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Космополитическая демократия и государство

«Роман Захаров против России» большой брат под контролем?

Национальное измерение Европейской Конвенции

Cosmopolitan Democracy and the State

Roman Zakharov v. Russia: Big Brother Under Control?

The National Dimension of the European Convention

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Содержание * Contents

От редакции
Editorial

Максим Тимофеев

Главный редактор Журнала конституционализма и прав человека

Уважаемые читатели!

Позвольте представить вашему вниманию очередной номер Журнала конституционализма и прав человека.

В первую очередь хочу обратить ваше внимание на материалы, посвящённые проблематике европейских стандартов прав человека и их имплементации в национальные правовые системы.

Завершение судебного года в Страсбурге ознаменовалось, в частности, чрезвычайно интересным и важным постановлением Большой Палаты Европейского Суда по правам человека по делу *«Роман Захаров против России»*. Европейский Суд постановил, что российское законодательство, обязывающее мобильных операторов устанавливать техническое оборудование, предназначенное для реализации оперативно-розыскных мероприятий в сетях связи, противоречит требованиям статьи 8 Конвенции (право на уважение частной и семейной жизни). Суд установил нарушение Конвенции в связи с тем, что российское законодательство не предусматривает адекватных и действенных гарантий против злоупотреблений при прослушивании телефонных и иных переговоров и не способно ограничить применение скрытых методов наблюдения исключительно случаями, в которых это «необходимо в демократическом обществе». В своей статье[1], посвящённой этому постановлению, его контексту и последствиям, Сергей Голубок привлекает наше внимание к проблемам, с которыми сталкиваются системы защиты прав человека в эпоху цифровых технологий и приходит к выводу о том, что комментируемое постановление «открывает огромное поле возможностей для судебной деятельности в защиту прав человека», возможностей, которые адвокаты могут и должны использовать.

В рубрике «Национальное измерение Европейской Конвенции» мы публикуем два материала, принадлежащие перу французских судей, Симоны Габорью[2] и Тимоти Париса[3]. Они повествуют о том, какое влияние оказала Конвенция о защите прав человека и основных свобод на французский правопорядок (в сфере административной и уголовной юстиции) и какую роль в этом сыграли французские суды и их диалог с Европейским Судом по правам человека. Как отмечает в своей заметке редактор рубрики Антон Бурков, в настоящий момент актуальность этих статей особо заметна «на фоне выводов судей Конституционного Суда Российской Федерации, сделанных в постановлении от 14 июля 2015

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1 *Roman Zakharov v. Russia:* Big Brother Under Control? (статья на англ. яз.).

2 Конвенция о защите прав человека и основных свобод и серьезные изменения в сфере уголовной юстиции Франции.

3 Европейская Конвенция и французский административный суд: от международного права к национальному праву?

года», касающегося вопроса исполнения решений Европейского Суда по правам человека в случае их конфликта с положениями Конституции Российской Федерации.

Особняком стоят две статьи, написанные датскими философами Асгером Сёренсеном и Мёгенсом Якобсеном.

В своей статье «Космополитическая демократия и государство»[4] Асгер Сёренсен полемизирует с Уильямом Шаерманом, одним из сторонников той точки зрения, что космополитическая демократия неосуществима на практике, поскольку реализация демократической идеи возможна только в рамках наций-государств. Сёренсен критически оценивает этот аргумент политического реализма, рассматривая взгляды его сторонников и противников, и приходит к выводу о необходимости идеалов и воображения в развитии кантианского подхода (многоуровневая всемирная демократия).

Статья Мёгенса Якобсена[5] также представляет собой заочную полемику с коллегой по цеху. Якобсен ведёт спор с Сэмуэлом Моэном, который в своей книге «Последняя утопия» утверждает, что Всеобщая декларация прав человека своей интернационализацией обязана 70-м годам прошлого века. Доктор Якобсен указывает, что согласиться с тезисом Моэна – равно как и с ответом последнего на вопрос о том, что именно привело к указанному феномену, – можно лишь отчасти. С его точки зрения, потенциал интернационализации Всемирной декларации прав человека содержался в ней с самого начала в заложенных в ней перфекционистских, а не либеральных, идеях.

В рубрике «Конституционализм и судебный контроль» мы представляем две статьи, которые – хотя и посвящены различным проблемам -– поднимают вопрос роли судебной власти в развитии конституционного права.

Дмитрий Курносов анализирует правовой стандарт равного представительства в пропорциональной избирательной системе на примере России[6]. Автор статьи, опираясь на правовые позиции Конституционного Суда РФ и сравнительно-правовые материалы, представляет анализ общего правового регулирования пропорциональной избирательной системы, а также вопросов распределения мандатов депутатов между партийными списками и внутри самих списков.

В статье Дебжйоти Гоша «Иная категория: преодоление гендерной бинарности в праве в Индии»[7] анализируется решение Верховного суда Индии, который в 2014 году ввел в индийское право понятие «третий пол». В статье указанное решение рассматривается в контексте необходимой для его понимания информации о проживающих на Индийском субконтиненте представителей социальных групп, которых можно отнести к категории трансгендера[8], а также в свете правовых и социальных последствий этого судебного решения.

Наконец, в рубрике «Права человека и уголовное правосудие» мы представляем вашему вниманию статью Дмитрия Дубровского «Экспертные заключения по делам о “словесном экстремизме” в России: спор о методах». В статье дается критический обзор основных методик, используемых экспертами-лингвистами в делах, в которых обвинение пытается доказать наличие «словесного экстремизма» в материалах, с их точки зрения разжигающих расовую, этническую и иную ненависть или вражду. Основной вывод автора заключается в том, что многообразие существующих подходов и серьезные противоречия в их использовании ставят под сомнение не только обоснованность использования существующих методик анализа текстов, но и как таковую целесообразность применения специальных лингвистических знаний к анализу «текстов особой прагматики».

[4] Cosmopolitan Democracy and the State: Reflections on the Need for Ideals and Imagination (статья на англ. яз.).

[5] The Internationalisation of the Universal Declaration of Human Rights (статья на англ. яз.).

[6] Judicial Standard of Fair Representation in a Proportional Electoral System: The Case of Russia (статья на англ. яз.).

[7] The Categorical Other: Going Beyond the Gender Binary in Law in India (статья на англ. яз.).

[8] Например, о касте хиджра.

Доктрина
Doctrine

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Cosmopolitan Democracy and the State: Reflections on the Need for Ideals and Imagination

Abstract

In Towards Perpetual Peace, Kant is known to give up the ideal of a world republic in favour of a federation of free republics. Following this lead in a contemporary perspective, Michael Walzer has argued for a "3rd degree of global pluralism", and Jürgen Habermas for "global governance without global government". To develop such a constitutional pluralism, Habermas has proposed a pluralist concept of sovereignty which includes the idea of democracy beyond the nation state. For Habermas this implies a multi-layer democracy, whereas David Held talks about "cosmopolitan democracy". The viability of such humanist ideals has been contested by Carl Schmitt, and a recent article by William Scheuerman argues in favour of a similar kind of realism. The basic objection raised is classical; namely that democracy requires a state, and this constitutes the point of departure for my reflections on these matters. The conclusion is not surprising. Yes, on the one side Scheuerman is right, but on the other, he is not: without unworldly ideals, there are no politics at all. It is thus worth continuing to develop the original Kantian approach.

Keywords: Peace, imagination, global government, federation, republicanism.

Космополитическая демократия и государство: размышления о необходимости идеалов и воображения

Аннотация

Известно, что в трактате «К вечному миру» Кант отказался от идеи всемирной республики в пользу федерации свободных республик. Следуя за Кантом, Майкл Уолтцер обосновал идею «третьего уровня глобального плюрализма», а Юрген Хабермас – «глобального управления без всемирного правительства». В целях развития такого конституционного плюрализма Хабермас предложил плюралистическую концепцию суверенитета, которая включает в себя идею демократии за пределами нации-государства. Если для Хабермаса эта идея предполагает «многоуровневую демократию», то Дэйвид Хелд использует термин «космополитическая демократия». Жизнеспособность таких гуманистических идеалов была поставлена под сомнение Карлом Шмидтом; в сравнительно недавней статье Уильям Шаерман также высказался в пользу похожего реалистического подхода. Реализм опирается на классический аргумент, который является отправной точкой моих рассуждений по данному предмету: демократия возможна только в пределах государства. Мой вывод предсказуем. С одной стороны, Шаерман прав, но, с другой, – нет: без возвышенных идеалов нет политики как таковой. Поэтому есть смысл в дальнейшем развитии кантианского подхода.

Ключевые слова: мир, воображение, глобальное правительство, федерация, республиканизм.

[1] Асгер Сёренсен, д-р философии, доцент Университета Орхуса (Дания).

Cosmopolitan Democracy and the State: Reflections on the Need for Ideals and Imagination

Introduction

Within political philosophy the point of departure is often a conflict considered 'classical'; e.g. natural freedom and insecurity versus conventional restrictions and security. This conflict is most often discussed as a conflict within a society of peoples, but it can also be considered at the global level as a conflict between peoples or states. Within a society of peoples, some combination of autonomy, democracy and the state of law is normally considered a viable solution, but what about conflicts between states? What kind of political order should we strive for at the global level to achieve security and, ideally, perpetual peace?

A simple and seemingly reasonable solution would be to scale up the approach just mentioned to conflicts at the national level and propose a world state which secures peace through autonomy, democracy and the state of law. In *Towards Perpetual Peace*, however, Kant apparently gave up the ideal of a world republic, instead recommending a federation of free republics. Following this lead in a contemporary perspective, Michael Walzer has argued for a "3rd degree of global pluralism" and Jürgen Habermas for a "global governance without global government". To develop such a constitutional pluralism, Habermas has proposed a pluralist concept of sovereignty which includes the idea of democracy beyond the nation state. For Habermas this implies a multi-layer democracy, whereas David Held talks about "cosmopolitan democracy". Habermas stages his argument against the so-called realism of Carl Schmitt, and, in a recent article by William Scheuerman, the viability of ideals concerning a democratic world order beyond nation states has also been contested. The basic objection raised by Scheuerman is classical; namely that democracy requires a state, and this I have taken as an opportunity to reflect on these matters.

First I will briefly present Kant's original argument for a federation of republics, at the centre of the project towards perpetual peace, and Walzer's more recent argument for a third degree pluralist global political order (1). Second, Habermas offers a reminder of the deficiencies of both these conceptions in neglecting the importance of economy to politics. Neither Kant nor Walzer show any awareness of the disintegrating forces of capitalism. And when it comes to Walzer, his approach to peace is simply lacking in ambition. Instead I will present Habermas' own idea of a viable political order that may lead to global peace and justice (2). Thirdly, I will consider the legitimacy of possible objections to this ideal, including Scheuerman's objections (3). The conclusion is not surprising: on the one side Scheuerman is right, but on the other, he is not. Utopianism might pose a threat, but without unworldly ideals, there are no politics at all. It is thus worth continuing to develop the original Kantian approach and discussing the idea of a democratic world order beyond nation states (4).

1. A federation of free republics balances peace and freedom

Kant considers the idea of a world republic an idea of reason,[1] but he nevertheless hesitates in recommending it as the ideal global governance structure. Kant is concerned that a world republic would threaten the diversity of languages and religions guaranteed by the nation state. A world republic might degenerate into the "soulless despotism" of a "universal monarchy"[2] or a "people's state".[3] For Kant, making this state democratic does not represent a solution since he thinks of democracy as the direct rule of the people by the people, without the intermediary of laws, and he considers such a rule despotic.[4] Ruling by immediate decisions is arbitrary and despotic, no matter whether the ruling agency is collective, as in democracy, or individual, as in tyranny. It is the separation of leg-

1 Kant, I. (1795/96), Zum ewigen Frieden, in Kant, Werke (1964), Bd. VI, Darmstadt: Wissenschaftliche Buchgesellschaft, 1983, AB 38.

2 Ibid., A62/B63.

3 Ibid., AB 30.

4 Ibid., AB 24-29.

islative and executive powers which constitutes the republic as the civilised alternative to despotism, and, for Kant, government without representation is not government at all.

For Kant the ideal of a state as a democratic people's republic would thus not make sense, neither at the local, nor at the global level. Instead, self-determination and autonomy should be thought of in relation to a plurality of republics. Not even at this level, however, did Kant express much faith in popular government. He actually allowed himself to believe that the ideal republic is one where there is only one executive, equivalent to a king. Thus, to have the republic ruled by a single person is perfectly alright, as long as this ruler understands himself as the highest servant of the state.[5]

The idea of a world republic is also the point of departure for Walzer in his essay "Governing the Globe", reprinted in *Arguing about War*. Just as was the case for Kant, Walzer's main concern is not democracy, but global governance structures and their likely impact on war and peace. The question is simply how to rule the world, and that leads to a normative discussion of the idea of a world government in terms of degrees of centralisation. Walzer thus discusses more or less centralist models of global governance in terms of their likely contribution to "peace, justice, cultural pluralism and individual freedom".[6] And even more than Kant, Walzer is sceptical of the idea of a world republic. Walzer acknowledges that the total absence of any global governance, and the resulting international anarchy, is often considered unattractive.[7] Nevertheless, he argues that an order of dispersed sovereign states actually does offer something attractive; namely unity and protection for natural, cultural and ethnic groups.[8]

According to Habermas' *The Divided West*, this was precisely Kant's point.[9] We thus have good reason to drop the idea of the world republic as an ideal for global governance. Instead of a federation of states, however, Walzer labels his ideal for global governance "third degree of global pluralism",[10] which he considers as the ideal compromise between a world republic and international anarchy. Basically, Walzer argues in favour of maintaining the current order of a world constituted by nation states which are all members of the United Nations (UN) as the overall global organisation. Apart from this basic order, however, Walzer also recognises the importance of regional supranational organisations like the European Union (EU). An organisation like the EU is characterised by having assumed a far greater degree of sovereignty from member states than the UN, and Walzer believes more of such organisations will emerge. In addition, he also acknowledges the importance of specialised cooperative international organisations like the World Bank, the International Monetary Fund (IMF), the World Trade Organization (WTO) etc., all of which he sees as part of the ideal compromise of a third degree of pluralism.

Walzer's pluralist ideal thus roughly describes the world order as we know it at the beginning of the 21st century. As such, it is important to point to a crucial difference between Kant and Walzer. For Kant the demand for a federation of states is one out of the three constitutive elements in the project for perpetual peace,[11] where the other two are republicanism and cosmopolitanism. Apart from these core elements, the project of perpetual peace is also supported conceptually by Kant's philosophy of nature, his anthropology, as well as his philosophy of history.[12] This is not the case for Walzer. His idea of a third degree of pluralism is the final goal, the ideal compromise, and he urges us to give up the dream of having solved the problem once and for all; that is, the dream of perpetual peace.[13] In-

5 Ibid., A98/B104.

6 Walzer, M. (2000), "Governing the Globe", in Walzer (2004), Arguing about War, New Haven & London: Yale University Press, p. 171.

7 Ibid., pp. 172-173.

8 Ibid., pp. 174-175.

9 Habermas, J. (2004), "Hat die Konstitutionalisierung des Völkerrechts noch eine Chance?", in Habermas, Das gespaltene Westen, Frankfurt a.M.: Suhrkamp, pp. 125-127.

10 Walzer, Op.cit., p. 187.

11 Kant, I. (1795/96), AB 35.

12 Kant, I. (1784), Idee zu einer allgemeinen Geschichte in weltbürgerlischer Absicht, in Kant, Werke (1964), Bd. VI, Darmstadt: Wissenschaftliche Buchgesellschaft, 1983, A 402-07; Kant, I. (1795/96), AB 47-58 ("Erster Zusatz").

13 Walzer, Op.cit., p. 188.

stead Walzer wants us to imagine a dynamic world order which allows individuals to engage politically in various aspects and at multiple levels. Walzer admits that there is a real danger that "no one will stop the awfulness",[14] but, on the other hand, in a world organised in a plurality of levels and aspects, there will be a lot of agents who can interfere. And for Walzer, this is as good as it can get; eternal peace is just an illusion.

2. The ideal global governance is without global government

Apparently Habermas' starting point is the same as Walzer's, and at first sight Habermas also seems to be more or less in accordance with Walzer in his normative conclusions. Like Walzer, Habermas argues for realising a multilevel global institutional structure which offers the individual opportunities to participate in various aspects and at various levels of governance. However, in contrast to Walzer, Habermas seems to follow Kant in his idealism. As such, Habermas also wants to maintain a reasonable hope for achieving something more than just a reform of the empirically given political reality; that is, something unconditional like perpetual peace. Habermas thus considers it meaningful to go beyond Walzer's modest realism and try to solve some of the contradictions that Kant ran into. It is in this perspective that Habermas acknowledges that Kant's project may not be particularly well-founded in all of its details.

As mentioned, republicanism is for Kant one of the main constitutive elements to achieving perpetual peace. Representation and the division of power are the key elements of the republic for Kant, and it therefore seems fair to draw a parallel to the contemporary idea of representative democracy. In this modern sense of democracy, democratically ruled states can be said to have been relatively peaceful in relation to each other, even though, according to Habermas, they have not lagged behind other states in waging wars in general. For Kant, however, this was not all. The benefits of republicanism would be supplemented by those of trade. Kant had great trust in the peace-generating effect of trade, since "the spirit of trade cannot coexist with war".[15] For Habermas, however, it is obvious that unchaining capitalism has "worrying effects",[16] but, as he has also pointed out, in *Towards Perpetual Peace* Kant did not have the insights that Hegel gained from the English economists; namely that capitalism would lead to a contradiction between social classes which, in turn, would threaten peace itself within societies thus affected. Neither did Kant see the logical progression, resulting from such contradictions within a capitalist nation state, towards imperialism, and consequently war and not peace. As Habermas reminds us, it was only in the later stages of the 20th century that European welfare states managed to put a lid on these internal conflicts,[17] and it remains unclear whether these solutions will last. As Thomas Pogge, among others, often reminds us, international economic inequality is increasing as we speak.[18]

As mentioned, Walzer puts his trust in existing organisations such as the World Bank, IMF and WTO to form part of the future global governance structure, each having its positive role to play.[19] In contrast, Habermas emphasiszes in *The Divided West* that these institutions have a mandate for business integration, which in reality means decisions of political nature.[20] When it comes to ideal examples of international coordination, Habermas actually sides with the classical anarchists pointing to the success of voluntary agreements in the 19th century regarding, for instance, postal and telegraphic communication.[21] Habermas' pluralism thus turns out to be quite different from Walzer's, and one of the reasons is no doubt that whereas Walzer appears to accept the premises of mainstream liberal political philosophy, Habermas has his philosophical roots

[14] Ibid., p. 189.

[15] Kant, I. (1795/96), A 65/ B 64.

[16] Habermas, J. (2004), p. 143.

[17] Habermas, J. (1995), "Kants Idee des ewigen Friedens – aus dem historischen Abstand von 200 Jahren", in Habermas (1996), Die Einbeziehung des Anderen, Frankfurt a. M.: Suhrkamp, p. 201-203.

[18] Pogge, T. W. (2007), "Cosmopolitanism", in Goodin, R. E., Pettit, P. & Pogge (2nd ed.; eds.), A Companion to Contemporary Political Philosophy, Vol. I, Oxford: Blackwell, p. 318.

[19] Walzer, Op.cit., p. 187.

[20] Habermas, J. (2004), p. 174.

[21] Ibid., p. 173.

in Marx' critique of political economy as the basic logic relevant for normative reflections about politics. Habermas thus takes a far more critical stance than Walzer in relation to capitalism, and along with such a stance comes greater hopes for the possibilities of a future political economy.

Habermas emphasises that global capitalism must be regulated in order to inhibit the disintegrating forces of business economy; forces which have been acknowledged within political economy since long before Marx. As I have argued, for Hegel there was no way to escape alienation and injustice in modernity.[22] Including the critique of business economy in political considerations, however, means recognising that a society has good reason for intervening in the business of entrepreneurs, which implies exercising governmental power and force. In spite of the anarchist tendencies just mentioned, in the end Habermas actually becomes even more supportive of some kind of global governance than Walzer.

Like Walzer, Habermas thus calls attention to the UN and its sub-organisations, as well as regional organisations such as the EU. For Habermas, however, the point is that these organisations all have mixed political constitutions, and together they thus constitute various examples of multilevel political organisations. According to Habermas, by creating such institutions, history has helped us go beyond Kant's original ideal of a federation of states. The existing international and transnational organisations, with their different forms of mixed constitutions, can therefore serve as a "pattern"[23] for the ideal organisation of global governance which should include both transnational and supranational organisations.[24] Kant's problem was how to develop his federalism into an idea of global governance. However, according to Habermas, this was only because Kant presupposed state sovereignty to be indivisible. This is not the case for Habermas. His procedural concept of popular sovereignty makes it possible to conceive of a multilayer structure as sovereign, both in its entirety and at various levels. Habermas argues that, with such a concept of sovereignty, the rule of law according to a constitution does not have to be embedded in a state,[25] and it is upon these conditions that Habermas can provide a consistent formulation of his idea of "global governance without global government".

3. Cosmopolitan risks

Habermas' idea of "global governance without global government" is thus intended as a modern version of Kant's combination of republicanism, federalism and cosmopolitanism. So far I have focused on Habermas' constitutional pluralism, and I have been able to do this rather affirmatively. It is only when looking at cosmopolitanism, and especially at cosmopolitan democracy, that the problems begin.

Even though Kant apparently gives up the ideal of a world republic, Habermas argues in *The Divided West* that Kant nonetheless must be credited for precisely this idea. The idea of the world republic represents a crucial innovation in international law since it is this idea that displaces the focus of international law from the state to the individual human being. Instead of only states and citizens of states, international law must now recognise every single human being as a citizen of the world. It is Kant who makes it clear that there must be a cosmopolitan law alongside a law for citizens of states and a law for states or peoples,[26] and this represents one of the major roots of the modern acknowledgement of cosmopolitanism.[27] After Kant, international law has to recognise two types of actors and concerned parties; i.e. states and human beings. And after the holocaust, the balance has shifted, so the reference to state sovereignty can no longer be considered the final word. As such, Habermas sees the Universal Declaration of Human Rights in 1948 as meaning that non-intervention can no longer be a non-violable right of the state.[28] This is expressed most clearly in the UN Charter with its dual concerns; i.e. state sovereignty and universal human rights.[29] Unlike the declaration itself, the charter is binding for

[22] Sørensen, A. (2016), "Not Work, but Alienation and Education. Bildung in Hegel's Phenomenology", Hegel-Studien, 49 (forthcoming).
[23] Habermas, J. (2004), p. 163.
[24] Ibid., pp. 134-142.
[25] Ibid., p. 138.
[26] Kant, I. (1795/96), AB 19.
[27] Habermas, J. (2004), p. 123.
[28] Ibid., p. 157.
[29] Ibid., pp. 133, 161.

all members of the UN, as are the conventions and covenants on human rights since they have been ratified by a sufficient number of member states.

This, however, sets the stage for a sequence of interrelated problems. In the context, it is important for Habermas to argue for the legitimacy of pursuing cosmopolitan goals. This brings him in conflict with Schmitt. It is Schmitt who has argued most forcefully that international politics based on the universalist morality inherent in human rights are a danger to the stability of the international order. The ideal of cosmopolitanism is such an ideal for international politics. Since Schmitt thus must consider cosmopolitanism as a threat to the stability of the world, he must also believe that it should be abandoned. In the particular case of Schmitt, however, Habermas argues that the claim that there is a conflict between the sovereignty of the state and the sovereignty of man is backed up by an ideology that idealises war as such, and this ideology is in turn backed up by vitalism, nationalism and anti-Semitism.[30] Nevertheless, Habermas does not disprove the validity of Schmitt's basic claim about the conflict. The conflict within modern international law between human rights and state sovereignty is thus still worth considering. I will explore this conflict by considering cosmopolitanism related to law (3.1.), institutions (3.2.) and hopes (3.3.).

3.1. Law is not a threat to peace

When it comes to Schmitt's challenge, Habermas' immediate solution is to recommend further developing the laws and institutions which are intended to manage these conflicts. In contrast to Kant, Habermas seems to accept that armed conflicts on the scale of war between nation states will always occur, but it is precisely because of the likelihood of such conflicts that he finds that a "democratically legitimate world organisation capable of taking action"[31] is vastly preferable to continuing to solve international conflicts through limited small-scale wars, as Schmitt would have it. Habermas recommends that breaches of international peace should be regarded as crimes within a global legal order. The existing legal system handling international crime should thus be expanded. This would also imply that war criminals receive legal protection, which, according to Habermas, would protect everybody against the dangers of excessive moralisation highlighted by Schmitt.[32] Quoting Klaus Günther, Habermas would therefore recommend "a democratic transformation of morality into a positive system of law" with all of its legal procedures. And Habermas adds his own conclusion: "Fundamentalism of human right is to be avoided not by giving up on the politics of human rights, but rather only through the cosmopolitan transformation of the state of nature among states into a legal order".[33]

In this way governance without government is also a "global domestic politics". By institutionalising human rights as legal rights within a constitutional framework, Habermas believes that Schmitt's argument can be dismissed, and I think he is right. However, such a dismissal is not that easy, especially when we consider Held's project for a cosmopolitan democracy.

3.2. Institutions might create peace

Today's advocates for democracy do not want to restrict themselves to arguing for democracy within the limitations of the nation state. Held made this a crucial point in his argument against the grand old man of democracy, Robert Dahl.[34] The basic argument is that we are facing problems that do not respect artificial frontiers. Economy, pollution and terrorism do not respect national borders. Perceiving such transnational problems as increasingly urgent is part of what Ulrich Beck calls "cosmopolitanisation", and, as I have discussed elsewhere, this experience is fundamental to the ideology of cosmopolitanism.[35] Here, however, the point is to emphasise that globalisation means that we need more comprehensive political structures, and if you are a supporter of democracy – as are the overwhelming majority of contemporary Western intel-

[30] Habermas, J. (1995), pp. 228-234.

[31] Ibid., p. 226.

[32] Ibid., p. 226.

[33] Ibid., p. 236.

[34] Held, D. (1991), "The Possibilities of Democracy", Theory and Society, 20 (6), pp. 885-887.

[35] Sørensen, A. (2015), "Cosmopolitanism – Not a 'major ideology', but still an ideology", Philosophy and Social Criticism, OnlineFirst, March 15th.

lectuals – then you have to argue for a democratic political order beyond the restrictions of the nation state. The result is that discussions about perpetual peace and global governance become discussions about how we can think of a viable global political system in terms of democracy.

This brings us to the second issue. Held and Habermas think that we should continue developing the ideal of democracy on a global scale, but are they right? Should we try to realise democracy beyond the nation state? Is cosmopolitan democracy an ideal to strive for and, if so, in what sense? If democracy is more than a form of government, i.e. if it is a culture, a lifestyle or, as John Dewey would have it, "a mode of associated living",[36] we may well want it to be developed globally and beyond the borders of a nation state. But what if we think of democracy as a form of government? Will democracy beyond the state be an ideal, or will it be a recipe for disaster?

The point made here is classical; namely that, as it was phrased by Hobbes, "covenants without swords are but words, and of no strength to secure a man at all".[37] It is this realist argument that Scheuerman directs against Habermas. Democracy can only function as a form of government if democratic decisions are backed up materially by state power and sanctions of the law. As Scheuerman stresses, the best way to ensure democratic equality and freedom is through the establishment of fair and reasonable procedures in a state. Only then will the individual have confidence in his possibilities for democratic influence in the future.

