conflict, the claims of opposing sides may be portrayed as rights claims: my right of freedom against your right to security. The boundaries of freedom and security are drawn in accordance with cultural and political presumptions about the values that a good society prefers. And the process whereby an aspect of reality comes to be characterized in terms of rights is not dictated by any essential nature of the matter, either. It is a matter of political preference: only certain visions of the good life merit being accorded the level of protection that the classification as a 'right' entails. Moreover, the rights-language is imprecise and indeterminate in ways that defer back to policy concerns. Even a core right like the right to life has no meaning independent of the way it is interpreted by the relevant authorities. And, like all legal rules, human rights cover cases we did not wish to cover and leave uncovered cases that we think should have been covered Accordingly,

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rights must always be supplemented with exceptions. The scope or the criteria for the application of the exception are never clearly defined, however. Within the European Convention on Human Rights, the relationship between rights and the power to derogate from them is conditioned by what is deemed 'necessary in a democratic society' — a contextual and politically loaded criterion, surely. Rights, then, are a product of a political society. Given the ethos of international law ('law against politics'), to say that human rights are the effect of politics, is nothing short of a scandal. But, let me emphasize from the start that I do not consider the banal administration of rights language a perversion or a scandal — quite the contrary. What I wish to assert is that the idea of human rights may bring emancipation precisely because it is the stuff of politics. This is what I shall do in my paper: using the case law of the European Court of Human Rights as my example, I shall look at the various ways to come to terms with bureaucratization and the possibilities of reserving the idea of human rights as a source of powerful critique of existing social institutions and practices. I also want to reflect on the consequences that the bureaucratization of human rights has on the current project for the New World Order, on the liberalism of certainties.

**Keywords:** Human Rights; Democracy; Globalization; European Court of Human Rights.

## Bibliography

### A) Books & Journals

1. Anne-Marie Slaughter (1992). "Towards an Age of Liberal Nations", *Harvard International Law Journal*, Vol. 33, p. 393.
2. Attanasio, John B. (1997). "Rapporteur's Overview and Conclusions: of Sovereignty, Globalization, and Courts", in: Franck, Thomas M. & Fox, Gregory H. (1996). *International Law Decisions in National Courts*, NY: Transnational Publishers.
3. Brunner, G. (2000). "The treatment on anticonstitutional parties in Eastern Europe", in: Feldbrugge, F. and Simons (eds), *W. B., Human Rights in Russia and Eastern Europe: Essays in Honour of Ger P. van den Berg*, Hague: Kluwer Law International.
4. Finnis, John (1980). *Natural Law and Natural Rights*, Oxford: Clarendon Press.
5. Fox, Gregory H. & Nolte, Georg (1995). "Intolerant Democracies", *Harvard International Law Journal*, Vol. 66, pp.1-70.
6. Fukuyama, Francis (1989). "The End of History", *The National Interest*, (Summer 1989) at 3.
7. Harvey, Paul (2004). "Militant democracy and the European Convention on Human Rights", *European Law Review*, Vol. 29, No. 3, pp. 407-420 at 409 and 414-415.
8. Janis, Mark, Richard Kay & Anthony Bradley (1996). *European Human Rights Law: texts and materials*, Oxford: Oxford University Press.
9. Koskenniemi, Martti (1999). "The Effect of Rights on Political Culture", in: Alston, Philip, et al. (eds.), *The EU and Human Rights*, Oxford: Oxford University Press.
10. Koskenniemi, Martti (2001). "Human Rights, Politics and Love", *Mennesker & rettigheter*, pp. 33-45.
11. Lowenstein, Karl (1935). "Autocracy versus democracy in contemporary Europe: Parts I and II", *American Political Science Review*.
12. Lowenstein, Karl (1936). "Legislative control of political extremism in European democracies: Parts I and II", *Columbia Law Review*, Vol. 38, pp. 591 and 725.
13. Lowenstein, Karl (1937a). "Militant democracy and fundamental rights: Part I", *American Political Science Review*, Vol. 31, pp. 417- 424;
14. Lowenstein, Karl (1937b). "Militant democracy and fundamental rights: Part II", *American Political Science Review*, Vol. 31, pp. 638;
15. Petman, Jarna (2003). "The Problem of Evil and International Law", in: Jarna Petman & Jan Klabbers (eds), *Nordic Cosmopolitanism: Essays in International Law for Martti Koskenniemi*, pp. 111-140, Leiden: Martinus Nijhoff Publishers.
16. Ryssdall, Rolv (1996). "The Coming of Age of the European Convention on Human Rights", *European Human Rights Law Review*, Vol. 1, pp. 22.
17. Science Review. Vol. 29, pp. 571 and 755;

