

## WHAT'S IN A NAME? THE RIGHT TO LIFE AND THE RIGHT TO FORM A FAMILY: HUMAN RIGHTS IN THE POLITICAL PROCESS

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'When I use a word', said Humpty Dumpty,  
'It means just what I choose it to mean  
– neither more nor less'.  
Lewis Carroll, *Through the Looking-Glass*,  
1872, ch 6

Eminences, Excellencies, dear Colleagues,

The title assigned to me consists of two fundamental human rights, the 'right to life' and 'the right to form a family'. The two are not directly connected, but are nonetheless also related insofar as life arises from conception and the child necessarily has two biological parents. Thus a biological family is made: the nuclear family as it traditionally has been known.

The right to life is often considered the first human right, as no other rights can be enjoyed if the rights bearer is dead. The right to form a family is likewise one of the fundamental human rights that is enshrined in art. 16 of the Universal Declaration of Human Rights of 1948 and in subsequent conventions, such as the European Convention on Human Rights of 1950.

This paper is not an empirical account of the status of these two human rights. Everyone knows that major political battles over abortion, euthanasia, the death penalty, and the family have taken place and are taking place in most states today, especially in the Western part of the world. For instance, I was recently debating whether the right of the child to know his parents and receive care from them (*Convention of the Rights of the Child*, 1989, art. 7,1) means that the child has a right to know and be cared for by his biological parents. I think this is a reasonable and logical interpretation

of this paragraph. But my opponent, the professor of law<sup>1</sup> who has provided the Norwegian government with a legal opinion on the matter, stated that there are no objective answers to this question and that it must be interpreted in light of both political developments and biotechnological progress by the so-called 'dynamic' legal method. In other words, there is no contradiction between art. 7,1 and the Norwegian Gender-Neutral Marriage Act of 2008 which contains a right to state-paid insemination of lesbians with anonymous donor semen.

Since we are talking about a legal issue, viz. the interpretation of a convention, the professor of law can claim professional authority whereas the professor of political science cannot. Those without professorships, only armed with common sense, presumably have no say at all.

However, on giving a talk at the Norwegian attorney general's office the subsequent day<sup>2</sup> about the dangers of divesting national politics of control by accepting the 'inflation' of human rights that now takes place, I found that lawyers in this office agreed with me on the unclear content and status of the 'dynamic method' as it is practised in the ECHR in Strasbourg. The attorney general himself has voiced criticism of the scope that this court defines for itself regarding human rights.<sup>3</sup>

#### THE META-LEVEL: WHAT, IF ANYTHING, DISTINGUISHES A HUMAN RIGHT FROM POLITICS?

One cannot suppress the deeper question: If human rights are to be interpreted in light of political trends, what difference is there between law

<sup>1</sup> Professor Aslak Syse, Faculty of Law, University of Oslo. The legal opinion in question is entitled 'Farskap og annen morskap', NOU, in a debate at the Law Faculty on April 22, 2009.

<sup>2</sup> Regjeringsadvokatens kontor, Oslo, luncheon speech, April 24th, 2009. The attorney general of Norway, Sven Ole Fagernæs, has voiced concern over the expansionist activity of the ECHR and what he calls the general 'inflation' of human rights. His office represents the Norwegian state vis-à-vis the international human rights courts and bodies, such as the ECHR. It has been state practise for Norway to implement the judgements of the ECHR – where the state has lost several times – but recently the minister of culture declined to follow a judgement from the court which made it illegal for the Norwegian parliament to forbid TV ads for political parties because this was seen as a breach of freedom of expression.

<sup>3</sup> 'Verdibørsen', July 2006, Interview and debate on the 'inflation' of human rights with attorney general Fagernæs.

and politics? If there is no clear legal method for interpreting international human rights, aren't judges then dangerously close to being political actors without a political mandate from the electorate? Unaccountable judges-*cum*-politicians must be representatives of the worst of all possible worlds, especially if they are at the international level where checks-and-balances regarding accountability do not exist.<sup>4</sup>

The worry is over two trends: that human rights come to include almost all aspects of politics and that the definition of what is politics and what is law is left to the judges of the court and not decided by nationally accountable politicians. *The legalization and the concomitant supra-nationalisation of human rights is a major democratic problem if human rights cannot be delineated, defined and adjudged in a transparent, clear, and apolitical manner.*

There is, as you will know, an academic literature on the various aspects of this *problematique*: The so-called 'legalization of world politics' is a central liberal political cause celebrated by most Western academics as well as scholars, counting myself among them. The change of the anarchy of international affairs in the direction of a *Rechtsstat* that resembles the rule-of-law of domestic politics is a major goal for most people, presumably creating more democracy and peace. The development of *Volkerrecht*, or international law itself, was a major movement from the 1890s onwards, coupled with peace aspirations. The League of Nations and, later, the UN are the foremost fruits of this.