The state monopoly on violence is a crucial factor in a well-functioning deliberative democracy. Only a strong state has the power to ensure that action is taken against illegitimate pursuits of power in civil society based on economic inequality, cultural hegemony, or traditional recognition. As Scheuerman emphasises, engaging in developing justice through democracy is a long process, and it only makes sense when there is a legitimate monopoly of power which can be applied against illegitimate resistance.[38] As he puts it: "the state's monopoly on legitimate violence has repeatedly helped guarantee both the fairness of democratic procedures and the effective enforcement of the policies generated by them".[39]

Actually, Habermas would have to agree with this argument since he has repeatedly stated that only a democratic constitutional republic and the state of law can secure the integration of citizens in the political will formation, decision-making and legislation.[40] Scheuerman's criticism can thus be said to reveal a conflict in Habermas' political thought between idealistic hopes and conceptual analysis. His conceptual analysis tells Habermas that, to have a well-functioning democracy, the support of a legitimate state is necessary, but such a state probably needs to be more coercive than Habermas can bring himself to suggest. The conclusion seems to be that there can be no democracy beyond a state, but does that mean that Habermas' conception of governance without government is but an illusion? Is Habermas' project "but words", as Hobbes put it?

No, I think not. Actually I think that it is precisely in accepting the conflict between hopes and concepts, and dealing with it in terms of institutions and law, that Habermas shows himself to be Kant's true heir. This would require Habermas to argue more clearly in terms of "institutions" rather than "organisations", but actually, when it comes to giving positive examples, he does indeed speak of institutions rather than organisations.

3.3. Utopian hopes might threaten peace

However, this is not the case with Held. Admitting his understanding of the ideals of a cosmopolitan democracy, one may worry about the implications – and thus the consequences – for the stability of the global political order. First of all, Held's original concept of democracy is strongly critical of procedural limitations and in favour of letting the realisation of democracy transgress the boundaries of constitutional institutions.[41] This however, I would

[36] Dewey, J. (1916), Democracy and Education, New York: The Free Press, 1966, p. 87.

[37] Hobbes, T. (1651), Leviathan, Harmondsworth: Penguin, 1985, p. 223 (Part 2, Chap. 17).

[38] Scheuerman, W. E. (2009), "Postnational democracies without postnational states? Some sceptical Reflections", Ethics & Global Politics, 2 (1), p. 51.

[39] Ibid., pp. 46-47.

[40] Habermas, J. (2004), p. 140.

[41] Held, D. (1991), pp. 881-882.

claim, contributes to a blurring of the idea of democracy as a constitutional ideal in relation to more general normative ideals such as justice, equality or the good life. The most important point in this context, however, is Held's way of dealing with one very important material condition of democracy; namely the state.

Like Habermas, Held was also raised as a critical theorist, and just like Habermas he argues for sharing sovereignty among multiple agencies and multiple layers, where some agents are national governments, while others are trans- or supranational institutions and organisations. However, whereas Kant put the emphasis on law, Walzer on governmental institutions, and Habermas on legal institutions, Held's idea of cosmopolitan democracy is to a much larger degree an expression of hopes for the development within civil society of voluntary non-governmental organisations (NGOs) such as Amnesty, Greenpeace, Oxfam, Human Rights Watch, etc.[42] While Habermas restricts himself to arguing in favour of a multi-layer democracy, Held calls his ideal "cosmopolitan democracy"[43] precisely to signal a much greater role for a global non-governmental civil society and the rights of world citizens in relation to each and every state. Held admits in the third edition of his *Models of Democracy* that his hopes for a cosmopolitan democracy and cosmopolitan governance might seem utopian, but he believes that what we stand to gain from being able to settle conflicts democratically – that is, for him, peacefully, without war – is so important that we must do everything possible to try anyway.[44]

Under the heading of cosmopolitan democracy, Held's wish is to establish a plurality of trans- and supranational structures, *fora* and NGOs. The problem is that this expansion in the number of organisational actors legitimately entitled to demand political influence contributes to a weakening of the relative legitimacy of the state, and thus of its sovereignty. Add to this that the mere augmentation of *fora* increases complexity and thus the difficulties in relevant and recognised authorities deciding anything when something awful happens and action is required. The problem is actually double-sided; i.e. how the decision must be taken and who has the legitimate authority. Following Schmitt, one can argue that the very recognition of cosmopolitan ideals in itself increases the possibility that horrors occur. The real danger is thus that ideals of cosmopolitan democracy such as Held's mean that the sovereignty of the nation state is no longer recognised as an almost sacred and inviolable entity. When state sovereignty is weakened ideologically, so is its important judicial function in international relations; namely as a disincentive to other people's bellicose intentions. The point is thus that strong political hopes for cosmopolitan democracy by implication can increase the risk of war for a number of reasons which may even work together and reinforce each other.

The argument is that if we demand democracy beyond the legal framework of a state, then we weaken the legitimacy and the power of governmental decision-making for the benefit of the sovereignty both of individuals and of transnational organisations, and this will increase the risk of armed conflicts. When the border of the state is no longer something sacred, then it can be transgressed all too easily. It is this development of sovereignty and international law that Michael Hardt and Antonio Negri have identified in *Empire*, with inspiration from precisely Hobbes and Schmitt. Their main approach is classically Marxist; namely that politics must be envisaged on the basis of the economy. When capitalism extends its logic and dynamic to a global scale, sovereignty is similarly extended. That means that we cannot talk about wars between sovereign states in the classical sense, but only about armed conflicts, civil wars and police actions within the global sovereign order, referred to by Hardt and Negri as "the Empire".[45] I have argued this point in more detail elsewhere.[46] Here the point is only to add to the scepticism towards Held's exaggerated

[42] Held, D. (3rd ed. 2006), Models of Democracy, Cambridge: Polity, pp. 306-311.

[43] Held, D., Archibugi, D. & Köhler, M. (1998; eds.), Re-imagining Political Community. Studies in Cosmopolitan Democracy, Cambridge: Polity.

[44] Held, D. (2006), p. 311.

[45] Hardt, M. & Negri, A. (2000), Empire, Cambridge, Mass.: Harvard University Press, p. 189.

[46] Sørensen, A. (2015), "The Law of Peoples on the Age of Empire: The Postmodern Resurgence of the Ideology of Just War", Journal of the Philosophy of International Law, 6(1), pp. 19-37.

hopes for cosmopolitan democracy.

Of course, being critical theorists, Habermas and Held are very familiar with this logic, but I believe that it has been important for both of them to distance themselves from the political realism, cynicism and despair which could easily be the implication of such a radical critique of ideology. Therefore they stick to the ideals of what, for instance, the EU could be and ignore what the EU really is; that is, how it actually functions. As reminds us, when we consider what the EU has actually done in the past, it does not regulate the globalised capital. In fact, the opposite is true: the EU has created financial structures that are conducive to increasing capital circulation and accumulation, and it remains a "paradigmatic case of primarily neo-liberal supranational governance".[47]

Applying the same critical perspective, one might argue that, when Held argues in favour of cosmopolitanism in terms of a utopian cosmopolitan democracy including all kinds of transnational NGOs, it increases the ideological support of civil society, which in itself weakens the state, thereby strengthening the possibilities of further globalisation of capital. What adds to this worry is not just Held's very liberal understanding of democracy, as demonstrated in his relationship to the Gaddafi family – letting his place of employment at the time, the London School of Economics, receive substantial funds while acting as a political adviser to the Libyan regime and as academic adviser to Saif al-Islam Gaddafi, son of former Libyan leader Muammar Gaddafi, up to his award of a doctoral title from the university, amid allegations of plagiarism and the use of a ghost writer, for a thesis praising democracy (Wikipedia) – but also the case of Habermas who, according to Perry Anderson, has actually spoken in favour of almost all possible military interventions in recent international conflicts.[48] As Peter Niesen has stressed, one should keep in mind that, no matter how liberal the ethos behind foreign policy unilateralism may appear, in international relations, the UN has already institutionalised an order of "legal omnilateralism". There are therefore good reasons to view the "ethical imperialism"[49] of a stronger state as detrimental to the world order.

In this light – with a nod to Lenin – one might be tempted to think of Habermas and especially Held as useful idiots for the ideological support and consequent expansion of the global capitalist world order. As such, Marx and Engels already used "cosmopolitan" to characterise the "bourgeois" "exploitation of the world market" through "production and consumption" in *The Communist Manifesto*.[50] Apparently this hint was developed in Stalin's Soviet Union, and, according to Veljko Vujacic, the authoritative definition of cosmopolitanism in 1953 was the following: "reactionary bourgeois ideological current which, under the guise of slogans in favour of a "world-wide state" and '"world citizenship", denies the nation the right to an independent state existence, national traditions, national culture, and patriotism".[51]

Cosmopolitanism was thus "the ideology of American imperialism striving for world domination", and it was concluded that "bourgeois cosmopolitanism is the reverse of proletarian internationalism and hostile to it".[52] Even though such dogmatic definitions sound a little corny today, I still think they contain elements of insight worth maintaining.

4. Keep dreaming: politics requires ideals

The conclusion is not surprising: Hobbes, Scheuerman *et al.* are of course right. A well-functioning and stable democracy requires a government that can pass laws and has the power to enforce these laws. Without this, democracy risks degenerating into the kind of mob rule that led Kant

47 Scheuerman, W. E. (2009), p. 46.

48 Anderson, P. (2005), "Arms and Rights. Rawls, Habermas and Bobbio in an Age of War", New Left Review, pp. 31, 32-34.

49 Niesen, P. (2007), "The 'West divided'? Bentham and Kant on law and ethics in foreign policy", in Chandler, D. & Heins, V. (eds.), Rethinking Ethical Foreign Policy, London and New York: Routledge, pp. 95, 113.

50 Marx, K. & Engels, F. (1848), "Manifest der kommunistischen Partei" in Marx-Engels Werke (MEW), Bd. 4, Berlin: Dietz, p. 466.

51 Vujacic, V. (2007), "Stalinism and Russian Nationalism: A Reconceptualization", Post-Soviet Affairs, 23 (2), p. 176.

52 Ibid.

to consider democracy despotic. And, of course, Schmitt, Hardt and Negri are also right. Recognising universal human rights and transnational structures weakens the legitimate sovereignty of the state. This is the same point made by the Soviet ideologists. As Habermas would remind us, we should be particularly wary of capitalism and the political organisations that contribute to the globalisation of capital, such as the EU, World Bank, IMF, WTO, GATT, etc. But it is not just a question of facilitating the globalisation of capitalism. Even UN-affiliated institutions dedicated to the protection of universal human rights, such as the International Court of Human Rights, in principle weaken the state precisely by recognising the universality of such rights, and thus their validity transcending the legal framework of any particular nation state. As organisations they of course rely on the states to recognise them and enforce their decisions, but the ideology they promote undermines the legitimacy and sovereignty of the state. As indicated above, in that sense cosmopolitanism is indeed a liberal ideology in the traditional Marxist sense; something which I have also argued elsewhere in more detail.[53]

Nevertheless, we must accept the challenge behind cosmopolitanism: our problems *are* global, and even though there are social classes with different interests, we are all in this together. Economic, technological and political developments mean that today we are struggling with material challenges that do not respect national state borders. Actually, we have seen it coming for a long time. As can be seen in *The Communist Manifesto,* this was already quite clear to Marx more than 150 years ago.[54] In relation to the fight against the exploitation of bourgeois capitalism, the "worker has no fatherland",[55] and it was precisely therefore the International Working's Association, often called the First International, was formed in 1863. For Marx, Bakunin *et al.* it was obvious that the problems of the global capitalist economy require international solutions, and today it is just as obvious that planetary ecology requires the same. Confronted with such challenges, we should be happy that also today we have intellectuals who insist that these crucial decisions must be made in democratic *fora*, even though we still do not know precisely what democracy may mean beyond the state. As André Gorz clearly already saw decades ago, it is a short path from dealing with real environmental problems politically to "ecological techno-fascism".[56]

So let us rejoice in humanity's sustained commitment to what is still not real but might become so, even if it may appear impossible, in both the technological and the political fields. As Aristotle expressed it in relation to politics and ethics, there is a part of reality which might be different,[57] and it is precisely this part of reality that we as human beings have a hand in. As Jørgen Huggler has emphasised, for Kant, cosmopolitanism is subordinated to the political goal of perpetual peace,[58] and today, with millions of refugees fleeing wars east and south of the Mediterranean Sea, this is certainly more important than it has been for a long time.

We should therefore honour Kant's project to initiate a global political process, building upon some rather simple preliminary principles, such as that of non-intervention, to reach the mature state of legally institutionalised republicanism, federalism and cosmopolitanism. This is actually what has happened with the establishment of the UN, and we should continue in the same way, just as we should think of Habermas' project for governance without government, multi-layer democracy and divided sovereignty in the same spirit. Both Kant and Habermas represent attempts at conceptualising and incorporating ideals in legal institutions, and this is so far the best way we have for handling conflicts in a civilised way. It is not perfect, but in relation to the powerful forces of economy and technology at our disposal, it is better than nothing.

[53] Sørensen, A. (2015), "Cosmopolitanism – Not a 'major ideology', but still an ideology", Philosophy and Social Criticism, OnlineFirst, March 15th.

[54] Marx, K. & Engels, F. Op.cit., pp. 463-67, 474, 479.

[55] Ibid., p. 479.

[56] Gorz, A. (1991), Capitalism, Socialism, Ecology, London: Verso, 1994, pp. 43-44 (here after Lataouche, S. (2007), Farewell to Growth, Cambridge: Polity, 2009, p. 94).

[57] Aristoteles, Nicomachean Ethics, in The Complete Works of Aristotle (1984), New Jersey: Princeton University Press, Vol. 2, p. 1139a.

[58] Huggler, J. (2010), "**Cosmopolitanism and peace in Kant's essay on 'Perpetual Peace'",** Studies in Philosophy and Education, 29 (2), p. 134.

The final conclusion is thus that we should respect the hopes of Kant, Habermas, Held and other idealists. Without their commitment to political ideals and legal norms, we would be much worse off. In the U.S. they often say to idealists, in a slightly derogatory way, "*Keep dreaming".* Yet dreaming, imagining, is precisely what it takes. Politics demands a willingness to imagination, as John Lennon reminded us with *Imagine.* Of course, we must engage critically with the way these dreams have been conceptualised so far, but we must be ready to imagine a world which goes beyond the realities we currently face. It is the demand for justice that makes this lack of realism legitimate. Our history so far has been all too generous with examples of injustice; to continue the fight for justice, we therefore need imagination.[59] To save the world it is necessary to demand the impossible: peace, freedom and justice. Making such demands just might make it possible.[60]

[59] References to imagination are actually quite common among critical theorists. Max Horkheimer and Herbert Marcuse often made remarks about it (e.g. Horkheimer, M. (1937), "Traditionelle und kritische Theorie", in Horkheimer (1988), Gesammelte Schriften, Bd. 4, Frankfurt a.M.: Fischer, p. 194 and Marcuse, H. (1937), "Philosophie und Kritische Theorie", in Marcuse (2004), Schriften, Bd. 3, Springe: zu Klampen, p. 246), and an anthology on these matters edited by Held et al. is aptly titled Re-imagining Political Community (Polity, 1998).

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Передовая
Frontline

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***Roman Zakharov v. Russia:* Big Brother Under Control?**

Abstract

On 4 December 2015 Grand Chamber of the European Court of Human Rights rendered its unanimous judgment in Roman Zakharov v. Russia. This is a new step in development of international human rights standards vis-à-vis massive surveillance techniques used by many States worldwide. The author draws our attention to the threats of mass surveillance in a digital era, deficiencies of the human rights mechanisms in this regard, and concludes that Roman Zakharov sets the agenda for a vast area of human rights litigation in the future. What visible today is only general contours of this area; digital frontier poses sets after sets of exciting questions that lawyers should start answering.

Keywords: European Court of Human Rights, right to respect for private life, secret surveillance.

***«Роман Захаров против России»:* большой брат под контролем?**

Аннотация

4 декабря 2015 года Большая Палата Европейского Суда по правам человека вынесла единогласное постановление по делу «Роман Захаров против России». Это, безусловно, новый шаг в развитии стандартов международного права прав человека, касающихся технологий широкомасштабного надзора, используемых многими государствами во всем мире. Автор привлекает наше внимание к угрозам систем массового надзора в эпоху цифровых технологий, а также недостаткам механизмов защиты прав человека в этой области и приходит к выводу, что постановление по делу Романа Захарова открывает огромное поле возможностей для судебной деятельности в защиту прав человека. Сегодня видны только общие контуры этой области; цифровая действительность ставит захватывающие вопросы, на которые юристы должны начать давать ответы.

Ключевые слова: Европейский Суд по правам человека, право на уважение частной жизни, тайный надзор.

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Roman Zakharov v. Russia: Big Brother Under Control?

On 4 December 2015 Grand Chamber of the European Court of Human Rights (hereinafter, also the Court) rendered its unanimous judgment in *Roman Zakharov v. Russia.*[1] This is a new step in development of international human rights standards vis-à-vis massive surveillance techniques used by many States worldwide.

Article 8 of the European Convention on Human Rights provides "everyone" with "the right to respect for his [or her] private and family life, his [or her] home and his [or her] correspondence".[2]

Back in 1978 the Court accepted that "the existence of some legislation granting powers of secret surveillance over the mail, post and telecommunications [was], under exceptional circumstances, necessary in a democratic society". However, "being aware of the danger such a law poses of undermining or even destroying democracy on the ground of defending it" the Court was wise to affirm that States "may not, in the name of the struggle against espionage and terrorism, adopt whatever measures they deem appropriate".[3] The Court "must be satisfied that, whatever system of surveillance is adopted, there *exist adequate and effective guarantees against abuse*".[4]

The Court developed this approach in a line of cases concerning interception by the authorities of various communications, including phone conversations and letters. That case-law focused on the grounds and procedure for authorization to intercept communications, in particular, in the framework of criminal proceedings. The Court reiterated that "[i]n the context of covert measures of surveillance, the law must be sufficiently clear in its terms to give citizens an adequate indication of the conditions and circumstances in which the authorities [were] empowered to resort to this secret and potentially dangerous interference with the right to respect for private life and correspondence".[5]

The Court's approach was based on the assumption that authorities would identify certain individuals or groups of communications between them for surveillance. Therefore, it was necessary to ensure that authorization procedure provides "adequate and effective guarantees against abuse". Normally, it is for independent courts to authorize surveillance.

However, the Court has always been aware that "the technology available for use is continually becoming more sophisticated".[6] In 2013 the Snowden revelations of the scope and magnitude of electronic surveillance programs run by the United States and their partners made headlines.[7] In 2015 the Court affirmed that at least in Russia "legislation institute[d] a system of secret surveillance under which any person using mobile telephone services of Russian providers can have his or her mobile telephone conversations intercepted, without ever being notified of the surveillance"[8]. It is now official. In Russia security services and police have direct access through backdoor under their exclusive control to all mobile telephone communications of each and every citizen.[9]

Such system is not incompatible with the Convention only if it provides for "adequate and effective guarantees against abuse". However, in the

1 *Roman Zakharov v. Russia* [GC], no. 47143/06, 4 December 2015.

2 Convention for the Protection of Human Rights and Fundamental Freedoms. Article 8 § 1.

3 *Klass and Others v. Germany*, no. 5029/71, §§ 48-49, 6 September 1978.

4 *Ibid*.,§ 50. Emphasis is added.

5 *Association for European Integration and Human Rights and Ekimidzhiev v. Bulgaria*, no. 62540/00, § 75, 28 June 2007.

6 *Kruslin v. France*, no. 11801/85, § 33, 24 April 1990.

7 Marko Milanovic, Human Rights Treaties and Foreign Surveillance: Privacy in the Digital Age. 56 *Harvard International Law Journal* (2015). P. 81.

8 *Roman Zakharov*, cited above, § 175.

9 *Ibid*., §§ 268 and 270. See also: Andrei Soldatov and Irina Borogan, The Red Web. The Struggle between Russia's Digital Dictators and the New Online Revolutionaries. *Public Affairs* (2015).

reality of potentially total surveillance these guarantees should have more dimensions than in the situation of individualized interceptions. It is not prudent to focus only on the procedure for authorization of surveillance when in fact everyone is followed. This new generation of guarantees against abuse by secret services should aim principally at the process of surveillance and especially use of data thus obtained.

Russian legislation and practice scrutinized by the Court in *Roman Zakharov* provided a good example of what is *not* sufficient.

Supervision over secret surveillance by Russian prosecutors is illusory in practice.[10] It is not conducted in transparent manner.[11] Moreover, this supervision is flawed due to the conflict of interests because the same prosecutors need the information obtained through secret surveillance for their criminal cases.[12]

Judicial remedies are *de facto* inaccessible given that the victim of surveillance is by design of the system (known in Russia as "SORM") deprived of the information about who and to what extent managed to overhear his or her conversations. The only exception is when the criminal proceedings are brought against the person concerned, and relevant communications are disclosed to be used as evidence against him or her. The Court therefore concluded that Russian law did not "provide for an effective judicial remedy against secret surveillance measures in cases where no criminal proceedings were brought against the interception subject".[13]

The systemic deficiency of Russian law revealed by the European Court of Human Rights in *Roman Zakharov* is exacerbated by the fact that it was consistently found to be compatible with Russian Constitution by the Constitutional Court of the Russian Federation.[14]

It led the Court to important conclusion "that Russian legal provisions governing interceptions of communications [did] not provide for adequate and effective guarantees against arbitrariness and the risk of abuse which is inherent in any system of secret surveillance, and which is particularly high in a system where the secret services and the police have direct access, by technical means, to all mobile telephone communications".[15]

It is not the Court's task to determine which general measures should be taken by the Russian Federation to ensure compliance with *Roman Zakharov* pursuant to Article 46 of the Convention. However, it is clear from what the Court said that such general measures should cover not only authorization to intercept, but also modalities of storage and destruction of information obtained through secret surveillance.[16] Most importantly, "adequate and effective guarantees against abuse" must encompass independent, effective and continuous supervision of interceptions which is, moreover, subjected to public scrutiny.[17]

It is the Court's position that the secrecy of surveillance measures should not result "in the measures being effectively unchallengeable and outside the supervision of the national judicial authorities" and ultimately the Court itself.[18]

For systems like SORM (and there are grounds to believe that they are run not only by the Russian Federation but also by other powerful States) to be compliant with Article 8 of the Convention, independent general overview of the secret services' activities should be coupled with effective individual complaints procedure accessible for persons concerned.

As for general measures, independent (judicial, pubic, and / or parliamentary) oversight should include the possibility to routinely check how exactly the secret services utilize the surveillance system and how they dispose of the data collected. In practice, this external audit should be tantamount to at least backdoor to the backdoor. *Modus operandi* of the Interception of Communications Commissioner established by the Regulation of Investigatory Powers Act[19] in the United Kingdom can perhaps be used as a model.

Apart from that, persons who have reasonable

10 *Roman Zakharov*, cited above, § 284.
11 *Ibid*., § 283.
12 *Ibid*., § 280.
13 *Ibid*., § 298.
14 *Ibid*., § 299.
15 *Ibid*., § 302.
16 *Ibid*., § 302.
17 *Ibid*., § 302.
18 *Kennedy v. the United Kingdom*, no. 26839/05, § 124, 18 May 2010.
19 See *ibid*., §§ 57-61.

grounds to believe that their communications were intercepted should have effective and accessible remedy at their disposal, resembling perhaps the Investigatory Powers Tribunal[20] in the United Kingdom.

These oversight structures, to be meaningful, should have competence to order the destruction of data if its storage is no longer justified.[21] One of the important remedies for the persons under surveillance is to ensure *a posteriori* access by them to the dossier collected.[22] This remedy represents an important dimension of the right to the truth: "For society in general, the desire to ascertain the truth plays a part in strengthening confidence in public institutions and hence the rule of law. For those concerned… establishing the true facts and securing an acknowledgement… constitute forms of redress that are just as important as compensation, and sometimes even more so".[23] In essence, quarry should be able to pursue the hunters after the chase in order to ensure the fairness of the chase itself.

Irrespective of the particular regulatory scheme in respect of secret surveillance accepted in a given jurisdiction it is clear that new technological realities revealed in *Roman Zakharov* make judicial authorization of interceptions *per se* simply not enough. The 2014 report of the Office of the United Nations High Commissioner for Human Rights noted that judicial involvement in oversight of secret surveillance should not be viewed as a panacea given that "in several countries, judicial warranting or review of the digital surveillance activities of intelligence and / or law enforcement agencies have amounted effectively to an exercise in rubber-stamping".[24] *Roman Zakharov* names one of such "several countries".

General approach taken by the Court in *Roman Zakharov* is applicable not only to surveillance of communications transmitted through mobile phones (smartphones). It will most probably lead to case-law concerning backdoors to other digital means of communication such as on-line messengers and social networks, e-mails and new methods of human interaction in the future. However, so far one has to agree with the somber assessment made in 2013 by the Special Rapporteur of the United Nations Human Rights Council on the Promotion and Protection of the Right to Freedom of Opinion and Expression that "[h]uman rights mechanisms have been… slow to assess the human rights implications of the Internet and new technologies on communications surveillance".[25]

Existence and effective functioning of the independent institutions ensuring both general oversight and examination of individual complaints vis-à-vis massive surveillance conducted by the secret services is indispensable for the exercise and enjoyment of human rights in societies where authorities have advanced surveillance systems like SORM at their disposal. It should not be overlooked that such systems interfere not only with Article 8 (privacy) rights but also with rights enshrined in Article 10 of the Convention (freedom of expression). The mere existence of such systems contributes to the chilling atmosphere of fear and self-censorship that undermines freedom of expression. People are afraid to talk to each other. They are prevented from expressing themselves. Very often not being able to rely on confidentiality of their communications by digital means they choose to stay silent. As infamous saying goes, the fact that one suffers from paranoia does not necessarily mean that he or she is *not* followed.

The United Nations General Assembly in its 2013 Resolution on the right to privacy in the digital age emphasized that unlawful or arbitrary surveillance

[20] See *ibid*., §§ 84-98.

[21] *Segerstedt-Wiberg and Others v. Sweden*, no. 62332/00, § 120, 6 June 2006.

[22] Véronique Bruck, Lever le voile sur la surveillance secrete – le droit au respect de la vie privée face à l'activité des services de renseignement. *Liber amicorum* Dean Spielmann. *Wolf Legal Publishers* (2015). P. 56.

[23] *El-Masri v. The Former Yugoslav Republic of Macedonia*, no. 39630/09, 13 December 2012. Joint Concurring Opinion of Judges Tulkens, Spielmann, Sicilianos and Keller, § 6.

[24] The Right to Privacy in the Digital Age. Report of the Office of the United Nations High Commissioner for Human Rights. A/HRC/27/37 (30 June 2014), § 38.