## 24 Abstract & Bibliographies in English

18. Slaughter (2000). "Government networks: the heart of the liberal democratic order", in: Fox, Gregory H. & Roth, Brad R. (eds.), *Democratic Governance and International Law*, p. 235, Cambridge: Cambridge University Press.
19. Slaughter, Anne-Marie (1992). "Law among Liberal States: Liberal Internationalism and the Act of State Doctrine", *Columbia Law Review*, Vol. 92, p.1909.
20. Slaughter, Anne-Marie (1995). "International Law in a World of Liberal States", *European Journal of International Law*, Vol. 6. P. 538.
21. Slaughter, Anne-Marie (1997). "The New World Order", *Foreign Affairs*, Vol. 76, pp.183-197.
22. Slaughter, Anne-Marie (2000). "A Liberal Theory of International Law", *ASIL Proceedings*, Vol. 94, pp. 240-249.
23. Slaughter, Anne-Marie (2000). "Judicial Globalization", *Virginia Journal of International Law*, Vol. 40, pp. 1103-1123.
24. Slaughter, Anne-Marie (2004). *A New World Order*, New Jersey: Princeton University Press.
25. Tesón, Fernando R. (1992). "The Kantian Theory of International Law", *Columbia Law Review*, Vol. 92, pp. 53-101.
26. Weiss, David E. (1994). "Striking a Difficult Balance: combatting the threat of Neo-Nazism in Germany while preserving individual liberties", *Vanderbilt Journal of Transnational Law*, Vol. 27, pp. 899-939.
27. Wuthnow (ed.), Robert (1998). *Encyclopedia of Politics and Religion*, London: Rutledge.

### **B) Documents**

28. Bosphorus Hava Yollari Turizm ve Ticaret AS v. Minister for Transport, Energy and Communications, Ireland and the Attorney General, Case C-84/95 [1996] ECR I-3953.
29. Charter of Fundamental Rights of the European Union.
30. Council of Europe, 2 Collected Edition of the 'Travaux Préparatoires' of the European Convention on Human Rights (1975) at 50 (Layton) and 60 (Ungoed-Thomas).
31. Glasenapp v. Germany, ECHR Series A (1987) 104, 9 EHRR 25
32. Handyside v. United Kingdom, ECHR Series A (1976) No. 24 para. 49.
33. Klass and others v. Federal Republic of Germany, ECHR Series A (1978) No. 28, para. 59.
34. Kokkinakis v. Greece, ECHR Series A (1994) No. 260-A, 17 EHRR 397, para. 31
35. Kommunistische Partei Deutschland v. Federal Republic of Germany (Application No. 250/57), 1 Yearbook of the European Convention on Human Rights (1957) 222.
36. Loizidou v. Turkey, 134 ECHR Series A (1995) 134 (preliminary objections).
37. Loizidou v. Turkey, 134 ECHR Series A (1995) 134.

38. Marks, Susan (1995). "The European Convention on Human Rights and Its 'Democratic Society' ", *British Year Book of International Law*, Vol. 66, pp. 209-38 at 216.
39. Oberschlick v. Austria, ECHR Reports (1991) No. 204, 19 EHRR 389.
40. Otto-Preminger-Institute v. Austria, ECHR Series A (1995) No. 295-A, 19 EHRR 34
41. Refah Partisi (Welfare Party) and others v. Turkey (Applications Nos 41340/98, 41342/98, 41343/98 and 41344/98)
42. United Communist Party of Turkey and others v. Turkey, 26 EHRR (1998) 121, para. 20.
43. United Communist Party of Turkey and others v. Turkey, 26 EHRR (1998) 121, para. 20.
44. Valsamis v. Greece (Application 21787/93) (Judgment of 18 December 1996), 24 EHRR (1997) 294.
45. Vogt v. Germany, ECHR Series A (1995) No. 323, 21 EHRR 205.

***B) WebSites***

46. Dahlab v. Switzerland (Application 42393/98) (admissibility decision of 15 February 2001) available at <[www.echr.coe.int](http://www.echr.coe.int)> (visited 29 June 2005).
47. Leyla Şahin v. Turkey (Application 44774/98) (Judgment of 29 June 2004) para. 108, available at <[www.echr.coe.int](http://www.echr.coe.int)> (visited 29 June 2005)
48. Socialist Party and others (25 EHRR (1999) 51), and the Freedom and Democracy Party (at <[www.echr.coe.int](http://www.echr.coe.int)> (visited 29 June 2005))