In our time there is the development of the International Criminal Court (ICC) and prior to that, the war crime tribunals that were *ad hoc*, such as ICTY in the Hague and the Rwanda tribunal in Harare. In addition, there is a tribunal for Cambodia at work now. The development of international courts for war crimes and crimes against humanity, genocide and also rape of women as a tactic in war, are in my view great steps towards a more just world.

In a somewhat different vein we have the supranational court of the EU, which has 'supranationalised' itself and been accepted as such by all member states. The academic literature on this court points to the undemocratic nature of this development, but also to the effectiveness of the court itself (see e.g. the work by Joseph Weiler; Hjalte Rasmussen, Karen Alter).

<sup>4</sup> This is indeed the topic I addressed to this papal academy a few years ago when I commented on professor Kirchhof's work on the status of fundamental human rights in Europe.

The only human rights court is the ECHR, based on the European Convention of Human Rights. This court has been in existence since 1950, but has become much more prominent and used in the years after 1990.

The UN system has no court, but a human rights council (prior there was a human rights commission). This council is responsible for *inter alia* the Durban-II conference that took place in Geneva two weeks ago. The chair of the council was Iran and president Ahmadinejad was the main speaker. The EU walked out in protest as he spoke, the US, Germany, Canada and other states boycotted the conference. The theme was racism, but it became a conference that was intensely politicized, seeking to call Israel racist and to define freedom of expression in an islamist variant where perceived blasphemy would be punishable (see para 11 of final draft text). This first draft for the conference text was only changed when the 27-member block of the EU put forward an ultimatum.

The Iranian foreign office presented a diplomatic protest to the Czech EU chair the day after the opening speech of Iran which led to the walk-out, saying that Iran was concerned about the disrespectful behaviour of the EU towards free speech and that Iran is worried about the many human rights abuses in EU states, e.g. denial of freedom of education for certain Muslim minorities and alleged murder and other persecution of human rights activists.

I mention this example of human rights politicization in detail because it illustrates *how undemocratic states now enter the human rights arena of the UN* to the fullest, and also that human rights are intensely politicized at present. This is a development we have seen throughout the 90s at various UN conferences where the right to life and the family were the contentious human rights. At that time there was no Western concern over politicization of human rights, whereas the present situation, as seen in Durban-II, enrages Western politicians.

We have now come full circle in terms of the politicization of human rights: *human rights are turned against themselves*. But who can define human rights? If they cannot be defined but are subject to the so-called 'dynamic' interpretation, who can deny Iran its interpretation?

The Durban-II conference was a welcome wake-up call for the West because it is now necessary either to define basic human rights or to agree that every state can have its own interpretation of them. The question of what a human right is, as compared to a political matter, is therefore very urgent. *Unless basic human rights can be defined as non-political, as 'common standards' for all human beings, they will be subject to ever more politicization.*

In the natural law tradition that is preserved and developed in the Church there is a clear answer to this question: human rights can and must be defined, and the Universal Declaration itself invites a clear interpretation if we look at all the rights as a whole. Professor Glendon has developed this theme in her work, as have many other scholars. The main problem is anthropological, not legal or political, one would agree from this vantage point. I am not going to develop this theme in this paper. I have written a book on the need and possibility of defining fundamental human rights, and such a definition requires that we start with the concept of human nature, i.e. human anthropology.<sup>5</sup> The philosophical underpinnings of the concept of human rights are all well known to this audience. What my contribution here will be, is *an analysis of the driving forces of the Western political process around human rights*, exemplified by the two fundamental human rights, 'life' and 'family'.

I will now leave this meta-issue and return to the two rights that this paper deals with, viz. the right to life and the right to form a family.

#### ESSENTIALLY CONTESTED CONCEPTS

What do these rights mean? If we look at the words 'human right', 'life', and 'family', they are all what we term 'essentially contested' – indeed, all these terms are by now extremely contentious and contested in Western politics.

The term 'human right' is used all the time in everyday speech, not only in political debates. When we want to underline the importance of some issue, we call it a 'human right'. There is seldom any reference to where the alleged human right is enshrined, and even less to the wording of it if it exists – Norwegian farmers' associations e.g. routinely state that it is a human right to eat Norwegian produce. One wonders whether this is a universal human right, given that only 4% of Norwegian land is arable.

When we look at the term *life*, we meet the same problem. Abortion rights start from various gestational ages in various countries, and euthanasia is variously defined in the same. The death penalty is forbidden in Europe and the ECHR has a protocol to that effect, but it is practised in the USA.

<sup>5</sup> *When Might Becomes Human Right: Essays on Democracy and the Crisis of Rationality*, Gracewing Publishers, UK, 2007. Editions in various other languages (in Italian: *Diritti umani abbandonati? La minaccia di una dittatura del relativismo*, EUPRESS, Lugano, 2007).