[25] Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Frank La Rue. A/HRC/23/40 (17 April 2013), § 18.

and / or interception of communications as highly intrusive acts violate both right to privacy and right to freedom of expression and may contradict the tenets of a democratic society.[26]

Apart from that, total secret surveillance of all communications irrespective of their nature by definition threatens advanced confidentiality regime accorded under Article 8 of the Convention to certain types of communications such as those covered by legal professional privilege,[27] containing confidential health data,[28] and capable of disclosing the identity of the journalistic sources.[29]

Mobile telephone conversations are frequently transboundary. Freedom of expression includes the right "to receive and impart information and ideas… regardless of frontiers".[30] Cases that the Court will decide in the future building upon *Roman Zakharov* may have extraterritorial dimension. Take, for example, users of Russian mobile phone providers who are outside of Russia. It was convincingly shown that there was "much uncertainty as to how existing case law on the jurisdictional threshold issues might apply to foreign surveillance".[31] There are of course essential differences between cases concerning use of lethal force outside of territory of a given State and cases about wiretapping of foreign or transboundary phone conversations. However, there are also similarities, and the useful test is "the degree of control exercised by the state over the conduct alleged to constitute a violation of human rights law".[32] It should be added that in cases of foreign or extraterritorial surveillance this control may be exercised by more than one State especially given the element of intelligence sharing.

Important and thrilling issue for the Court to deal with in the future is the use of encryption as counter-surveillance technique. Professor David Kaye, new Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, opined in his 2015 report that "[c]ourt-ordered decryption, subject to domestic and international law, may only be permissible when it results from transparent and publicly accessible laws applied solely on a targeted, case-by-case basis to individuals (i.e., not to a mass of people) and subject to judicial warrant and the protection of due process rights of individuals".[33] The Court will explore this myriad of questions in its future cases. Competition between surveillance / decryption and encryption is arms race of the digital age. It has legal dimension, not only technological one.

There is a cross-cutting public / private element of the problem raised by *Roman Zakharov*. The applicant initially brought domestic proceedings against three leading mobile network operators in St. Petersburg arguing that they had installed equipment which permitted the Russian secret services to intercept all telephone communications, the authorities including the Russian intelligence service were joined to the proceedings only as third parties.[34] In fact, surveillance conducted by public authorities is impossible without at least tacit approval or connivance by private telecommunications service providers who *de facto* act as undercover agents with, frankly, not much choice left.

But sometimes surveillance can be driven by private interests. Taking aside the cases of commercial espionage and dishonest spouses one can think about the relations between employer and employee. Indeed, as Professor Sheldon Leader has wisely pointed out "[a] good place to examine the protection afforded by basic liberties when vulnerable individuals meet powerful organizations is in

[26] United Nations General Assembly Resolution 68/167, Preamble.

[27] *Kopp v. Switzerland*, no. 23224/94, §§ 73-75, 25 March 1998. Note pending case *Versini-Campinchi and Crasnianski v. France*, no. 49176/11, communicated in 2013.

[28] *Avilkina and Others v. Russia*, no. 1585/09, § 45, 6 June 2013.

[29] *Telegraaf Media Nederland Landelijke Media B.V. and Others v. the Netherlands*, no. 39315/06, §§ 97-102, 22 November 2012.

[30] Convention. Article 10 § 1.

[31] Milanovic, cited above. P. 87.

[32] Françoise Hampson, The Scope of the Extra-Territorial Applicability of International Human Rights Law. The Delivery of Human Rights. Essays in Honour of Professor Sir Nigel Rodley. Edited by Geoff Gilbert, Françoise Hampson and Clara Sandoval, *Routledge* (2011). P. 182.

[33] Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, David Kaye. A/HRC/29/32 (22 May 2015), § 60.

[34] *Roman Zakharov*, cited above, § 10.

the law governing the workplace" given that "it is in the employment relation that balances and imbalances of power present some of their most subtle challenges".[35] Intrusive and secretive big brother may turn out to be your boss, not even a real spy.

Many tired eyebrows of office workers worldwide were raised by the Court's pronouncement in *Bărbulescu v. Romania.*[36] The applicant was fired by his employer for using his on-line messenger during the supposedly busy working hours for chatting with his fiancée and his brother. Employer monitored the applicant's private communications. The Court found that "it [was] not unreasonable for an employer to want to verify that the employees [were] completing their professional tasks during working hours".[37] In the situation *sub judice*, in the Court's opinion, that aim justified the means used to achieve it. Will the conclusion of the Court be different if the employer had other objectives such as, for example, learning more about planning of strike by its staff?

It is also a matter of not so distant future that massive private surveillance schemes will be launched very much like private contractors who take active part in many armed conflicts now. Special Rapporteur of the United Nations Human Rights Council on the Promotion and Protection of the Right to Freedom of Opinion and Expression expressly encourages States to "take measures to prevent the commercialization of surveillance technologies, paying particular attention to research, development, trade, export and use of these technologies considering their ability to facilitate systematic human rights violations".[38]

Roman Zakharov sets the agenda for a vast area of human rights litigation in the future. Only general contours of this area are visible so far today. Digital frontier poses sets after sets of exciting questions that lawyers should start answering.

The Court has communicated at least two complaints that allege use of massive digital surveillance by British secret services.

In *Big Brother Watch and Others v. the United Kingdom*[39] the applicants complain about the program known as PRISM that allegedly allows United States National Security Agency to access a wide range of internet communication content (such as emails, chat, video, images, documents, links and other files) and metadata (information permitting the identification and location of internet users) collected and stored by the American corporations such as Microsoft, Google, Yahoo, Apple, Facebook, YouTube and Skype. In the applicants' submission, the United Kingdom authorities may have been in receipt of foreign intercept material from the United States relating to their electronic communications. The applicants contend that the United Kingdom Government Communications Headquarters (GCHQ, British intelligence and security organisation "tasked by Government to protect the nation from threats"[40]) conducts generic interception of transboundary communications transmitted by transatlantic fibre-optic cables.

In *Bureau of Investigative Journalism and Alice Ross v. the United Kingdom*[41] the applicants also complain about the system that enables GCHQ to access electronic traffic passing along transatlantic fibre-optic cables running between the United Kingdom and North America. Applicants allege violation of their rights under Article 8 of the Convention and also under Article 10 of the Convention given that, in their submission, the deficiencies and the unlawfulness of the conduct of the British security services and of the applicable regulatory framework has impacted upon their ability to undertake their work of investigative journalism without fear for the security of their communications.[42]

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35 Sheldon Leader, Human Rights, Power, and the Protection of Free Choice. Strategic Visions for Human Rights. Essays in Honour of Professor Kevin Boyle. Edited by Geoff Gilbert, Françoise Hampson and Clara Sandoval, *Routledge* (2011). P. 82.

36 Application no. 61496/08, Chamber Judgment of 12 January 2016, not yet final at the moment of writing.

37 *Ibid*., § 59.

38 A/HRC/23/40, cited above, § 97.

39 Application no. 58170/13, communicated in 2014.

40 Message of Robert Hannigan published at the GCHQ website: http://www.gchq.gov.uk/who_we_are/Pages/welcome-to-GCHQ-from-Robert-Hannigan.aspx.

41 Application no. 62322/14, communicated in 2015.

42 For the summary of legal arguments that may be put forward by the Governments see: Peter Margulies, The NSA in Global Perspective: Surveillance, Human Rights, and International Counterterrorism, 82 *Ford-*

It is safe to predict that *Roman Zakharov* will be relied upon in judgments / decisions of the Court in both cases which "may provide further clarifications"[43] of applicable legal standards as well as in many other dossiers to be placed before the judges of the European Court of Human Rights in Strasbourg. Hopefully, they will continuously find right techniques to keep their judicial deliberations totally confidential.

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Национальное измерение Европейской Конвенции
National Dimension of the European Convention

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От редактора рубрики

В рубрике «Национальное измерение Европейской конвенции» публикуются две статьи французских судей, подготовленных для международной конференции «Преподавание прав человека в России и других европейских государствах», состоявшейся 21-22 октября 2013 года в Екатеринбурге, Россия[2]. Несмотря на то, что со времени конференции прошло более трех лет, мысли и выводы Тимоти Париса, действующего судьи Государственного совета Франции, и Симоны Габорью, судьи в отставке, председателя почетной палаты Апелляционного суда Парижа, одной из основателей ассоциации «Европейские судьи за демократию и свободу», не только не теряют своей актуальности, но и выглядят в какой-то степени «экстремистскими» на фоне выводов судей Конституционного Суда Российской Федерации, сделанных в постановлении от 14 июля 2015 года № 21-П[3].

[1] **Anton Burkov**, European and Comparative Law Chair, University of Humanities (Yekaterinburg, Russia), Candidate of Legal Science (Russia), Ph.D. (Cantab), LL.M. (Essex).

[2] Обзор конференции см.: Бурков А. Результаты Конференции «Преподавание прав человека в России и других европейских государствах» // Журнал конституционализма и прав человека, 2014, № 1-2(5), с. 31-39. В том же номере журнала читайте опубликованные по результатам конференции первые два доклада, сделанные Татьяной Термачич и Кармен Тиле.

[3] По делу о проверке конституционности положений статьи 1 Федерального закона «О ратификации Конвенции о защите прав человека и основных свобод и Протоколов к ней», пунктов 1 и 2 статьи 32 Федерального закона «О международных договорах Российской Федерации», частей первой и четвертой статьи 11, пункта 4 части четвертой статьи 392 Гражданского процессуального кодекса Российской Федерации, частей 1 и 4 статьи 13, пункта 4 части 3 статьи 311 Арбитражного процессуального кодекса Российской Федерации, частей 1 и 4 статьи 15, пункта 4 части 1 статьи 350 Кодекса административного судопроизводства Российской Федерации и пункта 2 части четвертой статьи 413 Уголовно-процессуального кодекса Российской Федерации в связи с запросом группы депутатов Государственной Думы.

Материал судьи Тимоти Париса посвящен месту Конвенции о защите прав человека и основных свобод (далее – Конвенция) в административном судопроизводстве Парижского апелляционного административного суда. Автор признается, что еще двадцать и даже десять лет назад позиция, высказанная в статье, «сама по себе считалась бунтарской и даже опасной», поскольку «разбирательство в национальном суде и его законность регулируются, в первую очередь, Конституцией, а, значит, связаны с народным суверенитетом, поэтому национальному суду было непросто опереться на международные нормы и цели, устанавливаемые Конвенцией». В заключении судья Парис делает вывод, что «[б]лагодаря влиянию Конвенции, административный суд стал судом, защищающим основные права, судом прав человека, выполняющим свою миссию для общества».

Материал судьи в отставке Симоны Габорью, определившей свою миссию в способствовании пробуждению европейского сознания и в распространении культуры Конвенции, посвящен влиянию последней на сферу французской уголовной юстиции и правосознание, а также вопросу независимости национальных судей и их роли в защите прав человека на национальном уровне.

В статьях нет ни слова о необходимости защиты суверенитета Франции от наступления конвенционных прав человека. Скорее наоборот, такая позиция с сарказмом называется «бунтарской» из прошлого. В этом актуальность и «экстремизм» позиций двух представителей судейского сообщества Франции, поскольку Россия сегодня находится там, где Франция находилась – по хронологии судьи Париса – десять или даже двадцать лет назад.

Национальное измерение Европейской Конвенции
National Dimension of the European Convention

Симон Габорью

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Конвенция о защите прав человека и основных свобод и серьезные изменения в сфере уголовной юстиции Франции

Аннотация

Данный материал посвящен влиянию Конвенции о защите прав человека и основных свобод на французский уголовный процесс и правопорядок, а также независимости национальных судей и их роли в защите прав человека на национальном уровне.

Ключевые слова: Конвенция о защите прав человека и основных свобод, уголовная юстиция, применение норм международного права в национальных судах.

European Convention on Human Rights and Major Changes in the Sphere of French Criminal Justice

Abstract

This material is devoted to the influence of the Convention for the Protection of Human Rights and Fundamental Freedoms on the French criminal procedure and the rule of law, and to the role of national judges, their independence, in protection of human rights at the national level.

Key words: Convention for the Protection of Human Rights and Fundamental Freedoms, criminal justice, domestication of international law.

[1] Simone Gaboriau, President of the honorary chamber of the Court of appeal of Paris (chambre honoraire de la Cour d'appel de Paris), a founding member of the European Magistrates for Democracy and Freedom (MEDEL).

Конвенция о защите прав человека и основных свобод и серьезные изменения в сфере уголовной юстиции Франции[1]

Введение

Конвенция о защите прав человека и основных свобод (далее – Конвенция), разработанная в продолжение Всеобщей декларации прав человека[2], стала первым международным договором, по крайней мере на европейском пространстве, который налагает на каждое государство–участника обязанности в области защиты прав индивида, в отличие от других многосторонних договоров, предусматривавших межгосударственные обязанности, соблюдение которых обеспечивалось взаимным контролем.

Этот международный договор нового образца был подписан государствами-членами Совета Европы 4 ноября 1950 года и вступил в силу 3 сентября 1953 года. Посредством этой Конвенции государства–участники подтвердили «свою глубокую приверженность основным свободам, которые являются основой справедливости и всеобщего мира и соблюдение которых наилучшим образом обеспечивается, с одной стороны, подлинно демократическим политическим режимом и, с другой стороны, всеобщим пониманием и соблюдением прав человека, которым они привержены».

Потребовалось 24 года, чтобы Франция, «родина прав человека», ратифицировала Конвенцию: ратификация произошла только лишь 3 мая 1974 года. Спустя несколько лет, 2 октября 1981 года, посредством ратификации пункта 25 Конвенции, было предоставлено право на подачу индивидуальных жалоб, что позволило окончательно быть уверенным в том, что Франция стала полноправной участницей Конвенции. Потребовалось более 30 лет, чтобы обеспечить юридические гарантии соблюдения прав, гарантируемых Конвенцией, защита которых была доверена Европейскому Суду по правам человека (далее – Европейский Суд; Суд). Официально размещенный 20 апреля 1959 года во Франции, в Страсбурге, Европейский Суд стал центром европейского правосознания[3].

Заявление о нарушении прав человека одним из государств–участников подается в Суд либо гражданином, чьи права нарушены, либо другим государством (за все время существования Суда государствами было подано лишь порядка двадцати заявлений). На сегодняшний день объединение 47 государств–членов Совета Европы предоставляет возможность более чем восьмистам миллионов людей обратиться в Европейский Суд за защитой своих прав. К настоящему моменту Российская Федерация, Турция, Италия, Румыния и Украина являются главными «поставщиками» жалоб. В течение последних пятидесяти лет Суд внес исключительный вклад в развитие и защиту прав и свобод в Европе. Только после вынесения множества постановлений, Европейский Суд побудил государства–члены изменить свое законодательство таким образом, чтобы оно соответствовало правовым позициям Суда.

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[1] Перевод Иванова Я. *Примечание от автора*: в ходе дальнейших рассуждений будут сделаны критические замечания по поводу нынешней ситуации во Франции. Речь не идет об изложении исконно французских проблем, но о том, чтобы предельно ясно продемонстрировать, насколько велико было внимание, прикованное к фундаментальным основам общества в древних государствах и в современных демократиях. Борьба за их соблюдение зачастую необходима; ни один принцип в этой области до конца не реализован, и поэтому возможности права должны быть всегда готовы к мобилизации.

[2] Всеобщая Декларация прав человека, одним из составителей которой был французский борец за свободы Рене Кассен, провозглашена Генеральной Ассамблеей ООН 10 декабря 1948 года.

[3] Рене Кассен, будучи заместителем председателя с 1959 года по 1965 год, стал впоследствии председателем Суда вплоть до 1968 года.

Во Франции практика Европейского Суда легла в основу многих изменений в законодательстве, в особенности в уголовной сфере: прослушивание телефонных переговоров, право на защиту, гарантия беспристрастности судьи, роль прокуратуры в уголовном процессе, уважение чести и достоинства задержанных, ряд норм уголовно-процессуального права, первичное задержание. Последнему пункту я уделю основное внимание в этой статье, после того как продемонстрирую, к какой революции во французском праве – в частности, в отношении роли судьи – привела имплементация Конвенции.

1. Европейская Конвенция по правам человека: революция[4] в соотношении сил между ветвями власти

Европейская Конвенция объединяет все государства–члены Совета Европы и составляет их общее юридическое достояние. Во всех этих государствах имплементация Конвенции во внутренние правовые системы привела к существенным изменениям как в отношениях между основными ветвями власти, так и в процедуре создания юридических норм.

Далее я намерена поведать о тех изменениях, которые претерпел французский правопорядок в результате имплементации, начав с краткого описания французской системы правосудия.

1.1. Краткая характеристика системы правосудия во Франции и статуса магистратов

Система организации правосудия во Франции является отражением сложной истории ее становления, которая привела к двойственности юрисдикций. С одной стороны, существует система административных судов; это – инстанции, в которых к ответственности могут быть привлечены представители публичной власти, в особенности государство и публичная администрация. С другой, – система судов общей юрисдикции, которая предназначена для разрешения споров, вытекающих из гражданско–правовых отношений, коммерческих и социальных. Суды общей юрисдикции также применяют уголовное право; уголовная юстиция решает вопрос относительно вины лица, находящегося под следствием, а в случае доказанности вины, она решает вопрос о мере наказания.

На вершине иерархии административной юстиции находится Государственный совет, во главе же системы судов общей юрисдикции – Кассационный суд.

Эти две системы также располагают различным судейским корпусом. Различия выражаются в системе отбора судей и их карьерном росте. Одним из главных отличий, однако, является то, что в Конституции есть положения о судьях общей юрисдикции, в отличие от судей административной системы, которые в ней не упоминаются.

Статус судей системы судов общей юрисдикции в общих чертах описан в Конституции, которая провозглашает независимость судебной власти. Это не означает, что данный принцип не относится к судьям административной системы, однако он не закреплен в Конституции, хотя и признается. Независимость этих судей обеспечивается обычаями, а Конституционный совет, орган конституционного контроля, провозгласил принцип конституционной независимости административных судов[5].

Конституция провозглашает, что судьи системы судов общей юрисдикции являются хранителями личной свободы человека. Кроме того, в ней сказано, что они обеспечивают соблюдение принципа, согласно которому «никто не может быть задержан, иначе как по постановлению суда». Этот принцип составляет исключительную компетенцию судей судов общей юрисдикции каждый раз, когда то или иное постановление может содержать посягательство на личную свободу.

В некоторых странах, таких, как Бельгия и Италия, система правосудия состоит из единого корпуса магистратов, частью которого являются прокуроры (они представляют прокуратуру)[6]

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[4] Автор использует французское слово *«bouleversement»*, что дословно переводится как «переворот», «потрясение» (прим. ред.).

[5] Conseil constitutionnel, décision n° 80-119 DC, 22 juillet 1980, p.46.

[6] *Magistrats du parquet* (фр.).

и собственно судьи[7]. В течение своей карьеры любой судья может продолжить работу в прокуратуре и наоборот. Я, например, начала свою карьеру в прокуратуре, где проработала некоторое время, после чего завершила карьеру в качестве судьи.

Конституционный совет считает, что «судебная власть включает в себя одновременно прокуроров и судей»[8]. Между тем, прокуратура подчиняется Министерству юстиции. Последнее в свою очередь может давать рекомендации прокуратуре, причем как общие, так и вполне конкретные. Таким образом, наблюдается очевидное противоречие между подчиненностью прокуратуры и независимостью судебной власти. Постановления Европейского Суда по правам человека (в особенности постановление по делу *«Мулен против Франции»* от 11 ноября 2010 года[9]) указывают на данный недостаток французской правовой системы, изменений в которой нет и по сей день. Проблема статуса прокуратуры и степени ее связи с исполнительной властью – острый вопрос для Франции.

1.2. Контроль за соответствием национального законодательства Конвенции

Французская правовая система не проводит никаких разделений между национальным и международным правопорядками, поскольку статья 55 Конституции гласит, что «ратифицированные международные договоры и соглашения с момента их официальной публикации имеют приоритет перед внутренним законодательством…»

Кроме того, для Конституционного совета[10], главного органа конституционного контроля во Франции, не существует понятия «конвенционализма», то есть степени соответствия внутреннего законодательства положениям Конвенции. Контроль осуществляется исключительно за «конституционностью» внутреннего законодательства.

Таким образом, контроль за соответствием законов Конвенции возлагается на любого судью в составе судов общей юрисдикции или административных судов, на каком бы уровне он не находился. Такой контроль может выражаться даже в отмене закона[11], противоречащего Конвенции. Очевидно, такая процедура контроля осуществляется под руководством Кассационного суда или Государственного совета.

Полезно в этой связи сосредоточить внимание на специфике порядка осуществления правосудия, касающегося, в частности, рассмотрения дел Кассационным судом. Такой порядок позволяет Кассационному суду вести диалог с нижестоящими судами; например, время от времени некоторые апелляционные суды не следуют практике Кассационного суда, что приводит к тому, что вышестоящий суд вновь должен приводить отклоняющиеся позиции нижестоящих судов к общему знаменателю.

Общий принцип, применяемый ко всем рассматриваемым делам, особенно важен в области применения Конвенции, в частности, когда Кассационный суд время от времени подталкивается судами общей юрисдикции к изменению, зачастую радикальному, своей изначальной правовой оценки дела. Это наблюдение показывает значимость эффективной независимости судов как от политической власти, так и от вышестоящих судов.

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7 *Magistrats du siège* (фр.).

8 Conseil constitutionnel, décision no 93-326 DC, 11 août 1993. Конституционный совет повторил эту же позицию в постановлении от 20 июля 2010 года по поводу задержания, которое будет анализироваться ниже.

9 *Moulin c. France*, requête no 37104/06, 23.11.2010.

10 В постановлении от 15 января 1975 года (décision no 74–54 DC, 15 janvier 1975) Конституционный Совет обратил внимание на то, что ему не принадлежат какие-либо полномочия в области контроля за соответствием национального законодательства Конвенции. Дальнейшие обсуждения этого вопроса были впоследствии вызваны постановлением от 29 декабря 1989 года (décision no 89-268 DC, 29 décembre 1989).

11 Кассационный суд в постановлении от 24 мая 1975 года по делу *«Сосьете Кафе Жак Вабр»* (*Société des cafés Jacques Vabre*), высказался о приоритете международных договоров (в особенности в рамках Европейского экономического сообщества) над национальным правом.

1.3. Новая эра разделения властей

Статья 16 Декларации прав человека и гражданина 1789[12] года гласит: «Общество, где не обеспечена гарантия прав и нет разделения властей, не имеет Конституции». Это то, что образует во Франции принцип разделения властей, который, начиная с Революции 1789 года, трактовался как запрет судам отменять законы. Традиционно судья считался – согласно знаменитой формуле Монтескье – просто напросто «ртом закона». Наша система предоставляла судьям ограниченное право интерпретировать закон и контролировать его исполнение.

Таким образом, вполне понятно, что осуществление судами контроля за соблюдением положений Конвенции спровоцировало напряженные отношения с законодательной и исполнительной ветвями власти. Действительно, идея того, что судьи своим решением могут оказать существенное влияние на законодательство и даже остановить действие законов, была принята не без сопротивления. И что важно, это составляет не факультативную, а самую что ни на есть императивную обязанность для судей, которую они в полной мере должны осуществлять.

Таким образом, исходящая из плюрализма источников права и иерархии внутри них и руководствующаяся принципом приоритета международных договоров судебная практика посредством контроля за соблюдением положений Конвенции способствует становлению нового правопорядка. Разделение властей инкорпорировано в этот плюрализм, инициированный законодательной и исполнительной властями. Если этот новый тип контроля и будет препятствовать их собственным инициативам, то в любом случае именно законодательная и исполнительная власть изначально отказались от части своего суверенитета в пользу международных институтов, провозгласив приверженность фундаментальным принципам. Таким образом, их воля, реализуется, несмотря на капризы политической конъюнктуры и общественного мнения.

Таково разделение властей в универсальном сообществе, объединенном общими ценностями.

2. Эволюция уголовного процесса Франции под влиянием Конвенции и роль судов общей юрисдикции: символический пример института задержания

Реформа института задержания в 2011 году является, наверное, наиболее удачным примером благоприятного воздействия Конвенции на нашу правовую систему в том, что касается защиты прав и свобод.

Задержание в рамках уголовного расследования означает принудительное содержание под контролем полиции или жандармерии лица, подозреваемого в совершении или попытке совершения преступления или проступка. Продолжительность такого задержания не может превышать 24 часа, но может быть продлена до 48 часов (72 часа в случае с наиболее тяжкими и сложными преступлениями, 96 или 120 часов при угрозе террористического акта). Эта мера находится под полным и постоянным контролем со стороны судебных властей (прокурора или судьи).

Момент задержания очень важен с точки зрения фундаментальных принципов, так как это первый момент в уголовном процессе, когда подозреваемый находится в конфронтации с репрессивным аппаратом государства.

С января 1993 года признавалось право задержанного – хотя и очень ограниченное – на разговор с адвокатом. Однако очень быстро вскрылось, что эта мера, значительным образом ограниченная и подвергнутая разного рода искажениям, была недостаточной и что задержание «на французский манер» не соответствовало ни конституционно-правовым требованиям, ни требованиям европейских норм прав человека.

2.1. Косвенная критика Европейским Судом французского института задержания и необходимость реформы

Во многом после вынесения Европейским Судом постановления по делу *«Салдуз против Турции»*[13], в котором косвенно – но достаточно

[12] Которая составляет неотъемлемую часть «конституционного блока», то есть норм права, имеющих высшую юридическую силу.

[13] *Salduz c. Turquie [GC]*, requête no 36391/02,

очевидно – осуждался французский институт задержания, французские юристы, судьи, адвокаты стали настойчиво указывать представителям государственной власти о необходимости реформы института задержания в интересах участников процесса и профессиональных судей. Следует сказать, что в большом числе постановлений Европейский Суд выразил позицию, согласно которой, помощь адвоката во время слушаний должна быть неотъемлемой частью института задержания, что иной – содержащий в этом отношении оговорки – режим недопустим, и что помощь адвоката не может быть запрещена без вынесенного судьей решения. Так, например, в постановлении по делу *«Дайанан против Турции»* Европейский Суд перечислил ряд мер, которые могли бы в лучшую сторону изменить институт задержания, указав на те меры, которые мог бы предпринять адвокат в ходе задержания своего клиента: «обсуждение дела, организация защиты, поиск доказательств в пользу подозреваемого, подготовка к допросу, поддержка обвиняемого, находящегося в психологически сложной ситуации, и контроль за условиями его содержания являются теми действиями, которые должно быть позволено осуществлять адвокату без какого-либо вмешательства»[14]. Позиция Европейского Суда была весьма однозначной.

Дебаты по поводу института задержания стали особо острыми, когда достоянием гласности стали данные, согласно которым в 2009 году число задержаний достигло рекордной цифры – около 800 000 (792 093). Эта цифра, озвученная одним журналистом в начале 2010 года, изобличила во лжи официальную статистику, которая тайно исключала из общего числа задержаний те, которые произошли в связи с дорожно–транспортными происшествиями, которые составляют довольно многочисленную группу правонарушений. Кроме того, он утверждал, что некоторые задержания были проведены в недостойных условиях и зачастую без соблюдения уголовно–процессуальных требований.

Средства массовой информации, представители юридических профессий, многочисленные граждане были взволнованы тем, с какой легкостью задержание применялось даже за незначительные проступки. Кроме того, в уголовном процессе в силу недавних изменений, усилилась важность фазы полицейского расследования, в ходе которой формируются те элементы, на которых будет основано обвинение лица, находящегося под следствием. Более чем когда бы то ни было, задержание стало решающей фазой уголовного процесса, что усилило необходимость и значимость помощи адвокату.

Политическая власть, тем не менее, не провела никаких реформ.

2.2. Открытая критика Франции со стороны Европейского Суда и выход французских судов на арену

В 2010 году французские суды общей юрисдикции, в результате рассмотрения подсудных им дел, применив позиции Европейского Суда, пришли к выводу о том, что задержание не соответствует требованиям Конвенции, в частности, в том что касается отказа правоохранителей допустить адвоката в уголовный процесс.