Some say that 'life begins at forty'. Seriously, in the abortion debate, no authoritative definition can be given. Whether it begins at 12 weeks, 18 weeks or after that remains a conclusion based on mere political compromise. The question of when life begins is never discussed seriously anymore anyway because the issue is not talked about as one of ending a life. The discourse is not about when human life can be terminated, or whether, but about stated women's rights to decide on this. When the issue is cast in rights-terms for women, it is an entirely different issue compared to the question 'Under which circumstances can the state take human life?'. *The terms of the debate largely decide the debate and its outcome.* It follows from this that the most important struggle is over the name – what we call the issue we debate: who sets the agenda and determines the terms for debate? Is the agenda set as a political or legal one? In the former case, there will be natural disagreement, in the latter case, only lawyers and their methods constitute legitimate actors.

The political arena is naturally full of disagreement, whereas the legal arena varies with the legal tradition – natural law-inspired lawyers arrive at different results than will a positivist account.

The debates about whether the *family* can be defined and in that case, how to define it, also rage in most of our states. The gay marriage agenda has been strong over the last years, and has now resulted in the redefinition of marriage and the family in many European states. The legal interpretation of human rights conventions seems to follow a so-called 'dynamic' principle. In Europe, the ECHR is supra-national, and its rulings take effect in member states. Thus, if we ask what it means to have a right to 'form a family' as part of fundamental human rights, we immediately see that the answer depends on how we define 'human right', 'family', and human nature itself.

There are broadly two classes of arguments in the political debate about the family: those that rest on the presumption of *constructivism* – gender, not sex, is socially constructed, sex roles are thus constructed, and sex is constructed in terms of the feminine and the masculine and variations 'in between', more like a continuum than two categories. In turn this means that fatherhood and motherhood are socially constructed, and therefore the family can be freely defined and redefined. In fact, on this view it is pointless to seek a definition, as there is none to be found. What was the typical 'nuclear family' in some societies in some historical periods, changes. When the empirical manifestations of the family dissolve into many types of households, the definition of the family also changes. This argument is

embedded in a view of society and politics that sees both as processes where there is no 'Fester Punkt' to be discovered.

The other point of view, the *natural law* argument, assumes the existence of a fixed human nature, consisting of two sexes, where the family is a natural and constant institution in human life – it makes sense to speak of something as *natural*. Motherhood and fatherhood are therefore constants, and the family cannot be redefined, but exists as a norm in all societies, albeit with many instances that differ from the norm, due to widowhood, single parents, etc. The *social* roles of the sexes are however malleable and thus, 'socially constructed' to a great extent. Yet motherhood and fatherhood exist as 'archetypes' of human existence with much more than mere biological qualities.

Corresponding to these two views on the family's constituent units, the parents, we find *two entirely different views on the rule of law (Rechststaat), the status of international human rights, and the limits of politics*. To the constructivist viewpoint corresponds the view that 'all is politics', as one critic put it to me: there are no limits to the political process in terms of human rights, and what we call human rights today, can be changed tomorrow, as we define new human rights. Likewise, if a majority today thinks that the traditional form of the family is obsolete, how can anyone stop it from redefining it when the ultimate political decision-making belongs, on the national level, to the electorate in a given nation-state? The empirical facts matter as well: the fact that there are many types of family constellations, high divorce rate, many single parents, etc. are facts that must reflect on politics. If the nuclear family disappears more and more as the dominant organisational form in a society, it seems natural that the term 'family' covers all sorts of combinations in a household setting. There are thus considerable problems today if one tries to uphold mother-father-child as 'the family' or even as a 'model' or 'norm'. I have no data on this, but it seems that in my society – Norway – second families are so common that the typical pattern is 'my children, your children, and our children'.

Similarly, to the view that there is a human nature that can be discovered and defined, corresponds a view of law that we usually call 'natural law': international human rights are apolitical and prepolitical, resting on the discovery of human nature and its dignity. If the family is protected and privileged by human rights, they are valid in all places at all times. Given the turn of international politics after Nuremberg, whose famous trials laid down the validity of natural law above all positive law, this is a very strong argument. But as we know, to paraphrase Tip O'Neill, 'all pol-