30 июля 2010 года Конституционный совет[15] признал неконституционным закон о задержании, во многом, по причине отсутствия в нём положений об эффективном участии адвоката. Конституционный совет, однако, перенес на 1 июля 2011 года вступление в силу своего решения, чтобы у законодателя было время проголосовать за новый текст закона; такой перенос возможен во французском праве при соблюдении ряда условий[16].

27.11.2008.

[14] *Dayanan c. Turquie*, requête no 7377/03, 13.10.2009,§ 32.

[15] Конституционный контроль над вступившим в силу законом возможен во Франции с 1 марта 2010 года благодаря «приоритетному вопросу конституционности».

[16] Статья 62 Конституции, в частности, гласит: «Положение, объявленное неконституционным на основании статьи 61-1 (в порядке последующего контроля – прим. ред.), теряет юридическую силу с момента публикации соответствующего решения Конституционного совета, либо с даты, установленной в таком решении. Конституционный совет определяет условия и сроки, в пределах

14 октября 2010 года Европейский Суд вынес постановление по делу *«Брюско против Франции»*, в котором указал, что «задержанный имеет право на помощь адвоката с момента задержания, так же как и во время допросов, и тем более, когда он/а не был/а проинформированы властями о своем праве хранить молчание (смотри также принципы, выделенные в постановлении от 27 ноября 2008 года по делу *«Салдуз против Турции»*, жалоба № 36391/02, §§ 50-62, постановлении от 13 октября 2009 года по делу *«Дайанан против Турции»*, жалоба № 7377/03, §§ 30-34, постановлении от 9 февраля 2010 года по делу *«Боз (Boz) против Турции»*, жалоба № 2039/04, §§ 33-36, и постановлении от 2 марта 2010 года по делу *«Адамкиевич (Adamkiewicz) против Польши»*, жалоба № 54729/00, §§ 82-92)»[17].

19 октября 2010 года, Коллегия по уголовным делам Кассационного суда вынесла три постановления, в которых определила новые условия законности задержания: сообщение о праве хранить молчание, участие адвоката в допросах, а также иные формы участия адвоката, которое – даже если речь идет об организованной преступности – не может быть отложено в особых случаях по решению судьи. Таким образом, Кассационный суд подтвердил направление правоприменительной практики нижестоящих судов. Он решил, тем не менее, перенести вступление в силу результата своих правовых оценок на 1 июля 2011 года. Подобный перенос, крайне редкий, был мотивирован коллегией по уголовным делам соображениями «юридической безопасности» и «надлежащим отправлением правосудия», принимая во внимание позицию Конституционного Совета и дискуссионный характер проблемы.

В отличие от немедленного правового результата решений Конституционного совета, который выражается в лишении отмененного закона силы (что в свою очередь приводит к пробелу в праве), постановление Кассационного суда привело бы к тому, что закон о задержании остался бы в силе, однако он мог бы быть дополнен практикой, согласующейся с требованиями Конвенции, которая могла бы возникнуть на основании обычного правительственного циркуляра.

Фундаментальное отличие решения Кассационного суда от решения Конституционного совета относится к процедуре недопуска адвоката к подзащитному: Кассационный суд постановил, что доступ адвоката не может быть запрещен абстрактной ссылкой на категорию правонарушения, тем более без решения судьи, тогда как Конституционный совет не затронул этот вопрос вовсе, исключив тем самым факт его неконституционности.

Необходимо подчеркнуть, что решения конституционных судов не являются обязательными для Европейского Суда. Последний неоднократно это подтверждал[18]; аналогичную позицию занял и Кассационный суд Франции, который в деле критики закона о задержании поступил более радикально, нежели Конституционный совет.

которых возможно обжалование последствий неконституционного положения».

[17] *Brusco c. France*, requête no 1466/07, 14.10.2010, § 45.

[18] Например, в деле «Компании *“Open Door”* и *“Dublin Well Woman”* против Ирландии» (постановление от 29 октября 1992 года), в котором перед Европейским Судом поставили вопрос конфликта между Конвенций и Конституцией Ирландии, первый не счел себя связанным позицией Верховного суда Ирландии. В деле *«Зелински и Прадал, и Гонзалез (Zielinski et Pradal et Gonzalez) и другие против Франции»* (постановление от 28 октября 1999 года) Суд установил, что соответствие оспариваемого законодательства национальной конституции не является достаточным для признания его соответствующим требованиям Конвенции. В постановлении от 14 июня 2004 года по делу *«Фон Ганновер (von Hannover) против Германии»* Европейский Суд решил не следовать позиции Федерального конституционного суда Германии, который – сославшись на свободу средств массовой информации – решил, что заявительница как публичная фигура должна терпимо относиться к обнародованию фотографий, являвшемуся предметом жалобы. Аналогичным образом, в деле *«Вагнер (Wagner) против Люксембурга»* (постановление от 28 июня 2007 года) Европейский Суд занял иную позицию, нежели Конституционный суд, в деле об усыновлении.

2.3. Историческое сражение между исполнительной и судебной властями с участием нижестоящих судов

Коллегия по уголовным делам Кассационного суда, принявшая указанные выше постановления, представляет собой лишь одну из палат этого судебного органа, который также проводит пленарные заседания, если хочет придать решению больший вес или когда практика различных коллегий суда разнится. Как бы то ни было, именно на пленарном заседании была поставлена точка в этой истории, о чём будет сказано ниже.

Политическая ветвь власти, вынужденная Конституционным советом и Европейским Судом пересмотреть закон о задержании, инициировала рассмотрение нового законопроекта в парламенте. Но не дожидаясь этого, нижестоящие суды стали применять теоретически действующий – согласно решению Конституционного совета – закон о задержании с учетом требований Европейского Суда. Это привело к широкой дискуссии в юридическом сообществе относительно практического применения норм французского национального права, несовместимых с положениями Конвенции.

Некоторые юристы считали, что указанные суды надлежащим образом применили важный принцип, согласно которому защита прав человека не может быть отложена. Министр юстиции, в свою очередь, выступил против такого положения дел. Он направил всем представителям судебной власти во Франции (прокурорам как адресатам и судьям на местах в порядке информации, как это обычно происходит с циркулярами) циркуляр, в котором указывалось, что «в рамках уголовных расследований, имеющих место до 1 июля 2011 года следует действовать добросовестно и в соответствии с Уголовным процессуальным кодексом, действующим на данный момент…» и что «*необходимо принимать во внимание решения судебных инстанций* (Конституционного совета и Кассационного суда), *касающиеся, в том числе, времени применения соответствующих норм, а при необходимости, и вопросов доступных средств правовой защиты*».

Таким образом, исполнительная власть заняла четкую и бескомпромиссную позицию в этом юридическом споре, который, однако, не был окончен.

Некоторое время в этой области царила некоторая путаница, поскольку следственные судьи, руководствуясь правоприменительной практикой Европейского Суда, требовали, чтобы полиция обеспечивала участие адвокат при допросах в ходе задержания, однако эти требования зачастую не исполнялись, в том числе по указанию лично министра внутренних дел.

14 апреля 2011 года был промульгирован закон о задержании, который, однако, должен был вступить в силу лишь с 1 июня 2011 года.

15 апреля 2011 года Кассационный суд на пленарном заседании вынес четыре решения[19], в которых подтвердил несоответствие действующей процедуры задержания требованиям Конвенции, а также указал на то, что правовые последствия этих решений не могут быть отсрочены, и необходимо, не дожидаясь 1 июня, применять «правила, сформулированные законом в части сообщения задержанному о праве хранить молчание, а также предоставления помощи адвоката[20] с тем, чтобы гарантировать соответствие этих мер европейским требованиям».

Действительно, посредством этих четырех постановлений пленум Кассационного суда подтвердил не только факт того, что действовавший закон о задержании всегда находился в противоречии с требованиями статьи 6 Конвенции в том, что касается участия адвоката, но также выразил мнение о том, что в случае, если позиции Конституционного совета и коллегии по уголовным делам Кассационного суда не совпадают, недопустимо откладывать во времени вступление в силу судебных решений. Последние должны применяться немедленно, поскольку после решений по делам *«Салдуз против Турции»* и *«Дайанан против Турции»* «государства-участники Конвенции были обя-

[19] В трех постановлениях из четырех Кассационный суд признал действительными решения, аннулировавшие задержания, а в одном – отменил решение, признавшее задержание законным.

[20] Новый закон устанавливал, что в доступе адвоката не может быть отказано без судебного решения.

заны руководствоваться правовыми позициями Европейского Суда, не дожидаясь того, когда им укажут на необходимость изменения законодательства».

За всю историю применения Конвенции эти события стали одним из наиболее ярких примеров прямого воздействия европейского права на национальный правопорядок, приведшего к защите фундаментальных свобод человека. При этом чрезвычайно важную роль сыграла судебная власть, которая предпочла подходу отложенной отмены нормативных актов подход непосредственного применения европейских стандартов прав человека.

Это прослужит настоящим примером для всех судей, призванных гарантировать личные свободы.

Заключение

Непосредственное воплощение в жизнь положений Конвенции о защите прав человека и основных свобод является общей миссией всех судов в Европе. Это – важнейшая обязанность каждого европейского судьи. Приведенные в статье примеры ясно демонстрируют, что независимость судебной власти является одним из важнейших факторов в эффективном осуществлении этой обязанности.

Необходимость независимости судебной власти признана многочисленными международными документами, в частности Всеобщей декларацией прав человека[21], Международным пактом о гражданских и политических правах[22], Конвенцией о защите прав человека и основных свобод[23]. Многочисленные рекомендации международных организаций – в особенности ООН[24] и Совета Европы[25] – регулярно напоминали о важности этого принципа.

Таким образом, судебная власть признается ключевым элементом общества, построенного на верховенстве права. Принцип верховенства права, продвижение и защита прав и основных свобод человека могут быть воплощены в жизнь только при опоре на сильную и независимую судебную власть. Это то, о чем неустанно говорят все европейские институты. Более того, все эти требования не могут быть удовлетворены одним лишь провозглашением необходимости их соблюдения. Каждый европейский судья является важным действующим лицом в этом процессе. Именно осознавая значение этой миссии, я приняла участие в создании ассоциации европейских судей, о которой стоит сказать несколько слов.

Ассоциация «Европейские судьи за демократию и свободу» (далее – Ассоциация), основанная в 1985 году, объединяет судей и прокуроров Европы. Её члены – в основном, представители стран Совета Европы. По данным на 2013 год Ас-

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[21] Статья 10: «Каждый человек, для определения его прав и обязанностей и для установления обоснованности предъявленного ему уголовного обвинения, имеет право, на основе полного равенства, на то, чтобы его дело было рассмотрено гласно и с соблюдением всех требований справедливости независимым и беспристрастным судом».

[22] Статья 14: «1. Все лица равны перед судами и трибуналами. Каждый имеет право при рассмотрении любого уголовного обвинения, предъявляемого ему, или при определении его прав и обязанностей в каком-либо гражданском процессе, на справедливое и публичное разбирательство дела компетентным, независимым и беспристрастным судом, созданным на основании закона. […]»

[23] Статья 6: «1. Каждый в случае спора о его гражданских правах и обязанностях или при предъявлении ему любого уголовного обвинения имеет право на справедливое и публичное разбирательство дела в разумный срок независимым и беспристрастным судом, созданным на основании закона. […]»

[24] См., например, Основные принципы, касающиеся независимости судебных органов, принятые седьмым Конгрессом ООН по предупреждению преступности и обращению с правонарушителями, состоявшимся в Милане с 26 августа по 6 сентября 1985 года, и одобренные резолюцией Генеральной Ассамблеи ООН 40/32 от 29 ноября 1985 года, а также Директивы о роли прокуроров, принятые ООН на 8-м Конгрессе ООН по предотвращению преступности и обращению с преступниками, состоявшемся в Гаване в 1990 году.

[25] См., например, рекомендацию CM/Rec(2010)12 Комитета министров государствам-членам Совета Европы о судьях: независимость, эффективность, ответственность.

социация объединяет 22 национальные ассоциации судей, работников судебных учреждений, прокуроров, представляющих тринадцать европейских государств.

Цель Ассоциации – всегда и при любых обстоятельствах способствовать защите основных ценностей демократического государства, и в первую очередь, независимости судебной власти. Средствами в достижении этой цели являются диалоги с представителями европейских институтов, учет мнений судей по всему миру, поддержка судей, на независимость которых совершаются покушения, распространение результатов исследований, осуществление контроля за осуществлением правосудия в отдельных странах, привлечение общественного внимания к проблемным ситуациям в случае необходимости.

Важно в этом отношении отметить неустанность действий нашей организации в вопросе независимости судебной власти как в странах «старой демократии», так и в странах с переходной моделью.

Как было уже сказано выше, каждый судья из государства–члена Совета Европы является судьей европейского сообщества, объединенного Конвенцией. Таким образом, национальный судья при рассмотрении дел (особенно, если по рассматриваемому вопросу нет национальной судебной практики) должен исходить из требований Конвенции, ее буквы и духа, истолкованных в решениях Европейского Суда, и тем самым участвовать в конструировании права на национальном уровне.

Национальный судья также должен соответствовать требованиям, предъявляемым к профессиональным судьям, таким как беспристрастное ведение судебных прений сторон в ходе заседаний, уважительное отношение к участникам процесса, пострадавшим, обвиняемым, свидетелям, адвокатам, внимательное рассмотрение любой информации, полученной от сторон, обдуманное и четко обоснованное судебное решение. Иными словами, речь идет о требованиях «справедливого судебного разбирательства», определение и признаки которого мы обнаруживаем в Конвенции и правоприменительной практике Европейского Суда.

Таким образом, основу деятельности нашей ассоциации составляет совместное с судьями развитие культуры Конвенции, которая представляет собой отражение идеи европейского права и суть которой состоит в том, чтобы ее положения стали частью и национальной правовой системы, и модели поведения профессиональных судей.

Мои предыдущие рассуждения показывают важность усвоения судьями европейской культуры. Преподавание в университете вносит в это определенный – но не определяющий – вклад: общего образования недостаточно для того, чтобы воспитать судью с сознанием того, что необходимо на практике применять положения Конвенции и решения Европейского Суда[26]. Например, существующая во Франции Национальная школа судей еще далека от идеала: многое предстоит сделать, чтобы достигнуть прогресса в этом отношении. В действительности европейский дух начинает формироваться благодаря образованию и специальной подготовке судей, но главным образом реализуется через непрерывное образование.

Ассоциации судей и юристов также способствуют пробуждению европейского сознания главных действующих лиц правовой системы. Стоит также отметить важную роль гражданского общества в распространении культуры Конвенции и бдительности в отношении соблюдения ее требований.

[26] В этой связи мне представляется важным сказать несколько слов о сотрудничестве с Россией. Мне кажется, что Франция настроена развивать сотрудничество. Со своей стороны могу сказать, что я дважды приезжала в Российскую академию правосудия в Москве, чтобы участвовать – вместе с российскими коллегами – в образовательных мероприятиях, связанных с Конвенцией. Особое внимание было уделено влиянию Конвенции на уголовный процесс и поведение судей. Я готова постоянно участвовать в подобной деятельности.

Национальное измерение Европейской Конвенции
National Dimension of the European Convention

Тимоти Парис

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Европейская Конвенция и французский административный суд: от международного права к национальному праву?

Аннотация

Конвенция о защите прав человека и основных свобод относится сегодня, без сомнения, к нормам, чаще всего применяемыми в административном судопроизводстве. Конечно, это не единственный текст, принимаемый во внимание административным судом. Административный суд является судом национального уровня и, конечно же, учитывает нормы внутреннего правопорядка: Конституцию, закон, регламент и судебные решения вышестоящих инстанций Французской Республики. Тем не менее, Конвенция о защите прав человека и основных свобод, так же как и нормы внутреннего правопорядка, занимает важное место в административном судопроизводстве. Материал посвящен месту Конвенции в административном судопроизводстве Парижского апелляционного административного суда.

Ключевые слова: Конвенция о защите прав человека и основных свобод, французские административные суды, применение норм международного права в национальных судах.

French Administrative Court and the European Convention on Human Rights: From International Law to National Law?

Abstract

The Convention for the Protection of Human Rights and Fundamental Freedoms is applied by administrative courts in France. This is not the only text considered by French administrative courts, which also take into account the norms of the domestic legal order: Constitution, statutes, regulations, and judicial decisions of higher courts (especially the Conseil d'Etat, which is the highest administrative court in France). Nevertheless, the Convention, as well as the national law norms play a crucial role in administrative proceedings and law. This article is devoted to the place of the Convention for the Protection of Human Rights and Fundamental Freedoms in administrative proceedings in French administrative courts.

Keywords: Convention for the protection of human rights and fundamental freedoms, French administrative courts, domestication of international law.

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Французский административный суд и Европейская Конвенция по правам человека: от международного права к национальному праву?[1]

Сегодня Конвенция о защите прав человека и основных свобод (далее – Конвенция), без сомнения, относится к нормам, чаще всего применяемым в административном судопроизводстве. Конечно, это не единственный правовой акт, который административный суд принимает во внимание. Административный суд является национальным судом и, следовательно, применяет нормы внутреннего правопорядка: Конституцию, законы, правительственные акты и судебные решения вышестоящих инстанций Французской Республики. Тем не менее, Конвенция, так же как и нормы внутреннего правопорядка, имеет важное значение при разбирательстве в административном суде.

Однако двадцать – и даже десять – лет назад такая мысль сама по себе считалась бунтарской и даже опасной. Ведь разбирательство в национальном суде и его законность регулируются, в первую очередь, Конституцией, а, значит, связаны с народным суверенитетом, поэтому национальному суду было непросто опереться на международные нормы и цели, устанавливаемые Конвенцией.

Это было особенно непросто в сфере французского административного судопроизводства, принимая во внимание его особенности. Система административного правосудия во Франции – это одна из двух основ здания французской юстиции. С одной стороны, мы имеем привычные общие суды первой инстанции, а также апелляционный и кассационный суды, которые рассматривают гражданские и уголовные дела. С другой стороны, административный суд первой инстанции, апелляционный суд и Государственный совет, являющийся верховным административным судом, исполняющим свои функции независимо от Правительства и Парламента.

Как следует из самого названия, задача любого административного суда – контролировать публичную администрацию. Он делает это, рассматривая жалобы физических и юридических лиц (ассоциаций, предприятий), а также чиновников. Административный суд может также аннулировать акты, принятые органами исполнительной власти, и даже обязать эти органы выплатить определенную денежную компенсацию. В компетенцию административного суда входит рассмотрение споров, связанных с градостроительством, налогами и сборами, ответственностью государственных больниц, публичными рынками, правом на социальное жилье, водительскими удостоверениями, а также въездом, проживанием и выездом иностранных граждан.

Административные суды применяют «свое», особое публичное право, которое отличается от права, применяемого при разрешении конфликтов между частными лицами. Публичное право связано с функцией контроля над государством. Оно также связано с идеей суверенитета, поэтому-то оно и не всегда хорошо уживается с правовыми нормами, пришедшими извне, такими, как Конвенция.

Тем не менее, текст Конвенции является неотъемлемым правовым источником в административном судопроизводстве.

Разбирательство во французских административных судах преимущественно проходит

[1] Перевод с фр. *Comitas Gentium France Russie*. Настоящая статья является докладом, прозвучавшим на международной конференции «Преподавание прав человека в России и других европейских государствах» (Россия, Екатеринбург, 22 октября 2013 года), в которой приняли участие 150 специалистов в сфере юриспруденции и образования из 8 стран.

Участие судьи Париса в конференции стало возможным благодаря поддержке Посольства Франции в России.

за закрытыми дверями, в письменной форме. До начала рассмотрения дела по существу, до того, как судья приступает к анализу фактических обстоятельств и применимого права, чтобы предложить решение, он должен продемонстрировать свою беспристрастность: есть ли у него интересы личного характера в связи с данным делом и есть ли сомнения в том, что он способен объективно разрешить данное дело? Разумеется, независимость и беспристрастность всегда были важнейшими принципами административного – и не только – судопроизводства, поэтому административный судья во Франции регулярно задает себе этот вопрос. Разрешение вопроса о независимости и беспристрастности – одно из требований справедливого судебного разбирательства, которое вытекает из постановлений Европейского Суда по правам человека (далее – Европейский Суд, Суд).

Анализируя каждое из полученных дел, судья должен ответить на доводы, на которых строят свои позиции обе стороны. Конечно, среди этих аргументов мы обнаруживаем и те, которые стороны указывают по причине незнания внутригосударственного, национального права: законов, регламентов и – реже – Конституции. Мы также находим в письменных заявлениях сторон процесса доводы о нарушении Конвенции. Такие аргументы мы находим примерно в 60% заявлений. В судебных процессах, касающихся, например, вопросов разрешений на проживание иностранных граждан, а также их высылки, заявители чаще всего ссылаются на статьи 3 и 8 Конвенции. Статья 3 запрещает пытки и бесчеловечное и унижающее достоинство обращение, поэтому администрация не должна принимать решение о высылке иностранного гражданина в государство, в котором он рискует подвергнуться такому обращению. На положения статьи 8 Конвенции стороны опираются тогда, когда пытаются остановить высылку иностранного гражданина за пределы территории государства, на которой у него имеются семейные связи. Часто мы сталкиваемся с необходимостью оценить доводы, вытекающие из требований этих же статей, в ходе судебных процессов, связанных с заключением под стражу, когда заключенные опротестовывают законность принятых по отношению к ним мер, таких как одиночное заключение, перевод, полный обыск и т.д. В судебных процессах, касающихся налоговых санкций, заявители ссылаются на статью 6 Конвенции, гарантирующую право на справедливое судебное разбирательство, а также на статью 1 Протокола № 1 к Конвенции, защищающую право каждого человека на пользование своим имуществом. Можно также добавить несколько слов о процессах, связанных с вопросами безопасности, в которых поднимается вопрос о соблюдении права на жизнь, охраняемого статьей 2 Конвенции. В рамках последних Государственный совет в ходе процедуры срочности возложил на администрацию специальные обязанности, связанные с предупреждением несчастных случаев, связанных с нападением акул на людей на острове Реюньен. Таким образом, решение Государственного совета от 13 августа 2013 года подтверждает, что Конвенция является важнейшей нормой административного судопроизводства, даже в случаях, когда суд рассматривает дело, применяя процедуру срочности.

Следующий этап – анализ судьёй каждого досье в целях предложения своего решения спора. Судья анализирует представленные сторонами средства, которые демонстрируют наличие нарушений как внутреннего, так и международного права (то есть международных конвенций). Судья обращается к тексту применимой статьи Конвенции, а затем – соответствующим правоприменительным решениям вышестоящих инстанций, таких как Государственный совет и Европейский Суд, независимо от того, какого государства касалось данное решение. Потом административный суд дает ответ на вопрос о наличии или отсутствии нарушения Конвенции, сопоставляя факты данного судебного разбирательства с ранее принятыми решениями вышестоящих судебный инстанций.

В ходе публичных слушаний (чаще всего дело рассматривает коллегия из трех судей), коллегия заслушивает одного из судей, который представляет их вниманию независимую оценку и мотивированное решение, которое, по его мнению, должно быть принято. Сегодня такого судью называют «общественный докладчик» (*rapporteur public*). Затем заслушиваются устные объясне-

ния каждой из сторон, после чего суд удаляется для принятия решения. Решение основывается на документах, приобщённых к делу, на мнении общественного докладчика и на устных ответах сторон. Сегодня общественный докладчик высказывает свое мнение до выступления сторон процесса, поэтому стороны имеют возможность ответить на его доводы. До недавнего времени общественный докладчик назывался комиссаром Правительства (*commissaire du gouvernement*). Это название должности, в принципе никак не соотносящееся с функциями, являлось традицией, но под влиянием Конвенции и решений Европейского Суда название должности было изменено, хотя функции не подверглись пересмотру.

Еще раз хотелось бы отметить, что судья в административном судопроизводстве сталкивается с Конвенцией ежедневно. Она не является единственной применимой нормой для суда, однако ежедневные примеры показывают, что Конвенция заняла прочное место среди источников права наряду с национальным законодательством. Таким образом, французский административный суд, являясь национальным судом, преимущественно толкует национальное законодательство, однако он также применяет и Конвенцию.

Далее я хотел бы последовательно ответить на три вопроса:

1. Как произошло, что содержащиеся в Конвенции международные нормы заняли столь важное место во французской правовой системе?

2. Какие изменения Конвенция привнесла в ежедневную работу административного суда?

3. Какое влияние в целом Конвенция оказала на миссию самого суда?

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Интеграция Конвенции и постановлений Европейского Суда в деятельность административного суда – это достаточно долгий процесс. Сегодня этот процесс полностью завершен. В отношении этого процесса я хотел бы отметить два важных момента.

Во-первых, французская судебная система в общем и целом всегда благоприятствовала интеграции Конвенции. Особенно это касается административного судопроизводства.

Это объясняется тем, что во Франции доминирует монистический подход к вопросу о соотношении национального и международного права. Этот подход прямо вытекает из текста бывшей французской Конституции (а точнее – её Преамбулы) от 27 октября 1946 года, который устанавливает, что Французская Республика, «верная своим традициям, принимает во внимание положения международного публичного права». Преамбула действующей французской Конституции от 4 октября 1958 года также основывается на тексте предыдущей Конституции. Таким образом, применяемые в административном судопроизводстве международные нормы, такие как Конвенция, напрямую включены во французскую правовую систему без посредничества норм внутригосударственного права.

Более того, международные соглашения, как правило, полностью интегрированы национальным судом в иерархию норм национального законодательства. Статья 55 Французской Конституции от 4 октября 1958 года подчеркивает, что ратифицированные международные соглашения после их публикации обладают приоритетом перед законами. Таким образом (и сегодня это можно констатировать с полной уверенностью), любой гражданин может выиграть дело в суде, если докажет, что его права были нарушены в связи с несоблюдением международно-правовых обязательств, даже если нормы национального права были соблюдены. Это касается, например, дел о получении иностранными гражданами разрешений на проживание. Французское законодательство, регулирующее вопросы прибытия и проживания иностранных граждан, а также вопросы предоставления убежища, предусматривает определенные лимиты для получения иностранными гражданами вида на жительство. Сейчас, даже если возможность получения вида на жительство не предусмотрена французским законодательством, административный суд может заставить администрацию выдать данный документ, если заявитель докажет, что имеет место нарушение его права на частную и семейную жизнь, гарантированного статьей 8 Конвенции. Эта власть админи-

стративного суда является следствием того, что Конвенция имеет больший вес, чем закон.

Во-вторых, упомянутая выше длительность процесса интеграции Конвенции в административное право явилась следствием опасений за правовую систему суверенного государства. Влияние международного права всегда рассматривалось как некий переворот национальных традиций государства.

Мы можем выделить пять этапов в истории отношений между французским публичным правом и правом Конвенции, которые постепенно привели к полному восприятию последней.

Первый этап можно назвать «парадоксальным равнодушием», которое, впрочем, не исходило от административного судопроизводства как такового. Данный этап был связан с тем, что до 1974 года Франция не была участницей Конвенции, или, точнее, Конвенция не была ратифицирована. И это при том, что Франция участвовала в создании текста Конвенции и что первый из президентов Европейского Суда был французом[2].