itics is local': who can sanction a national parliament who passes a law that contravenes international human rights? Furthermore, to this view belongs the assumption that the public and the private are definable, that politics is limited to the issues of the common weal. Regarding the family, this means that its political relevance lies in its child rearing: it needs protection from political intrusion but also political protection. The ideological assumptions of natural law and *Rechtsstaatsdenken* are so different from social constructivism that there is no bridge between them. In Norway we see an interesting polarisation on this meta-political level, implicit in the political arguments used. When a prize for free speech was given to a major critic of statal insemination rights for lesbians, the philosopher Nina Karin Monsen, in April 2009, an extremely vitriolic debate ensued: Monsen argued that the state cannot remove the child's right to know its biological parents (this right is granted when the child is 18 under Norwegian law) and certainly not 'design' babies through selection of donor semen according to the criteria of the mother, whereas the lesbians argued that Monsen insulted them and hurt their children by criticizing this new Gender-Neutral Marriage Act. *The terms of the debate were diametrically opposed* to one another: the gay community had set the agenda on this issue throughout the political campaign to change the old marriage act by arguing that they were discriminated against and that they were denied their human rights. When Monsen entered the scene, her arguments were along the lines of children's human rights and the importance of biological parenthood, whose importance had by then been successfully marginalised in the Norwegian debate. There is basically no debate on the *substance* of the issue at all – whether the state can remove the child's right to know his father until age 18 – but a fierce fight over the *terms of the debate*: Who is discriminated? Whose human rights are violated? What is the issue all about – this is what the power struggle concerns. The ones who can claim human rights/non-discrimination on their side, have won the debate.

It is therefore important to analyse how the 'symbolic politics' of human rights functions in Western democracy today. It is certain that both the right to life and the right to form a family have been redefined in major ways in the last 30 years in Europe and the US. The family has become politicized over the last few years, and national policies have changed in these areas. The frame of reference for this has been human rights.

Human rights were codified as a response to the political and legal relativism of Hitler's Germany and World War II; which put in a nutshell the



relativist problem of obeying orders from the legal ruler of the realm – in this case Hitler – when these orders were contrary to morality. The Nuremberg trials laid down that it is wrong to obey such orders; that there is in fact a ‘higher law’ – a natural law if you will – that not only forbids compliance, but which also makes it a crime to follow such orders. In the wake of this revolutionary conclusion in international affairs – it was the first time in history where a court had adjudicated in such a way – there was a growing movement to specify what this ‘natural law’ for the human being entailed. This resulted in the Universal Declaration of Human Rights only three years later – a supra-national set of inherent and inalienable rights for every human being. It is very clear that the statement of human rights was to be a ‘common standard for all mankind’, as stated in the preamble, and not something that could be changed at will by political actors.

The rights defined in this document are parts of a whole, making up a fullness of rights which reflect a very specific anthropology. The rights are clear and concise, and the underlying anthropology is equally clear. The intention of the authors of the declaration was to put into a solemn document the insight about human dignity that could be gleaned from an honest examination, through reason and experience, of what the human being is. Therefore they wrote explicitly that ‘these rights are inviolable and *inherent*’. *In other words, these rights could not be changed* by politicians or others, because they were inborn, belonging to every human being as a birth-right, by virtue of being a human being. The declaration is a natural law document which was put into paragraphs by representatives from all over the world, from all regions and religions. Human rights are *pre-political* in the sense that they are not given or granted by any politicians to their citizens, but are ‘discovered’ through human reasoning as being constitutive of the human being itself. They are also therefore *apolitical* because they are not political constructs, but anthropological – consequences of our human nature. As one of the key drafters of the declaration, Charles Malik, said: ‘When we disagree about what human rights mean, we disagree about what human nature is’. The very concept of human rights is therefore only meaningful if we agree that there is one common human nature which can be known through the discovery of reason.

But this stands in stark contrast to present politics in the West. What characterises the politics determining human rights today?

FIRST CHARACTERISTIC: DEMOCRACY AS *PROCEDURE*

In classical political philosophy, tyranny refers to illegitimate or unjustified governance, and as such implies that the notion of justification or justice is meaningful. Tyranny is in classical political thought the usurpation of just rule, and is always presented as a perversion of good forms of government.

Democracy is the form of government where legitimacy emanates from the people. It can vote rulers down in a recall mechanism – rulers have to be accountable to the people. Democracy thus becomes tyrannical when this condition no longer obtains. When justice in terms of the common good is no longer sought by politicians, but only maximization of their private interests, a democracy becomes tyrannical.

So far the ancients. Notice the fundamentally *moral* language of politics. It is a language which still is with us, even though people today want to remove morality from politics. Yet if one asks whether tyranny is a value-neutral term, the answer is necessarily no. It cannot be, as the word itself denotes moral qualities.

The legacy of liberal democracy is the normative model for most European states, and the only acceptable form of government in the West today is democracy. Even among self-professed sceptics that hold that no values or norms are universal, one is hard pressed to find a critic of democracy as such. All agree that this form of government is the best one, or at least the best there is to get in the absence of Platonic philosophers of the real kind. Democracy has come to stay and has developed in West over the last 2-300 hundred years. It is perhaps the only concept that is openly spoken of in Western politics as something that all should enjoy: one states that democracy must be instituted all over the world.

This form of government gradually included the whole population over a certain age by extending the suffrage to them, it contains representative institutions and holds period elections. Elected politicians are accountable to the electorate and can be 'recalled' in a new election. The government is accountable to Parliament and there is a formal separation of powers in the legislative, the executive, and the judiciary. The constitution contains a Bill of Rights that list fundamental rights for citizens – typically the right to life, liberty, property, the right to freedom of religion, association and free speech. The French constitution serves as a model for many European constitutions.