Второй этап тянулся с 1974 по 1989 год. Особое внимание следует обратить на период с 1981 года, когда была разрешена подача индивидуальной жалобы, до 1989 года, когда административный суд начинает все чаще применять Конвенцию, при этом не считая её инструментом, изменяющим его собственные решения или традиции. Это отношение было ясно показано комиссаром правительства Даниэлем Лабетулем, ставшим впоследствии президентом секции судебных процессов Государственного совета. Он в своих заключениях, касающихся дела *Дебу* от 27 октября 1978 года[3], предлагал Государственному совету, с одной стороны, «избегать всех тех решений, которые бы совершенно не соответствовали постановлениям Европейского Суда», но в то же время «избегать решений, показывающих разрыв с внутренним национальным правом». С того момента интеграция Конвенции осуществлялась благодаря статье 55 Конституции, которая подчеркивает превосходство международных договоров над внутригосударственным законодательством.

Полное применение Конвенции начинается с третьего этапа. Речь идет о судебном решении 1989 года по делу *Николо*[4], в котором Государственный совет отказывается от применения так называемой «нейтрализующей интерпретации» Конституции, регулярно используемой до этого. На этом этапе административный суд применяет Конвенцию в полном соответствии с интерпретацией Европейского Суда практически во всех областях, касающихся административного права: градостроительства, судебных процессов, касающихся прав иностранных граждан, ответственности госпиталей, налоговых санкций. Сегодня редко встретишь области, не оказавшиеся под влиянием Конвенции.

Четвертый этап начинается с 2001 года с постановления Европейского Суда по делу *«Кресс против Франции»*[5], в котором Европейский Суд высказался против присутствия комиссара Правительства[6] в совещательной комнате во время принятия решений. Это решение символически не является самым важным, так как эту тенденцию можно было наблюдать уже в решении «“Прокола” против Люксембурга»[7]. Речь идет о фазе процессуального конфликта: постановления Европейского Суда, касающиеся права на

[2] Речь идёт о Рене Кассене, вице-президенте Государственного совета.

[3] Conseil d’Etat, *Debout*, 27 octobre 1978.

[4] Conseil d’Etat, *Raoul Georges Nicolo contre commissaire du gouvernement,* 20 octobre 1989.

[5] ECtHR [GC]. *Kress v. France*, no. 39594/98, judgment of 07 April 2001.

[6] Комиссар Правительства – независимый судья (в настоящее время должность называется «публичный докладчик», чтобы не создавалось впечатления, что данное должностное лицо работает на Правительство), представляющий свой юридический анализ дела в ходе судебного заседания (в 90% случаев суд принимает анализ публичного докладчика). До постановление Европейского Суда по делу *Кресс*, Комиссар Правительства присутствовал в совещательной комнате вместе с судьями, которые рассматривают дело по существу (но он не принимал участия в голосовании). После постановления по делу Кресс Комиссар Правительства был лишён права присутствовать в совещательной комнате.

[7] ECtHR. *Procola v. Luxembourg*, no. 14570/89, judgment of 28 September 1995.

справедливое судебное разбирательство, были восприняты как дестабилизация национальных юридический традиций, особенно в сфере административного права. Этот период длится до 2007 года, когда Конвенция становится частью так называемого юридического пейзажа административного судопроизводства.

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Каким же образом под влиянием Конвенции изменилась работа административного суда?

В первую очередь следует отметить, что включение Конвенции в корпус административного права слабо повлияло на работу судебной системы в целом. Это может показаться странным, учитывая многочисленную критику в адрес Европейского Суда и страх дестабилизировать нашу правовую систему. В конечном итоге применять Конвенцию оказалось не так уж и страшно. Тем более, что нам удалось сохранить традиции административного процесса, такие как право на высказывание общественного докладчика и статус Государственного совета, являющегося одновременно судебным органом и органом исполнительной власти. Конвенция этого не изменила; более того, Европейский Суд определил эти особенности как достоинства нашего правосудия.

Необходимо добавить, что административная юстиция на самом высоком уровне не смогла сопротивляться влиянию практики Европейского Суда, но научился выстраивать со Страсбургом настоящий диалог. Благодаря этому диалогу нам удалось сохранить свои традиции, свои корни, своё «самое важное». Идея сохранения «своего самого важного» не означает желание остаться пассивным: французское административное правосудие претерпело многочисленные изменения в последние годы. И оно продолжает меняться. Возможно, его сила как раз и заключается в приспособлении к особенностям современного общества с одновременным сохранением части своего прошлого, заключающегося в защите основных прав и всеобщего интереса.

Во-вторых, все эти процедурные и организационные изменения под влиянием Конвенции являются положительными.

Обсуждаемые нами подробности в контексте данной конференции могут показаться незначительными. Речь идёт о замене комиссара на общественного докладчика, о важности непредвзятого отношения судьи, о ходе самого судебного процесса. Но мне представляется, что очень важно обратить внимание на одно из главных изменений, привнесенных Конвенцией и Европейским Судом во французскую административную систему: заявитель в судебном процессе занял важнейшее место, чего не было раньше.

Исторически французская административная судебная система сложилась из функций, связанных с контролированием государства и администрации. Точнее, административная судебная система появилась в тот момент, когда, суд получил полную независимость от администрации 140 лет назад (в 1872 году). Одной из главнейших ее функций и на сегодняшний день является контроль над законностью административных актов. То есть главнейшим объектом административного процесса является то, что мы называем «обращением в суд в связи с превышением полномочий». Это обращение в суд направлено не против конкретного человека, а против административного акта, сделанного данным человеком (чиновником). Существование сторон процесса сегодня признано совершенно обычным актом, чего не было еще шестьдесят лет назад.

Эволюция административного судопроизводства связана с принятием во внимание интересов заявителя, и этот процесс является следствием влияния Конвенции и постановлений Европейского Суда. Судебное решение по делу *«Кресс против Франции»* только начало демонстрировать влияние Конвенции на положение заявителя в судебном процессе, хотя это было сделано лишь символически. Это решение было направлено против использования названия «комиссар Правительства», которое не соответствовало идее о справедливом судебном разбирательстве. Речь шла о нарушении пункта 1 статьи 6 Конвенции в связи с так называемым процессуальным конфликтом. Важным в решении по делу *Кресс* являлось то, что комиссар Правительства присутствовал в совещательной комнате при принятии судебного решения, то

есть заявитель «так и не покончил с тайнами административного судопроизводства». Это выражение говорит само за себя: Европейский Суд привнес в административное судопроизводство возможность аргументирования каждой стороной своих позиций, что является вполне законным в демократическом государстве. Все эти изменения способствуют лучшему функционированию судебной системы, при этом не затрагивая её основ. Даже если источником реформы является не исключительно влияние Конвенции, следует признать, что она есть двигатель этой эволюции.

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В заключении остановлюсь на том, какое влияние в целом Конвенция оказала на миссию суда. Эволюция назначения административного суда под влиянием Конвенции является особым процессом. Имплементация требований Конвенции повлияла на традиции, при этом не изменив их радикальным способом и не поставив под сомнение качество работы судей. Конвенция оказала влияние на роль суда, сделав его важнейшей частью демократической системы и правового государства.

Во-первых, важнейшей частью эволюции миссии административного суда является углубление контроля за администрацией.

Еще в 80-х годах прошлого века контроль над администрацией был достаточно ограничен. Его целью было обнаруживать и подвергать критике только самые серьезные ошибки, так называемые «погрешности в оценке». Очень часто мы сталкиваемся с такими случаями в деятельности административной полиции при, например, депортации иностранных граждан. Благодаря влиянию Конвенции, административный суд смог уменьшить дискрецию полиции, в том числе и в области депортации иностранных граждан. Параллельно с этим процессом контроль над пропорциональностью мер, известный административному суду с 1933 года, расширил свои границы. Нужно лишь отметить, что контроль над пропорциональностью административных актов не должен выходить за рамки миссии административного суда и должен способствовать защите основных прав и свобод в правовом государстве.

Во-вторых, эволюция миссии административного суда под влиянием Конвенции связана с углублением контроля административного суда над действиями администрации.

До сравнительно недавнего времени существовали сферы, полностью находящиеся под влиянием администрации, которые не контролировались административным судом. В таких случаях административный суд не мог рассматривать заявления. К сфере, неподвластной административному суду, относились правительственные акты, так как считается, что они носят политический, а не административный характер. В эту сферу входили также меры внутреннего распорядка в школах, тюрьмах, армии. Административный суд предоставлял администрации свободу решать эти вопросы. В середине 90-х годов прошлого века административный суд еще «не проник» в места лишения свободы. Конечно же тюрьмы не были зонами бесправия. Специальные меры, касающиеся тюремного заключения, санкции за несоблюдения дисциплины, переводы из одного пенитенциарного учреждения в другое не контролировались административным судом, но считались частью основных прав. С тех пор произошло много важных изменений. Отныне все вышеперечисленные меры контролируются административным судом на предмет соответствия основным правам, тем более, что мы приняли во внимание требования и переняли стандарты, установленные Конвенцией. Нужно обратить внимание на слово «перенять»: его использование означает, что мы не только принимаем во внимание решения Европейского Суда, но и идем далее, присваивая себе не только постановления Суда, но и смысл этого постановления. Таким образом нужно подчеркнуть, что речь идет не о радикальных изменениях системы административного судопроизводства, но о расширении миссии административного суда.

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Одной из главных заслуг Конвенции является то, что она ускорила уже идущий процесс эволюции административной юстиции и отвела правам человека важнейшее место в ходе про-

изводства в административном суде. Быть административным судьей, контролировать администрацию – предполагает постоянные усилия по поиску равновесия между общим интересом, касающимся всех, а не отдельных граждан, с одной стороны, и защитой интересов отдельных граждан, с другой. Административный суд вышел из недр самой администрации. Он существенным образом изменился и получил полную независимость от администрации после Второй Мировой войны, став судом общественных свобод – свобод, находящихся под защитой государства. Благодаря влиянию Конвенции, административный суд стал судом, защищающим основные права, судом прав человека, выполняющим свою миссию для общества.

Если быть судьей – это быть картиной, то административный судья – это Джоконда со своей загадочной улыбкой, своим секретом, несущим в хаос некое умиротворение. И в этой картине Конвенция является штрихом кисти мастера. Это он создал такую загадочную улыбку Моны Лизы.

Права человека и международные отношения
Human Rights and International Relations

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The Internationalisation of the Universal Declaration of Human Rights

Abstract

Taking Samuel Moyn's book, The Last Utopia, as an interlocutor the author argues that the internationalization of the Universal Declaration of Human Rights (UDHR) is only in a quite restricted sense the product of the 1970's. The difference between the UDHR and the 18th century declarations of rights does not lie in the existence of a special tie to the state, as Moyn claims, but in their basic philosophical assumptions. Author argues that the UDHR is perfectionist and that this position has a much larger potential for internationalisation than older declarations. Author explains why this potential, present in 1948, did not unfold until the 70's. He argues that delay was caused, first, by Cold War that facilitated an essentially conflictual conception of international relations unsympathetic towards the internationalization of the UDHR and, secondly, by the fact that the human rights activism was minimalist and did not embrace the full program of the UDHR. In a conclusion, author argues that human rights NGOs eventually adopted the perfectionist program of the UDHR because intellectual coherence would command them to do so, but not due to a pressure for giving answers to all questions necessary for a new "utopia", as Moyn claims.

Keywords: Universal Declaration of Human Rights, international relations, internationalisation, realism, human rights movement.

Интернационализация Всеобщей декларации прав человека

Аннотация

Автор статьи, полемизируя с Сэмуэлом Моэном, утверждает, что интернационализация Всеобщей декларации прав человека (ВДПЧ) только частично является продуктом 70-х годов прошлого века. Различия между ВДПЧ и декларациями прав человека XVIII в. коренятся не в наличии особой связи с государством, как утверждает Моэн, а в их базовых философских посылках. Автор отмечает, что ВДПЧ выражает идеи перфекционизма, и это дает ей большие – по сравнению с более ранними декларациями – возможности для интернационализации. В статье объясняется, почему эта возможность не была реализована до 70-х годов XX в. Автор утверждает, что отсрочка была вызвана, во-первых, «Холодной войной», породившей неблагоприятную для интернационализации ВДПЧ конфликтную концепцию международных отношений, и, во-вторых, достаточно слабым движением за права человека. В заключении статьи содержится вывод, что негосударственные организации по правам человека в конечном итоге восприняли перфекционистскую программу ВДПЧ не потому, что, как утверждает Моэн, были вынуждены предоставить ответы, необходимые новой «утопии», а ввиду того, что этот выбор соответствовал интеллектуальному содержанию ВДПЧ.

Ключевые слова: Всеобщая декларация прав человека, международные отношения, интернационализм, реализм, движение за права человека.

[1] Мёгенс Хром Якобсен, доктор философии.

The Internationalisation of the Universal Declaration of Human Rights

Introduction

It is commonly said that human rights have become internationalized, but it is less clear what this exactly means. Samuel Moyn, in his important book, *The Last Utopia,* from 2010, thinks this only happened in the 1970s, while it was ordinarily thought to have happened in the 1940's, where the Universal Declaration of Human Rights (hereinafter – UDHR) emerged as a consensus between a large variety of countries from all parts of the world. We would like to explore another possibility, namely that the very wording of the UDHR contains a potential for internationalization. Peter Bailey, an Australian human rights lawyer, points at article 28 as potentially explosive: "Article 28 emphasizes the responsibility of the whole international community for seeking and putting in place arrangements of both a civil and political and an economic and social kind that allow for the full realization of human rights."[1] He notes drily that this provision has not been given legally binding force in the Covenants. We will argue that this potential is a direct consequence of the perfectionism which imbue the UDHR.

First, we will try to extract different notions of "internationalization" through a critical review of Samuel Moyn's book. We will argue that Moyn is overstating his case concerning the difference between 20th century and 18th century conceptions of human rights. In our view, the difference has to be explained by different philosophical assumptions. 18th century assumptions had much less potential for internationalization than the philosophical assumptions of the UDHR. Moyn is nonetheless right noting that actual internationalization only took place in the 1970's, and we will have to explain why the potential for internationalization inherent in the UDHR did not unfold immediately. Moyn is equally right in pointing at the emerging Cold War as an essential factor. We will then argue that the Cold War also facilitated an essentially conflictual conception of international relations which is wholly unsympathetic towards the internationalization of the UDHR. In theoretical language this conception is generally termed realism, and will here be represented by Reinhold Niebuhr, Hans Morgenthau and George Kennan. Theories of international relations do not as such explain this lack of unfolding, but international relations theory is the discipline where you would expect to find considered reflections about internationalization. We see these thinkers as an expression of a general state of mind pushing various kinds of internationalism into the defensive. The intense ideological conflict between East and West in the aftermath of the Second World War was no favourable ground for internationalist ambitions of the kind John Dewey among others was professing. In our view, Niebuhr and Dewey represent two very important philosophical positions informing the disagreement about internationalism.

With "détente" in the 1970's, internationalism began to see their chance again and realist assumptions were challenged. Robert O. Keohane and Jack Donnelly figure here as proponents of this approach. Again, theories of international relations are symptoms and should be considered in the light of the other factors Moyn is pointing at, namely de-colonization, grass-root movements like Amnesty International, the Helsinki process, dissident militancy in the USSR, mechanisms for monitoring, investigating and attributing blame for human rights violations and the Carter presidency's focus on human rights. Institutionalist international relations theory from this period will, however, allow us to identify those points which gave offence in realist theory and how different philosophical assumptions was allowed to unfold. This also appears as a necessary condition for liberating the internationalist potential in the UDHR. Even though human rights militancy and regime-building were not caused by theories of international relations it seems that the argument had to be made in order to clear the way for internationalization.

Moyn's explanation for the success of human

[1] Bailey, Peter: http://www.universalrights.net/main/creation.htm (consulted 20-01-2015).

rights was a crisis in the other utopias culminating in the fall of the Berlin Wall and the end of the Cold war, but much of their success was, according to Moyn build on their anti-political minimalism. Their success, however, made it necessary to address the whole range of global problems and the maximalism which was finally adopted imperiled thus the basis for its former success. Moyn argues this with much cogency, but we would like to emphasize that the maximalism Moyn is speaking about is inherent in the UDHR, and as soon as they chose to make the whole panoply of the UDHR rights the basis for their work, this maximalism imposed itself. Did NGOs then adopt a maximalist stand because they had to provide answers to all questions, or did they adopt a maximalist stand when they chose to work on the UDHR as a whole? We will argue for the importance of the last explanation. It is very possible that some groups within the NGOs wanted this development, but it would anyway had been difficult for the NGOs to adopt a perspective which was totally different from the one reigning in the UN system, since part of their impact was due to the fact that they could point to obligations made by states within this system.

1. Internationalization

Samuel Moyn's book, *The Last Utopia*, argues that international human rights only surfaced in the 1970's. He claims that they had to be reinvented and not merely retrieved.[2] They were "...not so much an inheritance to preserve as an invention to remake..."[3] Human rights "...emerged in the 1970s seemingly from nowhere."[4] He argues that the principal explanation for this fact was the bankruptcy of alternative utopian projects.[5] This seems in many respects both an interesting and tenable hypothesis, but it is much less clear what this explanation actually explain. General terms are "globalization of rights"[6] or more commonly "international human rights"[7] When we try to understand what "international" means in international human rights several different candidates present themselves. One suggestion concerns the link between human rights and the nation-state. Another suggestion emphasizes that human rights are somehow supra-national values. A third suggestion focuses on cross-border interest in human rights. A fourth suggestion accentuates the abrogation of the sovereignty principle. The last suggestion concerns citizen advocacy in the international sphere.

The first suggestion seems to be the most controversial contention and in our view also the most doubtful. He says about the so-called precursors of human rights that: "Far from being sources of appeal that transcended state and nation, the rights asserted in early modern political revolutions and championed thereafter were central to the construction of state and nation, and lead nowhere beyond until very recently."[8] He follows Hannah Arendt's argument about "rights to have rights". Rights have no meaning if you are not in a community. It is only within an actual political community somebody can have rights effectively, because these are enforced by the state. This seems to be a variant of the old dictum of legal positivism that rights are only rights when they are effectively enforced by the state or some other entity. This was certainly not the way the American and French revolutionaries looked at the matter. There were certainly natural rights or human rights in their view. Political society should of course enforce these rights and make them effective, but is it any different today? In which sense did human rights "transcend state and nation" in the course of the 1970's or even today, which they did not do then? Moyn says that "... rights had been born as the first prerogatives of citizens..."[9] He thinks there is a fundamental difference between earlier rights conceived as belonging to a (particular, we assume) political community and later human rights.[10] He admits that rights were natural or human for some thinkers, but reiterates that they had to be enforced within the framework of the state. Within this framework citizens could debate about and fight for old and new rights. He

2 Moyn, Samuel. *The Last Utopia* (Cambridge, Mass.: Harvard University Press, 2010). P. 83.
3 *Ibid*. P. 9. Cf. 216.
4 *Ibid*. P. 3.
5 *Ibid*. P. 4 ff.
6 *Ibid*. P. 205.
7 *Ibid*. P. 216.
8 *Ibid*. P. 12.
9 *Ibid*. P. 12.
10 *Ibid*.

thinks that rights after 1945 did not allow for that.[11] Why is this not possible? There seems to be much debate about which rights are human rights today, and even if it is not very likely, it is not impossible that a new conception of rights could be embodied in a new international declaration of rights.

He indicates next that the essential difference is that the new human rights "...might contradict the sovereign nation-state from above and outside rather than serve as its foundation."[12] To this one should retort that earlier declaration of rights was thought of as a check on the sovereign nation state, and they did this from above and outside as transcendent moral principles. In this there is no difference between earlier declarations and UDHR. The difference is, of course, that UDHR is an international declaration and that later covenants established mechanisms for scrutiny of state conformity, but this does not affect the conception of rights as such. He persists, saying that there is an essential connection between earlier rights and states, but which connection was there then which we do not have today. We still have states, and states are still considered the principal duty bearers for the implementation of human rights. We have now a mechanism for monitoring state compliance, which we did not have then, and we might have some new duty bearers like multinational companies which we did not have then (neither did we have that in the 1970's), so the system still relies quite heavily on states.

If earlier declarations served as the foundation of states, then UDHR would do so too, it was just decided by a collectivity of states in order to serve as the foundation of all states, but the French declaration of 1789 was also meant to serve as the foundation for all states, even though it was only elaborated by the French. So it boils down to the fact that the UDHR was international and 1789 was not, but this was a fact already in 1948 and has no special relation to the 1970's. The problem with Moyn's reasoning is that he reasons in terms of fact and thus ignores the pretensions inherent in what is enunciated. Earlier declarations were in fact elaborated in particular states by the political institutions of these states, but this does not make them essentially, but only contingently related to these states. What they declared was not perceived as having any relation to the state in question apart from the fact that the declarers belonged to that state.

After a short review of early modern natural law theory Moyn claims that the "...actual significance of the era of democratic revolution in America and France, in other words, is as much in negating the possibility of twentieth-century human rights doctrines as in making them available."[13] He sees early modern natural law theory as bound up with the modern state and the sovereignty principle. Elements of natural law theory are surely used to bolster and legitimate the state, but our own work in the area has convinced us that there is a perpetual conflict between natural law theory and sovereignty. Even in Hobbes, natural law in the guise of the duty to survive enters in inextricable conflict with the right of the sovereign to inflict capital punishment.[14] Natural law theory is thus not bound up with the modern state. Moyn seems to assume that only modern human rights theory could justify the abrogation of sovereignty and foreign intervention, but natural law theory in whatever guise always kept this potential. The right of resistance was always looming in the shadow of transcendent moral principles. The natural law traditions inspiring the democratic revolution in America and France would thus not, according to our analysis, negate the possibility of twentieth-century human rights doctrines.

He believes to find in the title of the French declaration of rights from 1789 support for his thesis. The title of this declaration speaks both about man and the citizen: "In a sense, every declaration of rights at the time (and until recently) was implicitly what the French openly labelled theirs: a declaration of the rights of man *and citizen*. … The 'rights of man' were about a whole people incorporating

[11] *Ibid*. P. 13.

[12] *Ibid*.

[13] *Ibid*. PP. 23-24.

[14] Cf. Jacobsen, Mogens Chrom. *Jean Bodin et le dilemme de la philosophie politique moderne*. Etudes Romanes 44 (Copenhagen: Museum Tusculanum, 2000); Hobbes, Thomas. *Leviathan*, Cambridge Texts in the History of Political Thought (Cambridge: Cambridge University Press, 1991). I.14, p. 92-93; II.21, p. 150-151.

itself in a state, not a few foreign people criticizing another state for its wrongdoings."[15]

Moyn seems to assume that all the rights outlined in the declaration are both the rights of man and the rights of the citizen. This interpretation is not tenable. The distinction between active and passive citizens cherished at the time and implemented in the ensuing electoral law reserves rights of political participation only to men (and not women) with fortune. The rights of political participation outlined in the declaration cannot thus belong to the rights of men (where women are included), but only be citizens' rights. The declaration outlines two sorts of rights: human rights and citizen rights. Political participation was not conceived as a human right in this declaration. The Covenant on Civil and Political Rights is also a bit fishy about the right of political participation, since it only states that every *citizen* has right to such participation.[16] Since we cannot assume that everybody possess citizenship this right cannot be the one we have in virtue of being human. This shows very well the discrepancy between human rights and citizenship, and the first cannot then be bound up with the first. If human rights was about the meaning of citizenship,[17] Moyn must give some other reason for this, but it is difficult to see in which ways earlier declarations could be about the meaning of citizenship and UDHR could not. Secondly, he introduces a different aspect, namely that of several other states criticizing another state for wrongdoing, as something quite new, but it is quite clear that the French revolutionaries criticized nearly all the neighbouring states for the wrongdoing pursuant to their feudal social structures. They looked very much outward and criticized other states. Some actually thought that this justified downright invasion.[18]

He admits that earlier rights were in some sense above the state, but they were only stated through the state, and there was no forum above the state.[19] What is this forum above the state? The UN, global public opinion, NGOs? He gives as an example that there was no judicial protection against the sovereign authority.[20] In the strictest sense there is no such thing even today, maybe apart from Council of Europe countries. There are today mechanisms for monitoring and investigating transgressions, but can we call this judicial protection? There certainly is a difference between then and today, but he seems to overstate this difference.

The second suggestion that modern human rights are somehow supranational values, needs some clarification, since it is clear that earlier declarations of rights also was conceived as supra-national in some sense. We have cited Moyn above for saying that they are somehow above the state, so he must mean something different when he says that they are supra-national values.[21] He actually speaks about moving rights to the international level,[22] about internationalism based on rights[23] and supra-national human rights mechanisms.[24] What makes these values supra-national seems to be the fact that they are agreed internationally in the form of declarations and covenants and furnished with mechanisms for monitoring and investigating. He notes that the 1947 ban on receiving petitions and investigating transgressions was only abolished during the 1960's,[25] making it evident that such a machinery could not appear before this time at the UN level. It then became possible to investigate gross violations of human rights. Do we then have a "world of individual human rights"?[26] It seems that human rights were individual in 1948 as well as in 1789, and that duties to respect them still lie with the state. Do these new mechanisms "penetrate the impregnability of state borders"[27]; do they "legally enforce rights across borders"[28]; do they

15 Moyn, *Op.cit*. PP. 25-26.
16 ICCPR § 25.
17 Moyn, *Op.cit*. PP. 25-26.
18 Mavidal, M.J., Laurent, M. E. and Clavel, E. *Archives parlementaires de 1787 à 1860*. Première série, tome 53 (Paris: Librairie Administrative de Paul Dupont, 1898). 19. november 1792, s. 474; 15. december 1792, s. 70-76. Cf. Moyn, *Op.cit*. PP. 28.
19 Moyn, *Op.cit*. P. 26.
20 *Ibid*.
21 *Ibid*. PP. 89-90.
22 *Ibid*. P. 39.
23 *Ibid*. P. 118.
24 *Ibid*. PP. 121-122.
25 *Ibid*. PP. 68-69, 100.
26 *Ibid*. P. 119.
27 *Ibid*. P. 1.
28 *Ibid*. P. 69.

offer an "international legal protection for individuals"[29]; have we finally abrogated the sovereignty principle?[30] Strictly speaking, we have to await the "responsibility to protect" doctrine emerging at the beginning of the 21th century in order to see something approaching to abrogation of sovereignty.

Another difference, he points at, is a much greater interest in what happens in other countries. Formerly people interested in human rights "gazed within";[31] now it is about "propagation of rights abroad"[32] and a "politics of suffering abroad".[33] The French revolutionaries was very much alert about rights abroad, but still Moyn is right that there happened something new in the 1970's, and it is related to what he calls the "institutionalization of activism".[34] He explains that the 1970's as something new saw a "citizen advocacy in the international sphere".[35] The particularity of this kind of activism was that it "relied on people, not governments".[36] People or organised groups addressed themselves directly to those governments seen to violate human rights. They relied on the pressure of public opinion both inside and outside the country in question, and the emergence of a cross-border public opinion was probably in itself something new at the time. A cross-border public opinion would both consist in mutual influences between national/regional public opinions and a general interest in matters outside local affairs. Moyn describes interestingly, how Amnesty International was instrumental in turning public opinion towards human rights, helped by President Jimmy Carter's integration of human rights into foreign policy and dissidence in Eastern Europe.[37]

Together with new mechanisms for monitoring and investigating, this last point seems to have been the most important move towards internationalization during the 1970's. Moyn's thesis, or what survives of it from this analysis, though interesting, seems much less controversial than one might think at first. Human rights has not been reinvented in the 1970's, but they have taken on a new significance in people's minds and gained more importance due to new mechanisms of monitoring and investigating. The reason for this upsurge, Moyn attributes to popular movements while international lawyers are just following suit.[38] He argues that international lawyers did not "push" for human rights, but how could they? The legal profession needs food for thoughts in terms of conventions, decisions or other legal sources. Before these existed there could be no specific discipline of human rights law. Moyn omits this very simple explanation for the flourishing of human rights interest in international law. Surely, grass-roots movements such as Amnesty International accentuated the process.