Typically these *fundamental norms are regarded as 'higher' than other law* and as so fundamental that they cannot easily be changed. Parliaments

thus have elaborate and cumbersome procedures for changing constitutions. In some countries there are special constitutional courts that are in charge of interpreting what the constitution really says. In short, modern democracies are equipped with a *code of higher norms* that are supposed to be safe from political change and which are therefore insulated from the political process.

How were these norms generated? Where did they come from? In the French 'code civil' they were simply decided on, as they were in other constitutions. For John Locke, the precursor of the modern democratic theory, the fundamental norms were self-evident. *He held that there were some higher norms, but that they could not be reasoned about.* But they were generated in the establishment of the 'social contract' and were thus not 'pre-political', belonging to man as a human being.

Modern democratic theory arose as part of social contract theory, and rests on three assumptions: First, that there are *self-evident rights that belong to the individual and which should be protected by the constitution.* These rights are however only postulated as such; they are not part of any argument about natural law. Second, the need for protection of these postulated rights is the reason for the creation of society in a social contract: in the state of nature man is thought to pursue self-interest in the form of power maximization but he needs to be protected from the others. Third, the state is a minimalist arbiter of pluralism among atomistic individuals: the state carries no values, politics is value-neutral. This institutional apparatus is what largely constitutes the legacy of modern democracy in the West.

Mill, Tocqueville, and others were, over a century back, extremely concerned with the problem of majority tyranny. Mill's *On Liberty* (1859), the classic plea for liberty as the highest norm, agonizes over this issue:

*Protection against the tyranny of the magistrate is not enough; there needs to be protection also against the tyranny of the prevailing opinion and feeling...against the tendency of society to impose...its own ideas and practises as rules of conduct on those who dissent from them...there is a limit to the interference of collective opinion with individual independence, and to find that limit is as indispensable to a good condition of human affairs as protection against political despotism.*

On the one hand, Mill saw the emergence of such a tyranny in democracy, on the other hand he could not find any remedy against it. This was because his premises were inconsistent: he postulated tolerance or liberty as the highest norm, saying that all is allowed that does not harm others. Politics is value-neutral, and only if you harm others should your freedom

not be allowed. Yet he clearly held that some actions and norms are right and true, whereas others are wrong, but could not argue for this as he had no criterion of ranking value-judgements. The interpretation of what does harm and what does not ultimately rests with subjective opinion, since the state has to somehow decide here, it is unavoidable that politics embodies values and is about value-judgements.

*Mill's problem is the same that we face today:* Tolerance or liberty is the almost the only norm that democracy accepts, and is certainly the highest norm. We see this all the time in the public debate: new interest groups claim freedom from interference, claim tolerance for their interests, whatever the moral content of them. Morals or ethics are thought to belong to the private sphere and to be subjectivistic. Value pluralism is the key premise.

Given this, how can – if at all – fundamental norms be safeguarded? The procedure of democracy is some form of majority voting. Even constitutions can be changed by parliaments, although the procedures are more cumbersome than simple majority and take more time. However, the basic premise is that all political power is vested in the people, who in a social contract invest it in the institutions of state. Even the rights in the constitution come from the people, it would seem. But is this the case? *Here we see an inherent inconsistency between the 'self-evident' character of fundamental individuals rights, which are simply postulated, and the tendency today to usurp these rights by changing them through majority voting.*

Classical democracy conceived of constitutional rights as being beyond the reach of the majority procedure, although constitutions could be changed. The judiciary was designed to be independent of the legislature in order to interpret and protect the constitution. However, the crux of the matter with regard to law and politics is not in variants of institutional design, but in the *view of the origin of law*. If all is reducible to politics, there can be no protection from the application of the majority procedure to any principled question of human rights.

## SECOND CHARACTERISTIC: PRAGMATIC DEBATE ABOUT PRINCIPLES

The major problem of modern Western democracy, viz. the reduction of ethical question to pragmatic ones. This is manifested in the lack of respect for human life in its non-utilitarian forms: unborn, handicapped, old, and sick; and in subjecting the taking of human life to pragmatic decision-making by majority procedure. This empirical development shows that the right

to life enshrined in constitutions and international human rights documents carries little if any weight when pitted against other interests. More importantly, it shows that modern democracy is reduced to the majority procedure. This development is inconsistent with the *Rechtsstaatstradition* which is based on the primacy of higher, unchangeable norms and independent institutions to safeguard them.

For example, *abortion* came to the fore in the public debate in Western democracies some 30 years ago. Everyone knew that abortions had always been performed, in secrecy, in the private sphere. Now women demanded that the state should perform them. Their argument was pragmatic: abortions will happen, they should be made 'safe'. Abortion was politicized, i.e. placed in the public-political sphere, by feminist interest groups.

The terms of the debate had to be pragmatic because the liberal state cannot deal with 'value' questions. The state does not represent norms – the constitutional norms are just there to protect the individual from intrusion into his private sphere. The decision-making procedure in liberal democracy is majority decision. *If however the terms of the debate are about universal norms of right and wrong, this procedure makes no sense.* The political discussion thus has to be set in other terms. It has to be pragmatic.

In the case of the abortion debate, the fierce struggle was about the terms of the debate: if the question is 'under which conditions can human life be taken?' one has to consider the constitutional norms of right to life and the international instruments of human rights that state this as the highest norm. If the debate is cast in pragmatic terms, e.g. as a women's issue, this is not necessary. *The abortion issue was decided when the terms of the debate were decided.* But abortion represents a watershed in Western politics precisely because it exhibits a total cleavage in views on what is legitimate democratic politics and procedure.

The same political process can be seen in the debate over *euthanasia*, which is now becoming politically prominent in Scandinavia, Australia, the US, and gradually in other Western states. The terms of the debate are being set in a very important process. For instance, one sees reports in the press on the increasing number of people that favour euthanasia, doctors who find it good for the patient, euthanasia as the right to choose, it is a new human right, etc.

A third issue that illustrates the inability to discuss ethical issues in ethical terms, is that of using *foetal tissue* from induced abortion for medical purposes. In Norway an expert commission was set up to advise the government on this issue. Even the one bishop on the commission – a member

of the Lutheran state church – turned out to be sympathetic to the government's proposal to use such tissue medically. The interesting aspect of this was however his way of reasoning: being against legalised abortion, he nonetheless argued for the use of foetal tissue because as abortion is allowed, one might as well make use of the results of it. He could not understand that there were problems with this argument from an ethical point of view – and in truth, his was a valid pragmatic argument: abortions will happen, let's make some use of them if we can. He could not understand that if he held that abortions were wrong on principle, he would also have to hold that the ancillary act, using the foetal tissue, was wrong and in fact might contribute to justifying the abortion itself.

These examples illustrate that the political discourse on ethical issues in liberal democracy is *de facto* pragmatic. Moreover, I have argued that *it has to be* pragmatic in order to fit with the central assumptions and institutions of liberal democracy: majority procedure, politics as 'value-free', and ethics as belonging to the private sphere. Yet it is also cast in human rights language – the right of women to abort, the right of old people to euthanasia, and so on.

### THIRD CHARACTERISTIC: HUMAN RIGHTS AS *SLOW POLITICS*

But also the 'rights' language is justified by pragmatic reasoning: because women have abortions, they are a right; and because many people accept euthanasia, it is a right. In this debate there is no discussion of which topics should belong in the private sphere – the strategy is to lift them all into the public sphere. There is no hierarchy of principles for determining what is a common, and thus political problem; and what is not.

Human rights have become the new political 'Bible' in two ways – as the only point of reference in a relativist political community – but also as the source of legitimacy in political debates: no actor can 'afford' to be seen to violate human rights. It is extremely important to be in accordance with human rights in modern European politics; they thus carry very much power in themselves. Yet there is often a denial that they can be objectively defined, something which undermines the authority of these rights in the long run.

There are thus at least *two paradoxes* at work here: while Europe and the West extols the rest of the world to follow human rights and in fact uses this as conditions for aid and cooperation, European politicians simultaneously refuse to define, in an objective manner, what these rights really

mean. Secondly, while these rights are appealed to more and more, they are undermined as sources of authority in the erosion of the belief that they can be defined in a clear and objective way.

*The situation is one where there is no clear distinction between politics and law, and between the national and the international level.* Actors that seek to achieve political change in these areas, act at both levels, and influence from the international to the national level and vice versa, occurs. If the legal interpretation of human rights is based on how society, science, and politics evolve, then it is but 'slow politics', a *post hoc propter hoc* measure. But legal statement of definitions carries the highest authority politically, especially if we talk about a human right.

Thus, politics in the form of human rights law is the most powerful of all political action. Today's politics increasingly deals with value questions and human rights discourse is becoming the major form of political argumentation, nationally as well as internationally. Human rights instruments have proliferated, both as hard as well as soft law. Legalization as hard law, where there is a clear definition of states' obligations, is usually difficult to achieve in the human rights area, normally requiring consensus. For this reason those who want to change existing human rights norms mostly opt for soft law strategies, where one uses 'soft law to cast the normative net more widely, building as broad a coalition as possible. Strengthening the normative consensus and possibly the hardening of legal commitments is left to a more gradual process of learning' (Kahler, 1979). In addition, we should note that most soft law obligations are obeyed by states. Non-compliance is rare in all international regimes, even in the absence of coercive measures of enforcement. Chayes and Chayes (1995) investigated a number of international regimes where there were tenuous monitoring and implementation mechanisms, and found, like Koh (1998) in his major legal review, that international obligations are met by Western states, even in soft law cases. This indicates that the 'shaming' of non-compliance is feared, and that states do not want to be seen as unreliable international citizens. This is also why those who want to change human rights seek an international strategy of soft law for the new norm above all else. We also notice that the political agenda often is set by professional interest groups that invoke more or less well established international human rights norms as their basis of legitimacy. These actors we call 'norm entrepreneurs'. They are highly specialised, highly committed, and work exclusively for their cause. They are thus eminently equipped to succeed. Once an issue has been defined in human rights terms, it acquires a special legitimacy that is difficult to counter.