In order to summarize our findings, we can thus outline the process of internationalization in five points:

1. 1948: The UDHR and related covenants are a consensus between several states.

2. 1970's: Supra-national mechanisms for monitoring, investigating and attribution of blame.

3. 1970's: Cross-border public awareness and interest in the state of human rights abroad.

4. 1970's: Activism: People and grass-roots organisations address foreign countries directly.

5. 2000's: Responsibility to protect doctrine: first incursion into state sovereignty.

Our conclusion will be that Moyn is overdoing the difference between earlier human rights and the events of the 1970's. Earlier human rights are not more related to the state than human rights are today. In both periods human rights (natural rights, rights of man) are transcendent moral rules, supposed to be valid everywhere, and which has to be implemented by the state. Human rights now and then are neither more nor less the foundation of the state, in the sense of furnishing the moral foundation of government. The important difference between now and then is not the contingent relation to the emerging nation-states, but the very content of the declarations and their different philosophical assumptions.

[29] *Ibid*. P. 109.
[30] *Ibid*. P. 208.
[31] *Ibid*. P. 38.
[32] *Ibid*. P. 159.
[33] *Ibid*. P. 12.
[34] *Ibid*. P. 37. Cf. 39, 150.
[35] *Ibid*. PP. 121-122.
[36] *Ibid*. P. 128.
[37] *Ibid*. P. 129 ff.
[38] *Ibid*. P. 178.

2. The Perfectionism of the UDHR

In an earlier article in this Journal we have argued that the UDHR is imbued with perfectionism.[39] In short the argument is the following: First we deploy a distinction between permissive and perfectionist rights. The basic feature of the permissive conception of rights is choice. The rights holder can choose whether to exercise his right or not either as a liberty or as a right against a particular person whose actions he controls in certain respects. A collection of permissive rights would delimit a space of liberty, and we would tend to think that a collection of such rights would have as its purpose to delimit such a space and thus to define human liberty. The basic feature of the perfectionist conception of rights lies in the end that rights are supposed to enhance. Rights are generally about what the individual needs in order to attain perfection. Duty is not Kantian duty, since duty is also the individual's own interest rightly understood. For this reason duty does not demand difficult sacrifices, since people are somehow irrational if they do not do their duty. The underlying supposition is that this is actually what every reasonable person really wants. So it does not always seem necessary to specify that this right is also a duty. Perfectionist rights can, however, coexist with permissive rights, if certain liberties seem important for the acquisition of perfection. This would incline us to think that a collection of both permissive and perfectionist rights would indicate that they were all ordained to a perfectionist end, if they had to be understood as a unitary whole.

We then take the UDHR at face value in order to see what emerges from the text itself, and we realize that the economic, social and cultural rights make no sense, if they are understood as permissive rights, though they can very well be understood as perfectionist rights. Since a perfectionist end implies a perfectionist conception of rights, and such an end is present in the declaration in the form the development of the human personality, we conclude that these rights should be understood as perfectionist rights. Other rights in the UDHR could be understood as permissive rights. Since all the rights in the declaration are not permissive rights, it is difficult to understand the end of the UDHR as the delimitation of a space of liberty, but a perfectionist end would not be incompatible with a mixture of permissive and perfectionist rights, since some kind of liberty could seem necessary to fulfil the end. In that case the perfectionist end of the UDHR would command all the rights, and the permissive rights should be used responsibly to attain this aim. We finally argue that an examination of the drafters' views consolidates our interpretation of the text, even though it has to be explained as an overlapping consensus between two types of perfectionism, namely full-blown perfectionism and social liberal perfectionism.

Broadly speaking, perfectionism implies some kind of substantial notion about how man should be, which the individual human being should strive to realise. It is understood that this notion is objectively true for all human beings. A full-blown perfectionism would then have a very dense[40] concep-

[39] Jacobsen, Mogens Chrom. "Ideology and the Universal Declaration of Human Rights", (2014) *Journal of Constitutionalism and Human Rights*, 1-2 (5): 8-30.

[40] A dense conception is one that details to a very high degree which qualities people should have and which kind of life they should live. An example of a dense conception of human perfection is Aristotle's definition of the good life: "Let us then define happiness as well-being combined with virtue, or independence of life, or the life that is most agreeable combined with security, or abundance of possessions and slaves, combined with power to protect and make use of them; for nearly all men admit that one or more of these things constitutes happiness. If, then, such is the nature of happiness, its component parts must necessarily be: noble birth, numerous friends, good friends, wealth, good children, numerous children, a good old age; further, bodily excellences, such as health, beauty, strength, stature, fitness for athletic contests, a good reputation, honour, good luck, virtue. For a man would be entirely independent, provided he possessed all internal and external goods; for there are no others. Internal goods are those of mind and body; external goods are noble birth, friends, wealth, honour. To these we think should be added certain capacities and good luck; for on these conditions life will be perfectly secure." (Aristotle. *Art of Rhetoric*. Loeb Classical Library 193 (Cambridge, Mass.: Harvard University Press, 1991), 1360b 3-4, I.5, p. 47-49.)

tion of human perfection generally coupled with a strong moral dimension. The social liberal conception focuses on the other hand on liberty and its effective realization. Effective liberty depends on certain factors in the human personality which make life worth living. To make this kind of life possible for all, the state should intervene actively in society. The idea of effective liberty likewise implies a substantial notion of how man should be, that is, the qualities necessary to live the kind of life worth living. However, the social liberal conception is somewhat ambiguous on this point, since we do not always know exactly how dense their conception of man would be. As long as emphasis would be on liberty of choice, so that people should be empowered to the point where they could make a real choice about what they want to do with their life, they would more reasonably be called social liberals. If what really matters is to convert formal freedom of choice to effective freedom of choice, it will not be necessary to include a moral dimension in this conception of perfection. This would thus be the basic version of the theory, but we would probably have to envisage a continuum from this version to full-blown perfectionism in which the moral dimension could enter in varying degrees. A strong moral dimension means that duties to society flow from the very idea of perfection. Duties to society are part of man's realization of himself as a social being. Here duties to society needs no further explanation, while basic social liberals would need some other explanation, for example a social contract explanation.[41]

We have thus argued that the large majority of the drafters actually expressing themselves during the drafting process was to be found within this continuum, even though we could not always determine their actual position within it. This conception is different from the one we will find in the 18th century declarations, and these two kinds of conceptions have a very different potential for internationalization.

3. Perfectionism and Internationalization

As we have argued elsewhere[42] 18th century declarations of rights were based on the assumption that states were contingent entities created by the consensus of the particular associates and supposed to exercise the functions defined by a limited number of natural law rules. Each state having its own particular common good, the potential for internationalization is limited, since what can be internationalised is only the limited number of natural law rules, which are supposed to govern all societies, while utility is something different and contingent for each particular society. A perfectionist conception of human rights, as we have argued is that of the UDHR, will have a much larger potential for internationalization. The common good of each society is related to the flourishing of the individual human person taken as a social being. Man being social does not only mean that we need the assistance of other people and social institutions in order to flourish, but also that helping other people and contributing to the common good are to some extent (depending on how strong the moral dimension is) part of human flourishing. Since this human flourishing is supposed to be the same for all human beings, one would suppose there would also be a global common good. Since we should all promote the common good, it would seem that we would have obligations concerning people in other countries. If we did not, we would have to explain why. The burden of proof seems to lie on those who wish to limit obligation to national communities.

This can be made clear using the distinction Robert Nozick deploys between historical principles of distributive justice and current time-slice principles. According to the first kind of principle, a distribution is just depending on how it came about. On the other principle "…the justice of a distribution is determined by how things are distributed (who has what) as judged by some *structural* principle(s) of just distribution."[43] When a distribution is judged by a historical principle the state can reassure itself that its present wealth is due to its own "choices"

[41] Cf. Jacobsen. "Ideology and the Universal Declaration of Human Rights". P.26.

[42] Jacobsen, Mogens Chrom. *Three Conceptions of human Rights* (Malmö: NSU-Press, 2011).

[43] Nozick, Robert. *Anarchy, State and Utopia* (Oxford: Basil Blackwell, 1980). P. 154.

(maybe not always a choice in the ordinary sense, but something which has emerged in the situation and to which peoples' mutual expectations has adapted) and it has no further responsibility for the fate of other nations, unless of course it has been acquired by illegal means, or the basic moral principles, for example, sanctions a right to life necessitating humanitarian aid. On this principle, it is relatively easy to limit state responsibility to the national territory. With a time-slice principle, this is more difficult. When we compare two distributions to see which one of them correspond better to the structural principle, we will have to ask the question; to whom we should apply the distribution. With a historical principle, this is given by the historical facts, but with a time-slice principle historical facts have no relevance. We should only look at how goods are distributed among persons at a given time, but which persons: the inhabitants of a particular country or all human beings? Here the burden of proof reverses. On a historical principle, one should show in virtue of which moral prescriptions one would be responsible for other people. With a time-slice principle, we will have to explain why we ought to limit its application to the inhabitants of a particular nation. Such a limitation will, however, easily seem arbitrary.

Perfectionism, as we have defined it above, has thus a strong potential for international responsibility transcending the national community and treating humanity as one global community. Having argued that the UDHR is imbued with perfectionism, one could expect that such an internationalist point of view would be expressed in the UDHR itself and during the drafting process.

4. The UDHR and International Responsibility

The UDHR is international in the sense that it was agreed upon by several different nations, but there is also an international perspective within the text. The preamble reminds us that the UDHR is a standard of achievement for peoples and nations, but respect for this standard should be promoted by progressive measures at both the national and the international level in order to assure effective recognition and observance. This provision is rather vague, but it does imply some role for international measures. Article 22 speaks about "national effort and international co-operation" and this is probably what the drafters have in mind here. The UN instituted a long range of institutions to facilitate such international co-operation. Co-operation is generally conceived as voluntary and does not as such imply any particular duty, but combined with article 28 the result could very well be different: "Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized."

This article indicates that everyone, and "everyone" here must mean the entire global population, is entitled to, that not only the national but also the international social order is such that the rights and freedoms of the UDHR can be fully realized. We assume that the duty bearers are still the individual states, but they have now become responsible for something beyond the state, namely the international order. A closer look at the drafting history will give us some additional clues.

Article 28 was a latecomer to the UDHR. It only entered during the third session of the Commission on Human Rights. The context for its insertion was the discussion of ESC-rights and more specifically the right to work. The idea is launched by the Lebanese representative Charles Malik. After the rights of the individual as such, they were now discussing the rights of the individual as a member of society. In this respect he called attention to "...the need for establishing the kind of economic and social conditions that would guarantee those rights." In order to do this, it was "...necessary to define the standard of an ideal society in which the individual could develop and in which his rights could be guaranteed."[44] The proposal was seconded by the Belgian representative and the Commission decided to set up a drafting committee to consider the question. The general assumption behind these words is that civil and political rights and ESC-rights would have different measures of implementation. The first rights would mostly depend on the existence of a working judicial and political system, while

[44] E/CN.4/SR.64 p. 17. The summary records from the drafting process are accessible at this website: http://research.un.org/en/undhr. We will use the UN document symbols. Explanation available here: http://research.un.org/content.php?pid=320836&sid=2626142.

the other rights would depend on specific social and economic conditions. The ideal society should indicate the totality of conditions (institutional, economic, social, cultural, etc.) necessary for the development of the individual and the guarantee of its rights. The perspective is very much of a perfectionist kind emphasising individual development and what kind of society would best promote such development.

The drafting committee came up with a proposal. The first paragraph was accepted unanimously, but the second paragraph was subject to discussion as to whether it should be inserted in the preamble or constitute a separate article.[45] Malik reiterates his worry thinking that it should be "...clearly stated somewhere in the Declaration that it was not enough to enumerate economic and social rights, but that society itself should be of such a nature as to ensure the observance of those rights. Favourable social conditions were necessary for that purpose."[46] He thought that an article of this nature should be inserted among the articles on ESC-rights. The Egyptian representative, Omar Loutfi, proposed to make such an idea a separate article placed before the articles on ESC-rights and this proposal was supported by Ronald Lebeau from Belgium. René Cassin still conceived this idea as a part of article 2 and he thought "... it was necessary to establish that the individual was entitled to demand that the State, society and international co-operation should guarantee the right in question."[47] (That is the right to work.) He therefore proposed the following amendment to paragraph 2: "...ensured by such measures taken by State and by international co-operation..."[48] Fontaina from Uruguay supported the French proposal which for him implied "...consultation with existing international organisations, in particular, with the International Labour Organisation".[49] Geoffrey Wilson (United Kingdom) asked for a decision whether this provision should stay in article 23 or constitute a separate article. Malik thought a provision stating that "everyone had a right to a good social order ensuring the enjoyment of..." could start or end the section on ESC-rights.[50] After a lengthy discussion, it was decided to set up another sub-committee to work out a special article "...concerning the measures to be taken in order to ensure the enjoyment of economic and social rights."[51]

The two ideas about necessary societal conditions and the international order were joined together by this subcommittee.[52] The international order is apparently conceived as consultations within international organisations, but the interesting thing with Cassin's amendment is that international co-operation together with state and society "should guarantee the right in question", and "should" generally implies an obligation. The subcommittee proposed unanimously the following new article: "Everyone has the right to a good social and international order in which the rights and freedoms set out in this Declaration can be fully realized."

Cassin proposes another article to precede the section on ESC-rights in conformity with his earlier ideas: "Everyone as a member of society has the economic, social and cultural rights enumerated below, whose fulfilment should be made possible in every State separately or by international co-operation."

This last article will in revised form end up as article 22 in UDHR: "Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality."

The Cassin's proposal eventually adopted as article 22 is more limited in scope, confined as it is to ESC-rights. Even though it is originally formulated as an alternative between fulfilment by state or in-

[45] E/CN.4/114. "2. The enjoyment of these rights should be ensured by such measures (taken by the State or by society) as would create the widest possible opportunities for useful work and prevent unemployment."

[46] E/CN.4/SR.65 p. 3.

[47] E/CN.4/SR.65 p. 4.

[48] E/CN.4/SR.65 p. 4.

[49] E/CN.4/SR.65 p. 9.

[50] E/CN.4/SR.65 p. 5.

[51] E/CN.4/SR.65 p. 11.

[52] E/CN.4/120. The summery record states as members: F, Lebanon, UK, USSR ans US, while the report states as members: F, Lebanon, UK, US and Uruguay.

ternational co-operation, it is finally conceived as a cumulative process between the national and international level. The obligation is also conditioned on each country's resources. The first proposal, on the contrary, comprises the whole panoply of rights and the entitlement people have to a "social and international order" is not attenuated by any conditions. A "good social and international order" refers to Malik's idea about an ideal standard for society, where the human being can flourish and realize its potentials.

The Indian representative, Mrs. Hansa Mehta, noted regarding the new article that the term "good" was redundant. An international order in which all the rights and freedoms was fulfilled must be a good one. The term "good" would imply that there could be a "bad or less good" order, where all rights and freedoms were fully realized.[53] This would, however, be the case if the rights were minimal personal guarantees and not perfectionist rights. Malik, though, wants to conserve the term "good", thinking that the phrase: "in which the rights and freedoms set out in this Declaration can be fully realized", defines the term "good".[54] Basically the same idea as the one advanced by Mehta. This discussion was taken up later when deliberation on this proposal resumed. Malik again emphasised "...the right of mankind to have a United Nations a world organisation, as well as a social order in which the rights and freedoms could be realized."[55] This seems to identify the world order with the UN. However, Alexei Pavlov, the Russian representative takes up the question relating to the term "good" again. The Russian representative has his own reasons for omitting "good", since "good" for him must be a socialist society.[56] For the moment he does not succeed, but in the Third Committee Pavlov reiterates the question and he gains the support of many other delegates, though not for the reasons he had given.[57]

The article 26 (28 in the final text) is finally adopted by the Commission with six votes against three and six abstentions in the form proposed by the sub-committee except that "has the right" is changed to "is entitled".[58] In the Third Committee the word "good" was deleted by 34 votes for and 2 against with 2 abstentions and the article 26 got its final form. Thereafter the article was voted in two parts. The first part was adopted by 32 for, 2 against and 4 abstentions, and the second part was adopted by 26 for, 2 against and 9 abstentions. The article as a whole was adopted by 25 votes for, 3 against and 8 abstentions.[59] Article 26 then becomes 29 by adoption of new articles.[60] During General Assembly deliberations article 3 is deleted and article 29 finally becomes article 28.[61]

The discussion of detail concerning the word "good" is interesting since it reveals some fundamental assumptions. If the UDHR consisted only of minimal rights protecting some basic interests such as the inviolability of the person, then the panoply of rights could very well be realized without having a good world order in the substantial sense of "good" as the ideal world order. If the world order realising the rights of the UDHR is good per definition, then this world order must be good in this substantial sense, and this corresponds very well to the perfectionist view that human rights are the basic goods needed for human flourishing. There is no distinction between the right and the good here. If one would object that "good" is used loosely here only to indicate that it is not bad, unjust or immoral, one should think about the argument of the Indian representative. She says directly that it cannot even be a "less good" order thereby implying some kind of degree; therefore the order in question must be the best. Combine this idea with later statements about what this world order should actually be: The Lebanese representative describes it as "...the ultimate conditions necessary for the realization of those rights."[62] Cassin states that "...certain preliminary conditions had to be laid down to ensure the implementation of the rights contained in the declaration."[63] What they are speaking about here cannot be anything else than the entire economical,

53 E/CN.4/SR.67 p. 2.
54 E/CN.4/SR.67 p. 3.
55 E/CN.4/SR.78 p. 9.
56 E/CN.4/SR.78 p. 9.
57 A/C.3/SR.152 p. 638 ff.
58 E/CN.4/SR.78 p. 10-11.
59 A/C.3/SR.152 p. 642.
60 A/C.3/SR.175 ff.; A/C.3/400.
61 A/PV.183.
62 A/C.3/SR.152 p. 639.
63 A/C.3/SR.152 p. 640.

social and political structure of the world society. We are not speaking about some formal restraints; these statements concern the very nature of society.

Chang, Malik and certain Latin American representatives want to go further. Chang thinks the Commission "...should affirm that it was the duty of all to contribute towards the establishment and maintenance of that order."[64] Malik agreed with the idea and realized its importance. For reasons of form he thought, however, that the Commission should not depart from the practice thus far followed and state duties in individual articles, but insert such a provision in the preamble.[65] In an answer to the Chairman, Chang specified that he distinguished between two kinds of obligations. On the one side the obligations the individual owes to his own state and fellow citizens and on the other side the duty to contribute to the establishment of the social order he has a right to demand. He emphasizes that this right depends on the fulfilment of the duty.[66] A similar idea is reiterated by the Uruguayan representative Fontaina emphasizing the "...duty of each individual to cooperate in achieving a society in which the rights and freedoms could be enjoyed."[67] There is thus both a right and a duty to the establishment of the order in question. Those who have the right to this order are also those who should establish it, which seems logical since we are speaking about the entire global population. How duties are distributed among individuals, states and other entities is not specified. It appears to be a purely individual duty. However it is, the order in question is both a right and a duty. From a perfectionist perspective rights can mirror duties in the way a right to food, existing because food is necessary to human flourishing, mirrors a duty to eat, existing for the same reason. In a parallel way the right to the establishment of a social order realizing the rights of the UDHR exists because this is necessary for human flourishing, and the duty to establish such an order exists for the very same reason. Since this social order is conceived both as national and international the individual has a right and a duty to the establishment of a world order realizing the rights and freedoms stipulated in the UDHR.

5. Post-war disenchantment

The UDHR has thus a very strong potential for internationalization implying rights to a world order consisting in a particular kind of judicial, political, economic, social and cultural structure capable of realizing other rights furnishing man with such qualities as seems necessary for human freedom and/or flourishing. This potential for internationalization did not receive much attention in the years following the adoption of the UDHR. In fact, the UDHR itself remained for a long time in the shadow of other events. The UDHR did not immediately have the impact it would get later on. First of all it was decided in 1947 that the Commission of Human Rights (CHR) could not investigate violations or receive petitions. The CHR was thus limited to elaborating norms and after the adoption of the UDHR, it concentrated its efforts on writing the conventions. This would by itself limit the impact that the CHR could have on public opinion, since one would expect public opinion to be more attentive to particular cases rather than abstract principles.

However, what probably contributed most to relegate the UDHR to a subordinate concern, and in particular to make its potential for internationalization irrelevant, was the emergence of the Cold War. Already during the drafting process tensions was visible between East and West. It became more and more evident that the promise of rallying the nations of the world around the idea of human flourishing would not transpire in the real world. In 1947 George Kennan's famous analysis of Soviet conduct points out that there cannot be any appeal to common purposes or common mental approaches. Only hard facts will impress the Soviet leadership and this leads Kennan to recommend the politics of Containment.[68] The assumption of perfectionism was, however, that people's true interest coincides with their moral interest in common perfection. If men by reason and education are made to un-

64 E/CN.4/SR.67 p. 3.

65 E/CN.4/SR.67 p. 4.

66 E/CN.4/SR.67 p. 4.

67 E/CN.4/SR.78 p. 10.

68 Kennan, George F. "The Sources of Soviet Conduct", (1947) *Foreign Affairs*, Vol. 25, No. 4 (Jul., 1947), p. 574.

derstand this, there will be no reason for conflict between them. This assumption was now challenged as naïve, seemingly unrealistic, considering the ideological gap that had to be overcome. The contrary assumption that conflict is inevitable had for some time been stated forcefully by Reinhold Niebuhr beginning with his book, *Moral Man and Immoral Society: A Study in Ethics and Politics,*[69] written in 1932, and this thesis became influential at least in North America.

Niebuhr questions the assumptions concerning human nature made by many educators and moralists. They assume that a higher development of human intelligence and capacities will make it possible to overcome social conflict whether inside or between societies. He directs his critique especially against John Dewey. Dewey's faith in the possibilities of education and better institutions, ignores in his opinion, what Dewey himself terms "our entrenched predatory self-interest". Niebuhr acknowledges that individual man can be moral considering the interest of other men and preferring them to his own interests, but this is practically impossible when we speak about societies. Within societies coercion controls the impulse of self-interest, but between societies there is no such control. Dewey and like-minded people overestimate the moral potential in human beings. You can never harmonise the self-interest of men. People with power will use it in their own interest and justice can only be achieved by opposing power with power. Whatever the developments in human intelligence and science, they will never be able to abolish social conflict. Social conflict is inevitable, since human nature is evil and harried by self-interest, in spite of high minded moral codes. Pure ignorance, as educators seems to assume, cannot to any practical purpose explain the existence of social conflict.[70]

6. John Dewey and Perfectionism

Dewey's alleged identification of evil with ignorance and true self-interest with the social interest points towards a perfectionist stand. Whether Dewey actually embraced such a perfectionist stand is disputed. Rebecca Katz discussed the question in her Ph.d. dissertation.[71] The discussion seems skewed by a conception of perfectionism considering the substantial notion of how man should be and strive to realise as something defined once and for all and in an absolute manner. This particular conception of perfectionism stems in fact from Dewey himself.

Dewey accuses perfectionism of the philosophical fallacy, which is to assume that what was true under certain conditions is universally so without any limits.[72] According to him, we cannot assume that perfectionist's goals are fixed a priori.[73] This makes Katz say that perfectionism is immune to contextual variation.[74] Dewey might have met this view in his philosophical environment, but our definition of perfectionism implies no such thing. That the kind of qualities that man should possess is considered as objective does not imply that they are insensitive to circumstances. Aristotle, one of those supposed to have committed the philosophical fallacy, put forward both an empirical conception of happiness and a circumstantialist account of subordinate ends (ends-in-view according to Dewey). When determining the highest good, Aristotle says that "...the great majority of mankind are agreed about this; for both the multitude and persons of refinement speak of it as Happiness, and conceive "the good life" or "doing well" to be the same thing as 'being happy'."[75] This explanation is eminently empirical and can hardly be accused of "aprioriarism". "Happiness" is of course an abstract

[69] Niebuhr, Reinhold. *Moral Man and Immoral Society* (Louisville, Ky.: Westminster John Knox Press, 2013).

[70] Niebuhr. *Moral Man and Immoral Society.* Introduction.

[71] Katz, Rebecca M. John Dewey and Perfectionism: Difficulties Interpreting the Experimental Life. Ph.D. Thesis (Stanford University, 2009): http://media.proquest.com/media/pq/classic/doc/1957930821/fmt/ai/rep/SPDF?_s=2hY7NMv9BF7uy5T%2FG2G%2FX-9MmKhg%3D (Consulted 14-04-2015)

[72] Dewey, John. "Human Nature and Conduct". *The Middle Works, 1899-1924, Vol. 14: 1922* (Carbondale: Southern Illinois University Press, 2008). PP. 122-123.

[73] Dewey, John. "Democracy and Education". *The Middle Works, 1899-1924, Vol. 9: 1916* (Carbondale: Southern Illinois University Press, 2008). P. 63.

[74] Katz, *Op.cit*. P. 23.

[75] Aristotle, *Op.cit.* 1095a 15-20; p. 11.

term, which needs further elucidation. This is the role Aristotle assigns to prudence and about prudence he says that it concerns the affairs of men and things we can deliberate about. Prudence considers means to an end and this end is a good attainable by action (in last resort happiness), and he adds that these matters always vary.[76] For the very same reason Aristotle values the "...unproved assertions and opinions of experienced and elderly people, or of prudent men, …for experience has given them an eye for things, and so they see correctly."[77] This approach is certainly not immune to contextual variation.

Dewey's position does not seem that different from Aristotle's if considered in the abstract. He agrees with Aristotle on several crucial points. Even though Dewey criticises "ideals of remote 'perfection'", he does not dismiss "the genuine ideal" brought out in special situations.[78] These special situations are also those which Aristotle would privilege emphasising that only the wise knows exactly what to do in such situations. This is a natural consequence of willing to realise certain kinds of ends like the common good, well-being or utility. What maximises these ends will depend on the circumstances in the particular situation.