New actors that are transnationally organised use whatever is convenient for their cause. The NGOs that promote alternative family forms or abortion will use the Beijing Final Document instead of the Universal Declaration, although the former has no legal or authoritative status. What matters, is simply to find some UN document that can be invoked because UN documents carry legitimacy in most states around the world. The legal scholars Abbott and Snidal notice that 'soft law' – non-binding international documents – often carry much weight and are in fact treated by interested actors as if they were hard law: this applies directly to the UN conferences in the last decade (Abbott and Snidal, 2000). In fact, aiming for soft law bases for new norms is a preferred strategy because its status in the international political system is so ambiguous.

Soft law instruments as well as legalization at the international level have increased very much in the last decades. Legalization is a strategy to create binding norms which carries more weight and legitimacy than mere soft law, but which is harder to achieve and which requires member state approval and often consensus (Keohane et al., 2000). Thus, soft law is the preferred tool for those who want to change norms (Goldstein, 2000; Abbot et al., 2000). Further, the growth of transnational advocacy networks is very important to the understanding of value politics today (Risse-Kappen, 1995). The growth of national NGOs is to be found in single-issue areas, and these groups easily network in horizontal ways. Modern communications help this organizational form (Kamarck and Nye, 1999). NGOs typically seek out causes where it is easy to present the issue as a singularly good thing, as an improvement or progress, and use human rights language as mode of argumentation and as justification. First, something is defined as a human right, e.g. abortion. Then abortion is justified because it is a human right.

Keck and Sikkink (1998) have done an extensive analysis of such transnational advocacy networks. They describe the strategies of these actors as a *pincer movement*: First, the new or redefined norm is sought to be established at the international level. Here UN conferences are the best arenas because they carry the most legitimacy, but also other arenas may be attractive in specific regions. The norm change sought is typically that of soft law, which does not require member state consensus. Once a text change has been established, it can be invoked at the national level as authoritative. The national NGOs work at this level all the time, seeking to prepare the public debate and public opinion. The invoking of the norm from the international to the national level is successful only if there is



some preparedness for its reception (Cortrell and Davis, 1996). This can be created by the *elite policy level*, where civil servants incorporate SOPs (standard operating procedures) in bureaucratic routines that have political significance, such as defining the abortion pill as 'emergency contraception', as has been done by the WHO and then, by national bureaucracies. In order to succeed in doing this, one preferably needs both some scientific basis (which can be had for any argument today), as well as some text in an international document.

The important role of scientific evidence has been studied especially under the aegis of the environment, in the case of climate change, which has been essentially contested for a long time. Haas has shown how 'epistemic communities' – important groups of experts who agree on what the 'state of the art' in their field concludes – form to support a scientific view-point, and that such communities exert major influence on both policy-makers and public opinion (Haas, 1992 and 1993). There are no systematic studies of medical science in this regard: are there epistemic communities regarding homosexuality and gender issues? Do psychiatrists basically agree on whether homosexuality is learned behaviour or innate? Do they agree on whether children need both male and female role models in their upbringing? From Soviet history we know that all science can be manipulated, but the interesting question is to what extent political actors in Western democracies try to create such epistemic communities in these areas today. It is clear that any position can find its scientific 'evidence' in the global marketplace, but it is politically significant if some actors, such as NGOs, actively seek to create scientific strongholds for their views. We know that the tobacco industry has supported medical research on smoking – a case in Denmark was just exposed – and there is every reason to believe that also other types of interest groups try to mobilise science on their side.

There are essentially three sources of authority for political arguments about norms and values: *international approval, popular, domestic approval, and scientific evidence*. Thus, new norms can also be seemingly generated from below, through agenda setting of the public debate. NGOs are of course expert at this. Finnemore and Sikkink lay out how the invocation of the international norm happens while the same norm is being supported from below, so that one arrives at both democratic legitimacy as well as being 'told' by the UN or some other international body to follow the norm (Finnemore and Sikkink, 1998). In the period after the norm has received some international recognition in some text, the advocacy networks work intensely to create a 'cascade': the norm should be seen and debated every-

where. Thus, one overcomes resistance to the norm by becoming familiar with it, and one thinks after a while that the norm is both just, the result of progress, and natural.

Thus, the interaction between the international and national level is an important one where the two levels consolidate each other: A norm invoked from the international level confers *legitimacy* (Hurd, 1999) – a key variable in modern transparent politics – and a norm seen to emerge from below likewise confers the most important source of legitimacy of all, viz. *democratic* legitimacy. Politicians will then follow suit, based on their respect for popular opinion (or fear thereof!). The campaign is successfully completed when the new norm is embedded in national legislation and practise. At this point it is part of national practice and perhaps law, and that makes it almost unassailable.

Both national and international organisations and bureaucracies may be actors in norm change – they are ‘norm entrepreneurs’, as Sikkink calls them. These strategic actors are often operators between the national and international levels, and we know that they wield important influence on negotiations in international conferences, working in networks of transnational civil servants.

There are several success stories of how transnational advocacy networks have achieved their goals: For instance, the international campaign to ban land-mines (ICBL) managed to get a core set of states to support its cause, and the convention on the use and stock-piling of land-mines actually achieved hard law status – it is a legally binding convention. In this process the NGOs were the major actors in setting the agenda and launching a process, against the persistent opposition of the US (Price, 1998). One can also mention the anti-apartheid movement in South Africa, where again the US was opposed to the claims for abolition, but was gradually forced to change its national position (Klodz, 1995). It is obvious that in order to succeed in such a norm change, one has to have a ‘good cause’ in the sense that it can be easily put in terms of a human right, and preferably in terms of good vs. bad. In the two cases mentioned above, this was easy. But in addition to a ‘good cause’ that easily persuades, one has to have a number of other political resources: a well-functioning transnational network, access to press and media, access to the relevant international arenas, access to favourable scientific knowledge when necessary, and ability to stay the course during the period of international norm establishment and its domestic diffusion and embedding. In the two cases mentioned above, it was critical to the transnational NGO to get a core set of states on board.

States are still the main actors of international politics. Once a 'coalition of the willing' has been established, this tends to attract also other states which do not want to be seen as laggards. If bandwagoning really gets started – as it was in the land-mine case – then no state, apart from those that really have a vital national interest at stake, wants to be left behind.

The number of international arenas for norm-creation has increased significantly in the last decade. A plethora of UN conferences on normative issues have been held: on the environment, on population and development, on women, on social policy, and to come next year, *inter alia* on small arms and light weapons, and on racism. In addition, there are very many other fora where international norms are debated and developed: in the whole UN 'family' of organisations, in the OSCE, the Council of Europe, the WTO, OECD, etc.

#### CONCLUSION: SETTING THE AGENDA, DEFINING IT IN RIGHTS TERMS, CREATING A CRITICAL MASS OF SUPPORT

Those who want to influence the definition of human rights or promote new human rights, must design a political strategy that contains a movement from below (democratic support and demand for change), import international legitimacy in the form of 'soft law', preferably from a UN text, create NGOs as single interest actors in the given area, and work hard to get the desired norm change into what is called the 'cascade' phase. If we look at the right to life in terms of abortion, this issue has left the political agenda many years ago (although resistance exists on a permanent basis in the US). But in Europe the 'right to abortion' is clubbed. No significant political engagement on this issue exists any longer. The 'cascade' phase took place in the 1970s.

If we look at euthanasia as a variant of the right to life – as a right to die – this issue is not yet in the 'cascade' phase. In my own country, there are persistent attempts to set the agenda on this new right, but the Association of Doctors keeps it away from serious debate. I also think that death is such a taboo topic in Western politics today that it is unlikely that people will take to the streets to lobby for the right to die. This issue will more likely be defined as something else, as a variant of terminal medical treatment. Death is too uncomfortable a topic for Western political debate.

Regarding the family, we can conclude that the redefinition of the family, also redefining the right to form a family, reached the 'cascade' phase some time ago in countries like Norway, Denmark, Sweden, and Spain. The

right of the child to its parents have been redefined as an adult right to have a child, as an individual right regardless of the marital status of the adult. This political process has been very successful in terms of transitional organisation of the gay movement (here we have not yet had any empirical studies of this movement, but it is clearly a very able and powerful one) and most of all, in defining the terms of the debate, which have become entrenched as redressing discrimination. The best indicator of this is the marginal role that biological parenthood plays in the political process on this. Biological parenthood, which has been of absolutely key importance in all family law always, is now seen as 'essentialist' and as an old-fashioned issue, as far as I can judge from the Norwegian debate. It is logical that constructivist views of sex brackets biology as a defining variable of parenthood; indeed, it has been necessary to marginalise biology in order to argue that the 'caring ability' of adults should be what counts regarding parenting.

In sum, all fundamental human rights can be changed in political processes if there is no agreement on anything in society as such – and by that I mean no agreement on whether there is a human nature and how to define it, on whether there are two sexes or endless deconstructive processes of sexes, and on whether there can be definitions that are deductive rather than inductive. When all these 'first principles' are essentially contested, as they are today in Western society, human rights have a precarious existence.

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