Dewey and Aristotle both have a special focus on the common good. Dewey discusses it in these terms: "Such terms as 'general' and 'common' need, perhaps, even more careful interpretation. The words come easily to the tongue and too readily give a wrong impression. They do *not* mean sacrifice of individuality; it would be a poor kind of society whose members were personally undeveloped. It does not mean the submergence of what is distinctive, unique, in different human beings; such submergence would produce impoverishment of the social whole. The positive import of 'common good' is suggested by the idea of sharing, participating – an idea involved in the very idea of *community*. Sharing a good or value in a way which makes it social in quality is not identical with dividing up a material thing into physical parts."[79]

Dewey indicates that there is no conflict between personal development and the common good, a fundamental presupposition of Greek philosophy. Further, the individual does not have to conform to a fixed common model. Individual differences can mutually enrich each other and make the social whole something more than the addition of the individual parts. We think, Aristotle would not disagree with any of this. Aristotle determines the common good as happiness, and it is possible that Dewey would be more circumspect and determine the common good, in less unitary terms. He speaks more vaguely about growth, wellbeing, general welfare and the like.[80] More importantly, Dewey would submit this determination to historical change. He would emphasize that these general determinations would be elaborated further by each generation as a function of our growing scientific knowledge. Both would, however, agree that further sub-goals will be elaborated according to the circumstances. Apart from this abstract resemblance Dewey develops his own original theory of growth as the characteristic of life, with which we will not go into detail. Katz notes that this conception "...can perhaps be considered a view of human flourishing ...", but Katz adds that it cannot be perfectionist in any meaningful way.[81] This last contention we will deny. Even if there is no static ends and ideals (apart from the abstract ideal of the common good, which Dewey himself subscribes to), Dewey would have to reckon with the present state of human enquiries concerning the proper conditions for the common good, growth or in whatever terms he would state the value that humans should cherish. He acknowledges in fact that we can safely say that certain goods are ideal mentioning expressly art, science, culture, interchange of knowledge and ideas. Past experience tells us that these values are "likely to be approved upon searching reflection". There are thus, he says, a presumption in their favour, though further enquiry can show that changed cir-

[76] Aristotle, *Op.cit.* 1141b 5-15.

[77] Aristotle, *Op.cit.* 1143b 10-15.

[78] Dewey, John and Tufts, James H. *Ethics, Revised Edition* (New York: Henry Holt and Company, 1932). P. 301.

[79] Dewey and Tufts, 1932. P. 383.

[80] Dewey, John. "Democracy and Education". *The Middle Works, 1899-1924, Vol. 9: 1916* (Carbondale: Southern Illinois University Press, 2008d). P. 46 ff.; Dewey and Tufts, 1932. P. 310 ff.

[81] Katz, *Op.cit*. P. 145.

cumstances or the like would defeat this presumption.[82] Even though the true good cannot be determined once and for all, we still have to determine it temporarily in some way in order to have any norm, from which we can act. Dewey thus has to propose some kind of substantial notion of man, though defeasible, in order to indicate what would for now be the proper development of the human species. He says that "...Health, wealth, industry, temperance, amiability, courtesy, learning, aesthetic capacity, initiative, courage, patience, enterprise, thoroughness and a multitude of other generalized ends are acknowledged as goods."[83] However, their value is only intellectual or analytic, or should we say, indicative, to be adapted to actual circumstances. They can give us a lead when we try to eliminate perceived ills in the particular situation.[84] So this temporary specification does indicate some substantial human qualities perceived as helpful to cope with individual situations. These qualities would probably be different from the one Aristotle proposed, but the general idea is the same.

This general agreement also shows itself concerning the relation between desire and reason. Dewey states that there is no conflict as such between desire and reason considered as two independent motives of action. There can be a conflict between desire concerning the short sight and the long sight.[85] Reason is only illuminating desire telling it how its overall satisfaction can be best considered. This thesis is related to the thesis of identity between personal development and the common good. Overall satisfaction is best satisfied by the individual's insertion into the community: "In the realization of individuality there is found also the needed realization of some community of persons of which the individual is a member; and, conversely, the agent who duly satisfies the community in which he shares, by that same conduct satisfies himself."[86]

Reason thus tells the individual that overall satisfaction is best assured by satisfying the community, which satisfy the individual's realization in its turn. This complex standard of achievement gives a moral significance to nearly everything the person does. According to Dewey all acts are connected. We cannot consider morality in terms of the performance of isolated acts. Acts are connected in series with consequences for other persons and has to be considered in the light of these consequences. He thinks this solves the problem of indifferent acts, since "...every act has *potential* moral significance, because it is, through its consequences, part of a larger whole of behaviour."[87] In the end there are no indifferent acts, they all have some consequences which have to be considered in a moral light as far as they contribute to or subtract from what is considered valuable. For the same reason he also rejects fixed codes of conduct. They can only be looked upon as a source of data for reflective morals, having to determine what is right and good at this moment according to the reigning circumstances.[88]

Katz concludes, rightly, that Dewey's view does not justify any "gut-reaction claim" that some particular right is violated.[89] Rights in the sense of permissions granted by fixed rules is not possible in Dewey's moral universe. Rights would rather be the rights Christian Wolf is considering being both duties and rights conducive to some perfectionist end. In the first edition of Ethics, he thus states clearly that the legal order should express the common good.[90] This will not, however, answer our question about what kind of perfectionist Dewey is: a full-blown perfectionist or a social liberal perfectionist?

The first edition of Ethics shows clearly that Dewey shares the particular concern for effective freedom with the social liberal: "Effective freedom. - Exemption from restraint and from interfer-

82 Dewey and Tufts, 1932. P. 230.

83 Dewey, John. "Reconstruction in Philosophy". *The Middle Works, 1899-1924, Vol. 12: 1920* (Carbondale: Southern Illinois University Press, 2008). P. 176.

84 *Ibid*. PP. 176-177.

85 Dewey and Tufts, 1932. P. 200.

86 Dewey. *Outlines of a Critical Theory of Ethics* (Ann Arbor, Michigan: Register Publishing company, The Inland Press, 1891). P. 131.

87 Dewey and Tufts, 1932. P. 179.

88 Dewey and Tufts, 1932. P. 191.

89 Katz, *Op.cit.* P. 142.

90 Dewey, John. "Reconstruction in Philosophy". *The Middle Works, 1899-1924, Vol. 5: 1908* (Carbondale: Southern Illinois University Press, 2008). P. 419. In the preceding pages, Dewey criticises taking goodness as a matter of obeying rules. *Ibid*. P. 418.

ence with overt action is only a condition, though an absolutely indispensable one, of effective freedom. The latter requires (1) positive control of the resources necessary to carry purposes into effect, possession of the means to satisfy desires; and (2) mental equipment with the trained power of initiative and reflection requisite for the free preference and for circumspect and far-seeing desires. The freedom of an agent which is merely released from direct external obstruction is formal and and empty."[91]

Men should have some substantial qualities both externally in terms of material resources and internally in terms of a particular mental equipment. This concern for effective freedom is not missing from the 1932 edition, but there is much less emphasis on this question.[92]

As explained above emphasis on effective freedom is not incompatible with full-blown perfectionism. We therefore have to determine whether there is a strong moral dimension in Dewey's conception of the common good. Does the common good in itself imply that individual realization takes place by being moral? The citation above concerning the realization of individuality seems to imply this, because the realization of individuality also realises a community and by satisfying the needs of the community it satisfies the needs of the individual. The needs of the individual must somehow be social and the realization of the individual therefore reinforces the community at the same time. Another indication of a more dense conception is the far-reaching moralization of ordinary life, making every act potentially significant from a moral point of view. The emphasis seems here to lie on the moral life of man and less on effective freedom.

7. Reinhold Niebuhr and Human Sinfulness

Niebuhr's critique of Dewey goes right to the heart of the perfectionist position targeting the identification between well understood personal interest and the common good. Niebuhr's assumptions being totally different. Natural impulses such as greed and will-to-power can never be fully controlled by reason or be made fully socially or culturally acceptable.[93] Social conflict is inescapable.[94] The moralist believing in social intelligence and moral goodwill as a permanent solution for social problems ignores the underlying injustice and coercion in any actually implemented social peace.[95] This would mean that conflicting interests will not disappear, even though they are considered in the long run. People's interests are simply not such that they would be able to live in perfect harmony. They basically want to have more than other people, controlling them if they can, and these impulses can never be harmonised, they can only be repressed to some extent. Man is not basically social such that his true interests consist in concern for other people and the community. Man has genuine interests that cannot necessarily be harmonised with those of others. This is visible even in teaching. Facts and truths are suppressed consciously or unconsciously in order to influence pupils in a particular direction. This happens in all forms of communication, so education alone cannot resolve social conflict.[96] He cites Augustine for saying that the peace of the world must be achieved by strife.[97]

Augustine is no doubt important for Niebuhr and a basic inspiration for him. He finds in the works of Augustine the conception of society, which he also expounds himself, bearing as it does the mark of faction, tension and competition. As he distinguishes himself from Dewey, he also seems to distinguish Augustine from the philosophies of the classical age and in particular Cicero, the preferred target of Augustine himself.[98] He explains the difference of viewpoint by their different conceptions of human self-hood. Augustine's view of self-hood is dualistic composed of mind and body. For him the seat of evil lies in the self and more precisely in the body as the origin of lusts and ambitions. The classics saw man as part of a fundamentally rational system of nature,[99] and, we assume, evil in ig-

91 *Ibid*. P. 392.

92 Dewey and Tufts, 1932. P. 408.

93 Niebuhr. *Moral Man and Immoral Society*. P. 231.

94 *Ibid*. P. 234.

95 *Ibid*. P. 233.

96 *Ibid*. P. 245.

97 *Ibid*. P. 256.

98 Niebuhr, Reinhold. "Augustine's Political Realism", *The Essential Reinhold Niebuhr* (New Haven: Yale University Press, 1986). PP. 124, 128.

99 *Ibid*. P. 124-125.

norance about man's true nature. If man is part of a rational system of nature, men's interests cannot be conflicting assuming that contradiction is repugnant to reason. On the Augustinian view interest and reason have different origins and often do conflict with each other. That man is dominated by lusts and ambitions contrary to the dictates of reason is what Christians mean by man's inherent sinfulness. Niebuhr would take a middle stand here disapproving the concept of "total depravity".[100] Man has a moral capacity, but one should not forget that selfishness generally prevails. On this assumption, government can only be seen as a consequence of and remedy for sin. Political institutions establish peace through coercion in order to restrain human selfishness, but these institutions can be instruments of the very same selfishness, which makes counter-coercion necessary in order to re-equilibrate the consideration of the different interests.[101] Augustine thus "...seeks to establish the most tolerable form of peace and justice under conditions set by human sin."[102]

Niebuhr shares the dualistic assumptions of Augustine renaming body and soul as vitality and reason. He also emphasises the force of human sin – originating in vitality we assume - making man consider himself more important than others and prompting him to consider only his own interests. This tendency is so strong that moral and rational arguments cannot restrain people from doing this. Society must therefore be seen as a more or less stable or precarious harmony of these vitalities. This unstable and precarious harmony is propped by force establishing a balance of power between government and various destabilising forces coupled with a balance of power between the different vitalities or social forces within society.[103] Order in society is maintained through laws and the system of justice. Considerations of justice should be distinguished from the law of love. He will not exclude justice from the domain of love as he thinks both sectarian and Lutheran analyses does, but admits that they have both a positive and negative relation to mutual love and brotherhood. They both approximate and contradict the idea of brotherhood. Justice merely approximates brotherhood because justice presupposes – or is made necessary by - human self-interest and greed. Fine distinctions between mine and thine are set to counteract these, and this might appease relations making them look like harmonious, but they do not express true brotherhood. They contradict the idea of brotherhood as far as conceptions of justice are imperfect and tainted by passion and self-interest. The determination of justice is no easy thing, and a fair and reasonable estimate is often skewed by particular interests and outdated institutions.[104]

The highest morality is about unselfishness and disinterested motives.[105] Here Niebuhr rejoins a general Lutheran theme. Being perfect is to obey all the commands; turn the other cheek, go another mile, …Perfection is about rubbing out self-interest altogether, and this ideal is obviously unattainable for man considering his sinful nature. Human justice can nonetheless be a slight approximation in Niebuhr's view, but this does not come about by itself. Those with vested interests will not give them up without a fight, so conflict is necessary in order to make this approximation. Still, there is no simple relation between justice and the law of love. In the 12th century Hugo of Saint Victor could assume that the law of love in its negative and positive form would express itself in the Commandments.[106] Niebuhr does accept that there "...are essentially universal 'principles' of justice moreover, by which the formulation of specific rules and systems of justice is oriented".[107] He speaks about the ideals of liberty and equality as the requirements of the natural law,[108] but their application will always be subject to the relativities of history. Abstract ideals must be translated into concrete norms and a generally valid principle gets an inevitable ideolog-

[100] *Ibid*. P. 123.

[101] *Ibid*. P. 128-129.

[102] *Ibid*. P. 131.

[103] Niehbuhr, Reinhold. *The Nature and Destiny of Man, Volume II; Human destiny* (London: Nisbet & Co. Ltd., 1948). PP. 266-268.

[104] *Ibid*. PP. 260-261, 265-266.

[105] Niebuhr. *Moral Man and Immoral Society*. P. 258.

[106] Weigand, Rudolf. *Die Naturrechtslehre der Legisten und Dekretisten von Irnerius bis Accursius und von Gratian bis Johannes Teutonicus* (München: Max Hueber Verlag, 1967). P. 131.

[107] Niehbuhr. *The Nature and Destiny of Man. P.* 263.

[108] *Ibid*. P. 290.

ical taint when applied to historical circumstances in this way.[109] Niebuhr explains that this is due to two or maybe three forms of corruption, which can be summarized as will-to-power, conflict of interest and lastly isolationism, which he in the end consider as a negative version of the conflict of interest.[110] Even though there is no simple relation between abstract ideals and concrete norms, he does seem to conceive the last in terms of rules.[111] His idea of perfection does not imply any substantial qualities that humans should possess and strive to obtain, but rather the absence of something namely self-interest. Justice, on the other hand, should establish peace by arbitrating conflicting interests, and rules seems to be the chosen means to this purpose.

Nation states are generally performing this arbitration between interests and they are to that extent a check upon individual egoism, but a new form of egoism crystallizes around them in the species of patriotism.[112] Loyalty towards the community is a strong competitor to individual morality having a strong tendency to pacify moral criticism thus leaving little room for moral considerations between states. The particular groups in society controlling government for their own purposes will also enhance state egoism to the detriment of the type of moral considerations which has some force between individuals.[113] The nagging consciousness of national egoism leads further to a pervasive amount of hypocrisy trying to coach patriotic ambitions in universal principles.[114] In general terms Niebuhr explains the problem in this way: ethical action suppose self-criticism and self-criticism suppose the ability to transcend the actual and pose a critical standard, and this nation states are hardly capable of.[115] Even though patriotism or group interests make self-criticism difficult, they do nonetheless seem to be able to pose universal principles being it as a cover up for self-interest. It seems like, in Niebuhr's words, that man has a "...so strong sense of obligation to his fellows that he cannot pursue his own interests without pretending to serve his fellowmen."[116] We conclude from this that the rules of justice apply to relations between groups, but they just have much less force to prevail in these relations.

The quote below shows that statesmen cannot pursue selfish interests unhampered. There is a due consideration to be taken in the interests of the rest of humanity. The difference between individuals and states lies not in the rules of justice that apply to them, but in the fact that individuals can decide to be wholly unselfish while states cannot.

"An individual may sacrifice his own interests, either without hope of reward or in the hope of an ultimate compensation. But how is an individual, who is responsible for the interests of his group, to justify the sacrifice of interests other than his own? 'It follows,' declares Hugh Cecil, "that all that department of morality which requires an individual to sacrifice his interests to others, everything which falls under the heading of unselfishness, is inappropriate to the action of a state. No one has a right to be unselfish with other people's interests." This judgment is not sufficiently qualified. A wise statesman is hardly justified in insisting on the interests of his group, when they are obviously in unjust relation to the total interests of the community of mankind. Nor is he wrong in sacrificing immediate advantages for the sake of higher mutual advantages. …Nevertheless it is obvious that fewer risks can be taken with community interests than with individual interests. The inability to take risks naturally results in a benevolence in which selfish advantages must be quite apparent, and in which therefore the moral and redemptive quality is lost."[117]

Individuals as well as groups can pursue legitimate interests, but only individuals can choose to act unselfishly. Interests are legitimate within certain moral bounds, but people's incapacity to determine their legitimate interests correctly exacerbates conflict. Niebuhr nonetheless believes that

[109] *Ibid*. PP. 264-265.

[110] *Ibid*. P. 275.

[111] *Ibid*. PP. 256-257 (rules and laws of justice), 259 (specific rules), 260 (rules of justice), 263 (principles of justice, prohibition of murder), 265 (absolute norms of justice, generally valid principle), 266 (rules, laws).

[112] Niebuhr. *Moral Man and Immoral Society*. PP. 91, 93.

[113] *Ibid*. P. 89.

[114] *Ibid*. PP. 89. 95 ff.

[115] *Ibid*. P. 89. 88.

[116] Niebuhr. "Augustine's Political Realism". P. 123.

[117] Niebuhr. *Moral Man and Immoral Society*. PP. 267-268.

people should pursue these interests. Those who has acquired more than their due will not abandon these possessions voluntarily and conflict is inevitable. Both within and outside society the power of the one stands against that of another in a more or less precarious balance. Social groups and states should therefore pursue their interests with due concern for the legitimate interests of others. They should also prefer mutual interest in the long run for narrow interests on the short sight. However, these mutual interests in the long run are still particular interests; conflicts of interest cannot be erased altogether. The state should thus not unselfishly promote some higher ideal, probably because unselfish sacrifice is a personal choice one can only make for oneself. Unless the choice is made unanimously, which seems unlikely, a state cannot make such a choice. A basic assumption would be that the state is a contingent association made for the common interest of its inhabitants, and therefore such a choice would be contrary to its purpose. The majority is not mandated to make such choices. Perfectionists can on the contrary demand such 'sacrifices' because they believe them to be in the true interest of everybody. Dewey and like-minded people can therefore recommend "internationalist" schemes implying such sacrifices, and we believe this is also the tenor of the UDHR. From Niebuhr's point of view the UDHR would thus be less interesting. This could give us a clue to why the UDHR slumbered for so long after its drafting.

8. Hans Morgenthau and George Kennan

Niebuhr's outlook inspired or was shared by an important school within international relations namely the realist school. Prominent realists such as Hans Morgenthau and George Kennan had close relations to Niebuhr. Kennan is supposed to have said that "Niebuhr is the father of us all" allegedly referring to the realist school.[118] The relation to Morgenthau is more ambiguous, since they both admitted being inspired by the other. It is unclear how much new inspiration Morgenthau found in Niebuhr and how much he just found a kindred spirit in him.[119]

Realism is known for leaving very little room for moral considerations in foreign policy. Hans J. Morgenthau and George F. Kennan, both distinguished realists, leave, however, some room for moral considerations. Kennan distinguishes between two ways, how moral considerations enter foreign policy. There is the behaviour of foreign governments on the one side and the behaviour of the national government on the other side. Concerning the conduct of national foreign policy, he will not deny that there are some negative strictures on behaviour, and he mentions the Ten Commandments as an illustration of his point. He specifies later that "excessive secrecy, duplicity and clandestine skulduggery are simply not our dish …because such operations conflict with our own traditional standards and compromise our diplomacy in other areas." Morgenthau states for his part that no human action can evade being judged morally, since this goes with being a human being. Foreign policy is no exception. Morgenthau quotes Churchill reporting from the Teheran Conference in 1943, where Stalin proposed to execute about 50000 German officers and technicians. Churchill answered that the British Parliament and public opinion would never accept this and he said further that he would rather be shot right now in the garden than sully his own country with such an infamy. Morgenthau gives other examples of statesmen having refrained from certain actions on moral grounds. He concludes that foreign policy is not devoid of moral significance, but like Kennan, he would distinguish between the judgement applied to ourselves and the application of these standards to the action of others.[120]

There are then limits to what a state legitimately can do when pursuing its national interest. The national interest Kennan defines as "…its military security, the integrity of its political life and the well-being of its people." He insists that these "needs" as he calls them has no moral quality. They cannot be said to be "good" or "bad", since they are inherent in the very existence of the national state.

[118] Rice, Daniel F. *Reinhold Niebuhr and His Circle of Influence* (Cambridge: CUP, 2013). P. 12.

[119] *Ibid*. P. 145 ff.

[120] Morgenthau, Hans J. *Human Rights and Foreign Policy* (New York: Council on Religion and International Affairs, 1979). PP. 1-3.

Even though they can be "questioned from a detached philosophic point of view"; they must be the basis for any foreign policy. In sum, any foreign policy must pursue these ends subject to certain moral strictures. What Kennan disapproves is an "unduly legalistic and moralistic" approach to the behaviour of other governments. Various interventions have been made under the banner of democracy, human rights, majority rule, fidelity to treaties, fidelity to the UN Charter, etc. If any behaviour on the part of foreign governments seriously injures American interests, there will be reason to react, but a mere injury to their moral sensibility will not justify such reaction. Concern about the moral behaviour of other states might even jeopardise American interests and he adds that the defence of American interests will leave very little energy and attention to such matters.[121]

Morgenthau makes clear, however, that we are not speaking about ethical relativism, since he believes himself that there is only one moral code. Such a code would need a theological foundation, and in his opinion, this code would be something objective. He assumes that certain basic moral principles apply to all human beings and mentions as an example the preservation of life, though subject to certain qualifications. This would not for that reason entitle a nation to impose its own moral principles on other nations, and this is actually what human rights are about. Quite apart from the fact that Morgenthau would object to the concept of right, which in his view only applies to a society, where these rights are allocated and protected, so he would also object to our wish to present these to other nations for acceptance and not for imitation. In his view we are not morally justified to proceed in this way, but he also thinks this is infeasible. It is impossible to enforce this regime, and at the same time such a tentative would conflict with other interest, which in his view are more important. Human rights are one interest in US foreign policy, but not the most important. The prime business of US foreign policy is not to defend human rights.[122] We must assume then, that the prime business of US foreign policy is to defend American interests within the moral limits that Americans impose on themselves.

These moral limits Morgenthau describes elsewhere as "certain moral rules of conduct which interpose an absolute barrier against a certain policy and which do not permit it to be considered at all from the point of view of expediency."[123] Further on in the same article he considers the policy of mass extermination and concludes that such a policy is limited "...by virtue of an absolute moral principle the violation of which no consideration of national advantage can justify."[124] Here national interest is sacrificed and he emphasizes that expediency does not impose such limits.[125] Dewey would on the contrary, maintain that such a policy was not expedient, because it is contrary to man's moral interest in society and the growth of all mankind. Morgenthau seems to assume a different kind of moral philosophy deploying rules forbidding particular kinds of action. A moral conception supposing the classical dichotomy between self-interest and moral imperatives. As a consequence everybody is free to pursue their self-interest within the strictures of some basic moral imperatives. If the moral strictures are rather limited in number, it would signify that the pursuit of self-interest is legitimate to a very high degree. A few interdictions such as not to commit mass exterminations or not to assassinate foreign heads of state, would imply nearly no responsibility for what happens in other states. In Kennan's words "…the most significant possibilities for the observance of moral considerations in American foreign policy relate to the avoidance of actions that have a negative moral significance, rather than those from which positive results are to be expected."[126] The state is not obliged to labour for the best possible situation according to some moral ideal. This seems intelligible if we consider that the state on this conception is the outcome of a contingent historical process. Whatever the way it was actually constituted, it has by now established

[121] Kennan, George F. "Morality and Foreign Policy", (1985) *Foreign Affairs*, Vol. 64, No. 2 (Winter, 1985), pp. 205-218.

[122] Morgenthau. *Human Rights and Foreign Policy.* PP. 10, 25, 15, 4-7.

[123] Morgenthau, Hans J. "The Twilight of International Morality", (1948) *Ethics* Vol. 58, No. 2 (Jan.). P. 80.

[124] *Ibid*. P. 82.

[125] *Ibid*.

[126] Kennan. "Morality and Foreign Policy". PP. 205-218.

decision-procedures enabling collective action, and the state's actual situation is conceived as the result of the "choices" it has taken in the past. Each state organises itself in the preferred way and leave other states to do the same. If breaches of moral principles have enriched a country illegitimately, reparations can come into question, but otherwise no redistribution is envisageable. The behaviour of other states is only morally pertinent to the extent that it injures other states. So the way a state treats its own citizens has little import for another state's foreign policy, and Kennan can in this way relegate human rights to the category of "high-minded but innocuous professions".[127]

9. Institutionalism: Opening Up New Possibilities

Critics of realism have emphasised that the definition of state interests is subjective. What matters is what states perceive as their interests. Keohane notes that the idea of self-interest is elastic. It is difficult to draw a sharp distinction between egoism and altruism. Since egoism can be both far-sighted and short-sighted, altruism can often be hard to distinguish from far-sighted egoism. It is also possible to conceive self-interest in terms of moral principles, people preferring to sacrifice their own life or well-being rather than breaking a moral principle or let someone else suffer. In this case one's self-interest is a moral one.[128] Donnelly reiterates this view observing that state interests are not given objectively. Individuals are seen as moral agents with a potential for moral action, so why not conceive states in a similar way. Why should states be bound to act selfishly? In their view, this is rather a realist vision about what should be valued in foreign policy and as such a normative stand. Even if one should be careful about moralistic excesses, there "…is no reason why states cannot, if they wish, define their national interest (in part) in moral terms."[129] This point of view would exclude a conception of morality that conceives morality as strictures on a predefined self-interest. However, even on this view self-interest can conform to moral prescriptions, but self-interest cannot be moral as a motive, that is, we cannot define our self-interest morally. Self-interest can conform to moral strictures, but it cannot as such be moral. When we follow Keohane and Donnelly, morality and what is perceived as self-interest can of course conflict, but they can also coincide; that is, we can take morality as our interest or identify true self-interest with morality. This move opens the gates for a different conception of morality.

According to a perfectionist conception of morality, true self-interest coincide with morality. The perfection of the human being is conceived as something objective, which is not only our moral objective, but also our true self-interest. Not pursuing this end only testifies to our ignorance about our own good. Donnelly seems to subscribe to such a view, at least in his early days. He notes that the basis for human rights is a "moral account of human possibilities". The state plays a determining role in the realization of these potentialities and the object of human rights is "the most complete possible realization of that potential, and their protection and implementation would '*create* the envisioned person'". Human rights endeavours "to establish and guarantee the conditions necessary for the development of the human person" so conceived. Donnelly calls this theory constructivist,[130] but we would rather call it perfectionist. If we allowed everybody to construe the human potential in just any way human rights would be perfectly void. There should at least be a general theory on the basic features of human perfection even if this theory is defeasible in the way Dewey thought it was.

Keohane is less precise concerning his moral affinities. Citing Peter Singer, he rejects utilitarianism on the ground that it is too demanding, since "... it appears to imply an almost unlimited moral obligation to anyone, anywhere, who is less well-off than oneself."[131] He also invokes against utilitarian-

[127] *Ibid*.

[128] Keohane, Robert O. *After Hegemony, Cooperation and Discord in the World Political Economy* (Princeton, New Jersey: Princeton University Press, 2005). P. 122.

[129] Donnelly, Jack. *Realism and International Relations* (Cambridge: CUP, 2000). PP. 71, 165-166.

[130] Donnelly, Jack. *The Concept of Human Rights* (Beckenham, Kent: Croom Helm, 1985). PP. 31-32.

[131] Keohane. *After Hegemony, Cooperation and Discord in the World Political Economy.* P. 250.

ism that it is insufficiently strict, since it is possible to justify the sacrifice of innocent people in order to attain the greatest happiness for the greatest number of people.[132] A government acting on such a conception would have to assign a rather low priority to national interest (in the realist sense). If the country of this government or some elements of it were the one to be sacrificed, it would have to reduce more or less substantially the happiness of their own country. This is of course absurd on realist premises taking Kennan as the representative of this position. Within the limits of basic decency the government should pursue the wellbeing of the state, since it has been instituted for that purpose, and this is perfectly legitimate from this point of view. A government conducted according to utilitarian principles would have a different relation to national interest. It could hardly argue that the utilitarian principle would never interfere with the advantages the state could otherwise hope for. On the realist position, morality would also limit national interest to some extent, but it would not replace it by the interest of the greatest number. What the realist terms the national interest is illegitimate for the utilitarian.

Keohane is more tempted by another position inaugurated by John Rawls, but made global by Charles Beitz. Beitz apply the "veil of ignorance" and the resulting difference principle on a global level.[133] In this hypothetical situation interest and moral concern are supposed to coincide. Each and everybody is here assured the best possible situation, whatever their initial capacities. Social and economic inequalities should benefit the least advantaged members of society. In the real world, it would probably mean a rearrangement of the existing patterns of distribution, and this might upset the expectations of the more wealthy societies. Still the possible consequences will probably be less radical for the individual society than what is suggested by the utilitarian theory. However, he uses both the utilitarian principle and Rawls' difference principle in order to evaluate the existing international institutions. In his view, there is little difference between them in what concerns their practical implications. He largely defends the beneficial effects of liberal institutions within the advanced industrial countries, but recognises that they show insufficient sensitivity towards disadvantaged people in the Third World. The principles might be morally deficient, but this does not imply that the institutions should be abandoned. His conclusion would rather be that citizens of the advanced industrialised countries should labour to modify these principles. In order to do so they should not ignore self-interest, but define their self-interest in a less myopic manner and in a more empathetic way.[134] The bulk of Keohane's contentions is based on realist assumptions of self-interest, but he considers in the end of his work the possibility of transcending self-interest altogether through empathy. How empathy relates to the utilitarian principle or the difference principle is not quite clear. Should empathy motivate people to act according to any of these principles? This is of course possible, but it seems in no way necessary.

Whatever the hesitations Keohane might have concerning his moral theory, it is quite clear that he wants to open the field for a different kind of moral theory than the realist one. A theory which implies a greater responsibility towards other nations and their populations. This aim Donnelly shares with him, but their common critique of the realist stand on self-interest seems somehow beside the point. The realists cannot appreciate this critique, since self-interest on their moral assumptions cannot be anything different. Self-interest can of course be more or less myopic, but it cannot assume a moral character. The dispute around self-interest is a dispute about moral theory. Keohane seems to suggest something like this, when he opposes the doctrine of the morality of states with the cosmopolitan perspective, but we believe he is not quite conscious about the basic moral assumptions at stake.[135] So we cannot just as a matter of fact note that the idea of self-interest is elastic or subjective. Perceptions of self-interest vary of course, for the

[132] *Ibid*. P. 250.

[133] Beitz, Charles R. *Political Theory and International Relations, with a new afterword by the author* (Princeton, New Jersey: Princeton University Press, 1999). P. 169 ff.

[134] Keohane. *After Hegemony, Cooperation and Discord in the World Political Economy*. P. 252-257.

[135] *Ibid*. P. 248.

reason among others that people hold different conceptions of morality.

This position had to be argued in order to break the way anew for an internationalist conception. Internationalism is nothing new and did not come into being with the UDHR, but the internationalist potential of the UDHR would likewise need this argument to overcome realist hesitations. The success of the human rights movement would eventually make the argument necessary, liberating the potential. However, it appears that the success of the human rights movement did not do this right away. Moyn argues that initially it was anti-political and minimalist and this was the key to its success.

Conclusion: The Human Rights Movement of the 70's

Moyn describes how the human rights NGOs working mainly within the UN system failed to capture the imagination of the larger public, and how Amnesty International (AI) managed to do this relying on people rather than governments.[136] Moyn quotes Peter Benenson, the founder of AI, speaking about the first campaign in 1961 and explaining how he hoped to create a common base for the idealists of the world gathering them around this cause.[137] For Moyn, this is a strong indication that the human rights movement was at first intended to go beyond politics.[138] The utopia offered for idealists was thus a minimalist one claiming a large consensus. Therefore the self-imposed limitation to subjects such as torture, political prisoners, forced disappearances. The movement was intended as "...a new venue for idealism..." and this presupposed the waning of the ideological struggle of the Cold War.[139] Moyn explains that several catalysts were at work in facilitating the success of the human rights movement in the 70's: European efforts for unification, the work of East European dissidents following the Helsinki-process, President Carters focus on human rights in his foreign policy, de-colonization, but in Moyn's view the best explanation for the success of the human rights movement was the collapse of alternative utopias.[140] The human rights movement succeeded because there was no other rallying point for idealists.

There is much good sense in this explanation, but we are less convinced by his explanation of how the human rights NGOs adopted a maximalist stand. Moyn considers it unlikely that human rights could have remained a "minimalist utopias of anti-politics". The pure moral vision was suddenly less attractive, and answers to a whole range of questions made it necessary to have a political agenda and a programmatic vision.[141] This explains the venue of the ESC-rights. Because "...totalitarianism and authoritarianism waned, social and economic rights consciousness could not help surge."[142] It is possible that ESC-rights was seen as the answer to many questions that the earlier minimalist approach had left unanswered, but they are also unavoidable if one had to embrace the UDHR. In the 1993 Vienna Declaration and Programme of Action it was rammed home that: "All human rights are universal, indivisible and interdependent and interrelated."[143] It was henceforth clear as crystal that you could not pick and choose. According to David Petrasek the adoption of ESC-rights was motivated by the concern for intellectual coherence and pressure from the "global south" emphasising interdependence and interrelation.[144] This seems very logical if we consider the UDHR as essentially perfectionist. The different rights are all ordained to the same end, which is human flourishing, and in order to promote this end they will work together, constrain or presuppose each other. If the NGOs wanted to lean against the UN system in order to strengthen their work they had to take it all or work on a philosophical basis totally different from the one reigning in the UN system. To all appearances there was no real choice for the NGOs. They had to embrace the UDHR in full and realise its internationalist potential.

136 Moyn, *Op.cit*. PP. 126-128.
137 *Ibid*. P. 130.
138 *Ibid*. P. 132.
139 *Ibid*. P. 131.
140 *Ibid*. P. 8.
141 *Ibid*. P. 218.
142 *Ibid*. P. 223.
143 A/CONF.157/23: I.5.
144 http://humanrightshistory.umich.edu/files/2012/08/Petrasek.pdf (consulted 15-04-2015).

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Конституционализм и судебный контроль
Constitutionalism and Judicial Review

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Judicial Standard of Fair Representation in a Proportional Electoral System: The Case of Russia

Abstract

The spread and entrenchment of the proportional electoral system is often viewed as one of the key features of establishment of the so-called "sovereign democracy" regime in Russia. The article attempts to track the issues of the system against the background of judicial decision-making, mainly focusing on jurisprudence of the Russian Constitutional Court, but also taking into the account the comparative European law. Our analysis focuses on three issues: general regulatory framework, mandate distribution between the party lists and within party lists.

Keywords: Russia, elections, parties, proportionality, standard, representation.

Правовой стандарт равного представительства в пропорциональной избирательной системе: пример России

Аннотация

Распространение и закрепление пропорциональной избирательной системы зачастую рассматривается в качестве одного из ключевых элементов создания режима так называемой «суверенной демократии» в России. Настоящая статья призвана связать системные проблемы и правовые решения, в основном на примере правовых позиций Конституционного Суда РФ, но также принимая во внимание тематические положения конституционного права европейских стран и заключения международных организаций. Предметом исследования являются три основных поля: общее правовое регулирование пропорциональной избирательной системы, распределение мандатов депутатов между партийными списками, а также их распределение внутри самих списков.

Ключевые слова: Россия, выборы, партии, пропорциональность, представительство.

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Judicial Standard of Fair Representation in a Proportional Electoral System: the Case of Russia

Introduction

Current types of electoral systems are usually divided in two large subgroups – plurality (also known as majoritarian or first-past-the-post) and proportional ones. The former ones enable a voter to pick clear "winners" and "losers", while the latter ones aim to eliminate the problem of "wasted votes", ensuring that every vote counts i.e. that the distribution of seats in the assembly would closely mirror the actual distribution of votes. Proportional systems can further be divided into those based on party lists in nationwide or large subnational electoral districts (a prevalent type) and those using a single transferable vote in relatively small electoral districts.[1]

However, despite the purported aims of the proportional electoral system, it does not exclude certain majoritarian elements. An extreme example can be found in the legislation of early Fascist Italy, where the top party list was assured of the two thirds of legislative seats, provided that it secured at least 25% of the vote, essentially establishing a majoritarian block system.[2] In-built devices, limiting the exact degree of proportionality (such as for example an electoral threshold), proliferated in the wake of the Second World War as the states sought to limit the possibility of small radical or extremist groups entering parliament. Similar concerns guided their introduction in the Post-Socialist states, including Russia.

Courts have generally taken a rather deferential approach to majoritarian devices within the ambit of the proportional system. The European Court of Human Rights (hereinafter – ECtHR),[3] and many national courts (with some notable exceptions) have concluded that "governmental stability",[4] or prevention of factionalism,[5] constitute permissible ground for deviations from the general proportionality principle. That would represent a sharp contrast with the position of the Canadian Supreme Court, which explicitly rejected such rationale in *Figueroa v. Canada.*[6] Perhaps the greatest contrast could be found between the positions of the Slovenian Constitutional Court and the US Supreme Court. On the one hand, the former rejected the case for greater proportionality of the electoral results by arguing that "it may occur to any voter, with an equal degree of probability that their vote would be worth more or less".[7] While, on the other hand the US Supreme Court proclaimed that "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise".[8] Having this in mind, one can argue that while the majoritarian electoral system is systematically geared to produce less fair results, at the same time it may require a more stringent judicial scrutiny.[9]

Against this backdrop, the Russian case is especially interesting, as the judicial standard of proportional representation did not evolve gradually in a stable environment, but rather in a whirlwind of constant political change, which constantly affected the "rules of the game" (both in favor and against the proportional system). To discern the basic precepts of the judicial standard of fair representation in Russia, I would focus on three dimensions – the evolution of the general legislative framework (1) and judicial decisions, regarding the relationships both between the party lists (2) and within the party lists (3).

1. Basic legislative framework of proportional representation

First proposals for the introduction of a proportional component into the electoral system of the post-Soviet Russia were introduced in 1992, under the auspices of the Constitutional Commission, entrusted with, *inter alia*, drafting new electoral legislation.[10] The proposals faced stark criticism from both the supporters of President Yeltsin and of the Supreme Council[11]. This was hardly surprising. Unlike their Eastern European counterparts, the former Soviet republics and Russia in particular,

lacked any significant partisan infrastructure. If the former could either readily re-establish the pre-Socialist parties or grant official status to sufficiently representative dissident groups, for the latter such options were not available. The situation has been further exacerbated by President Yeltsin's refusal to build a party support base.

As a result of this political climate there is no specific proportionality requirement in the Constitution of the Russian Federation (unlike for instance in its Albanian, Czech, Finnish and Polish contemporaries). For the future, it meant that the judicial standard of fair representation had to be deduced from general electoral clauses of the Constitution (i.e. Articles 3 and 35). Nonetheless, the presidential decree on elections to the first State Duma, issued as a part of transition to the new constitutional regime, stipulated that half of the chamber was to be elected from party lists on a proportional basis in a single national district, with a 5 per cent threshold.[12] This was seen as largely a transitional provision as shown by subsequent attempts of presidential administration to modify the ratio between the proportional and first-past-the-post components, in favor of the latter.[13]

The formula has been replicated without any significant changes in the subsequent federal laws on the State Duma elections, adopted in 1995[14] and 1999[15] respectively. A 2002 law has slightly modified it by increasing the electoral threshold to 7 per cent (with delayed effect). Another presidential decree of October 1993, setting transitional guidelines on the formation of regional legislative assemblies,[16] made no provision for a mandatory proportional component. Neither could it be found in the subsequent federal framework electoral laws of 1994 and 1997 establishing basic guarantees of citizens' electoral rights, and a right to referenda (hereinafter – the framework electoral law). Reflecting low popularity of a proportional electoral system, in the period between 1993 and 2003, only 9 regions[17] had introduced some form of a proportional component for the elections of their legislative assemblies.[18] Of these, only three[19] have used it more than once.[20] Furthermore, only in Krasnoyarsk kray and Sverdlovsk oblast the proportional component has been used for electing more than a third of legislators.[21] However, in those two regions the proportional seats were contested almost exclusively by regional, rather than national political actors.

Overall, a dominant majority of regional legislators were notional "independents" with average share of party representatives in a regional legislature falling from 21.8 per cent during December 1995 – April 1999, to just 14.2 per cent in December 1999 – May 2003[22]. Such a situation has been generally interpreted as a sign of excessive fragmentation and excessive volatility[23] and hence institutional weakness of the Russian political system,[24] manifesting itself among other things in the establishment of regional authoritarian regimes and growth of centrifugal tendencies.

Early 2000s saw an establishment of consensus within both Kremlin administration and nationwide political parties that such an environment was no longer tenable. While the Kremlin wished to enhance their influence in regional politics, the parties hoped to entrench their position as only legitimate political actors. As a direct consequence of such a consensus, two key laws were adopted in 2001-2002. First one, regulating political parties, aimed to "streamline" the political process and exclude "frivolous" actors by establishing extensive requirements for party registration, banning regional and confessional parties. This law was complimented by subsequent amendments to the framework electoral law, which mandated the election of at least half of the legislators (or half of at least one chamber in a bicameral legislature) from the party lists, on the basis of a proportional system.[25]

The introduction of the amendment into regional legislation stretched for the period from December 2003 to October 2008. Its outcome can be divided into two major phases. For the duration of the initial one, the party-political system at both federal and regional levels maintained many features of the previous period: party registration was relatively easy, ballot access remained unobstructed, and *ad hoc* electoral blocs took the place of the erstwhile regional parties. A size of proportional quota would rarely exceed the mandatory 50 per cent. The second stage saw major steps towards the centralization and "cartelization" of the political process. A switch to a fully proportional system for the elections of the State Duma effectively denied ballot access to independent candidates and

restricted opportunities for minor parties. For the latter, participation in political process was further complicated by more stringent membership requirement in force from January 1, 2006. A party was required to have at least 50 000 members to obtain official status or to retain it. On top of that, effective ballot access was conditional on stringent requirements for presentation of citizen signatures, while alternative electoral deposit was abolished. Those requirements were waived for the parties, represented in the State Duma, thus contributing to the "cartelization".

This coincided with some regions, starting with St. Petersburg in 2005, emulating federal model by introducing a fully proportional electoral system. By 2010 such a mode of election had been introduced in eleven regions.[26] The proportional system also spread into the municipal elections with a 2011 law mandating a 50 per cent proportional quota for all municipal assemblies with over 20 members.

Another tendency was a "streamlining" of regional electoral legislation, which set the electoral threshold almost uniformly at 7 per cent of the vote. While some regions previously employed a higher threshold,[27] in most cases it was a raise. These measures had an effect of severely limiting ballot access to the political actors, who in practice had to satisfy three stringent criteria – mass membership, onerous registration procedure and eventually an electoral threshold within the electoral system itself. As a direct result of stringent membership requirements, by 2011 only seven nationwide political parties could contest elections, and of those, only one had been registered during the operation of the law (since January 2006). As a direct result of burdensome requirements for ballot access, in a majority of elections for regional legislatures between 2007 and 2011 only four "parliamentary" parties qualified for a place on a ballot. In two campaigns the number of participating parties shrunk to just three. Hence instead of allowing political evolution run its natural course, electoral politics was artificially turned into a game of "major league" parties.

However the thinking behind this process has received a degree of approval from the Russian Constitutional Court. In 2005, the latter emphasized the requirement that a party represents "the interests of a considerable number of citizens",[28] as "such support is required to fulfill the main mission of a political party in a democratic society, namely forming and articulating the political will of the people".[29] In 2007, the Constitutional Court further contended that the 50,000 membership requirement was vindicated by the State Duma being elected entirely on a proportional basis,[30] and thus the will of the nation ought to be represented "only by large, well-structured political parties".[31] The ECtHR in *Republican Party of Russia v. Russia* took the contrary view, arguing that "a minimum membership requirement would be justified only if it allowed the unhindered establishment and functioning of a plurality of political parties representing the interests of various population groups",[32] and further underscoring that "small minority groups must also have an opportunity to establish political parties and participate in elections".[33]

In 2009-2010 the restrictive regime was slightly relaxed. Parties satisfying the 5 per cent threshold but not the 7 per cent one, at the State Duma,[34] and regional legislative elections,[35] were guaranteed "consolation mandates". Parties, already represented in the regional legislature, were no longer required to present voter signatures to gain ballot access in the elections for that particular legislature.[36] While these amendments did not change the restrictive registration regime and, thus, mostly concerned the interests of "major league" parties, the next changes, introduced in 2012, had a more wide-encompassing significance. Most prominent in this respect were the decrease of minimal membership requirement to 500 persons,[37] and the abolition of a requirement for party lists to present signatures in order to register to run in an election.[38]

However, after the two regional electoral campaigns pursuant to the new requirements, which saw increased competition, the "proportional" trend is being reversed. A federal law adopted in November 2013, cut the obligatory proportional quota in regional legislatures to 25 per cent, abolishing it altogether for the legislatures of Moscow, St. Petersburg and municipal assemblies.[39] At the same time, the mode of election to the State Duma election reverted to a mixed-member system. The Constitutional Court reacted to these developments by confirming that in choosing between the

FPTP and proportional system, the legislator had wide discretion.[40]

Given the persuasive influence of the general regulatory framework on the key features of the electoral process, such as ballot access, one may wonder whether the judicial standard of fair representation does matter at all. I would argue to the contrary. It is precisely the wider ballot access that makes the standard of representation all the more crucial. On the other hand, the existing safeguards may offer insights as to why the legislator seeks to curtail proportional representation in the context of wider ballot access.

2. Inter-party aspect of fair representation

By far the most popular of various devices, which limit the ideal-typical proportionality is the electoral threshold, which makes representation of a party list conditional on the attainment of a certain percentage of the vote. While, as noted above, for the purposes of the State Duma election such a threshold was initially fixed at 5 per cent, in the 1996 legislative election in Koryak autonomous okrug, it was as high as 25 per cent with only a single party being able to surpass it. In November 1998 the Constitutional Court of the Russian Federation found the threshold in State Duma election constitutional, as it fulfilled permissible policy goals such as prevention of "excessive fragmentation" of the legislative corps, "normal functioning of the parliament", "stability of the legislative power and the constitutional order in general".[41] The exact size of threshold was found to be in line with its average "in countries with an established multi-party system", where, reasoned the Court, it was fulfilling the above-mentioned policy goals without violating the proportionality principle.[42] However, when analyzed against the backdrop of the nascent and yet unstable multi-party system in Russia, in Court's opinion, the threshold could have been excessive, unless surpassed by the party lists, which in total command the support of the majority of voters. Otherwise, suggested the Court's reasoning, the State Duma would lack popular legitimacy. Next, the Court dealt with a hypothetical case where only one party satisfies the electoral threshold and thus is entitled to the totality of seats contested through the proportional system. Judges found such a scenario to be incompatible both with the principle of proportionality and the very idea of pluralist democracy.[43] As a remedy against both prospects the Court suggested either to provide an option for a merger of unsuccessful party lists or to establish a flexible threshold, which was to be lowered until the two conditions (representation of at least two party lists and the majority of the voters) were met. The legislature chose the latter option, which has been subsequently introduced in the law on the State Duma elections,[44] and various regional electoral laws.

Nonetheless, some experts remained unconvinced, deeming the very existence of an electoral threshold a violation the proportionality principle.[45] The Constitutional Court's rationale for the existence of the electoral threshold essentially followed a well-established line of thought, which defined it as a tool of "militant democracy", designed to keep the "fringe" parties out of the parliament, and thus prevent them from gaining the so-called oxygen of publicity. For instance, the Czech Constitutional Court explicitly referred to the ill-fated experiences of both the Weimar Republic and the French Fourth Republic as examples of how an "excessive diversification in the Assembly's composition and unrestricted proportional representation may become a tool of political destabilization and an element destructive of a constitutional state".[46] The Court conceded that "certain distortion of proportionality in political representation" due to operation of limitation clauses was constitutional, as long as the degree of disproportion did not cast into doubt the democratic nature of the political representation.[47] Czech judges based their reasoning, *inter alia*, on the foreseeability of electoral legislation for the voter and the transitionary nature of the political regime.[48]

However, some recent developments in European "soft law" run contrary to that wisdom. The 2007 resolution of the Parliamentary Assembly of the Council of Europe called on the member states to balance considerations of effectiveness of a legislature and fair representation of views in the community.[49] With this in mind, it stated that "in well-established democracies, there should be no thresholds higher than 3% during the parliamentary elections".[50] On the other hand, the adoption

of such a position did little change to the established line of precedent of the European Court of Human Rights in deciding cases on Article 3 of the Protocol No. 1 to the Convention. In this regard the ECtHR tends to grant member states "wide margin of appreciation"[51] in deciding whether "currents of thought which were sufficiently representative"[52] to guarantee representation in parliament, conceding no electoral system can eliminate "wasted votes".[53] Particularly notable is the Strasbourg court's reasoning in *Yumak and Sadak v. Turkey*, which, along the emphasizing the previous line of jurisprudence, based itself on the premise that the applicants could circumvent the high threshold by joining other party lists or standing as individual candidates.[54] At the same time, we should also note the 2011 decision of the German Constitutional Court, which deemed the 5 per cent threshold in the European election to be unconstitutional.[55] The Court's reasoning was based on assessment of the potential impact broader representation would have on the functioning on the European parliament, as well as of the latter's powers vis-a-vis the executive organs of the European Union.[56]

This line of thought is essentially replicated by some experts when assessing the regional electoral legislation of the Russian Federation. They argue that the distribution of powers between regional legislative and executive powers warrants sufficiently wide representation as a paramount concern, rather than prevention of political fragmentation.[57] In hindsight such rationale could have been rebutted by referring to special roles of legislature and plurality party list in "vesting powers of a chief regional executive"[58] upon presidential nomination,[59] under previous system of regulation. However, under the current system such reasoning probably may apply only to those regions, whose chief executives are elected by legislature. On the other hand, we shall note the approach of the ECtHR, which viewed the threshold in conjunction with other barriers to ballot access – minimum membership requirement for a political party, and a requirement to collect signatures in order to run in elections.[60] In absence of the two other restrictive provisions, in our opinion, the case for a threshold becomes only stronger. Legal challenges to a 7 per cent threshold have seen courts so far take the position that the technical conformity to the 1998 Judgment of the Constitutional Court warrants the legality of a particular threshold in place.[61]

Ideal-typical proportionality can be further distorted by using a specific formula for converting votes into actual legislative seats. Some of the formulas used in proportional systems were found to constitute an implicit bonus for a party list, winning a plurality of votes, at the expense of less successful ones.[62] For the State Duma election, the preferred method since 1993 has been the Hare quota, often described as favorable for smaller parties and ensuring wider representation.[63] However the Russian framework electoral law establishes no particular formula as binding for the regions. As a result, since 2006 a majority of regional electoral laws have introduced a so-called Imperiali divisors formula, previously employed only in Belgian municipal elections, where it acted as an implicit electoral threshold.[64]

Two variations of the formula have been in use. The early one provided only for the representation of more than one party, thereby satisfying one the requirements, established by the 1998 Judgment of the Constitutional Court, but simultaneously establishing a potential extra implicit threshold beyond the one explicitly provided by the law.[65] The latter variation, also dubbed the Tyumen method,[66] avoided this conundrum, by assigning at least one seat to each party list having surpassed the threshold.[67] The first variation has been shown to dilute proportionality in favor of the plurality party, beyond the bias displayed by other established electoral formulae.[68] The second variation, on the other hand, in its practical operation mimicked the established D'Hondt formula, which generally favors a majority party.[69] The danger of the first variation of Imperiali divisors formula acting as an implicit threshold, has been largely precluded by the aforementioned 2010 amendment to the framework electoral law, which entitled to representation every party list satisfying a 5 per cent threshold.[70]

In the wake of the 2007 regional legislative elections, which saw the first use of Imperiali divisors, corresponding provisions of electoral laws have been challenged by voters in a number of regions. The lawsuits have been uniformly rejected by the courts of general jurisdiction.[71] The position of

lower courts has been subsequently endorsed by the Supreme Court of the Russian Federation.[72] A possible constitutional challenge could possibly be made by applying "arithmetic" scrutiny; thereby an electoral formula must be as close as possible to the ideal-typical model of proportional representation. This is an approach favored by some Russian commentators, who contend that in order to satisfy the proportionality requirement as set in the framework electoral law (i.e. that the seats are to be proportionally divided between party lists, depending on the number of votes), an electoral formula has to satisfy a two-prong mathematical test: a) deviation from "pure" proportionality, defined as sum of modules of difference between vote and seat percentage; b) equal "price of mandate", i.e. number of votes per mandate.[73]

In comparative perspective, such an approach establishes itself with the German constitutional jurisprudence. Perhaps the most vigilant protection of the principle of proportionality can be found in the 1952 decision of the Bavarian Constitutional Court, which established the general rule that the principle of equal suffrage requires first and foremost equal measure of success for the vote of equal value.[74] A similar position has recently been taken by the Federal Constitutional Court of Germany, which ruled a long-established practice of so-called overhang seats, as unconstitutional. In its 2009 decision, the Court found this practice in violation of the principles of the equality and directness of elections as far as rounding losses bring about "negative voting", where the party list could benefit from voters actually casting their vote for another party.[75] The 2012 decision further clarified the Court's position by explicitly limiting the number of such seats to satisfy the fundamental nature of proportional representation elections.[76]

However, such a position is far from representing a European consensus. The aforementioned integrationist reasoning, in our opinion, can be applied not only to the electoral threshold, but also to the very electoral formula. Evidently an *implicit* bonus constitutes a lesser violation of proportionality principle than an *explicit* bonus, which can be found in the electoral legislation of several European countries (e.g. Italy, Greece and France).

Another challenge to the proportionality principle lies in the very magnitude of an electoral district. If such a district is too small, a party list can be denied representation, despite satisfying an electoral threshold. This is precisely what happened in 1996 legislative elections in Kaliningrad oblast and Ust-Orda Buryat autonomous okrug, which were contested in excessively small districts (5 and 4 seats respectively). In the 2000 Kaliningrad oblast legislative election all the party lists satisfying the threshold, received one seat each, despite wide disparities in actual percentage of the vote. Hence the very purpose of proportional representation has hardly been achieved. Subsequent amendments to the framework electoral law helped exclude such a scenario for the time being, however the proliferation of the proportional system to the municipal level helped it resurface itself. While the law prescribed mandatory proportional quotas in municipal assemblies with 20 or more members, it did not preclude them in smaller ones. Electoral officials have early on warned about legal issues posed by proportional districts of small magnitude effectively creating an additional implicit threshold.[77]

Eventually in 2011 the issue went before Constitutional Court, which found unconstitutional an electoral system in a village council, which elected all of its 10 members on the basis of proportional representation. The Court ruled that the application of such a system effectively resulted in party lists winning the same number of seats, despite large-scale variations in the number of votes cast, thus making impossible to establish clear winners and losers of the election.[78] Such an outcome, according to the Court's reasoning, resulted in obscuring the electorate's will and hence undermining the legitimacy of an elected body.[79] As a direct result of the Judgment an amendment to the framework electoral law stipulated that in municipal elections, the size of an electoral district in a proportional system should be no less than 10 members.[80]

However with the adoption of the aforementioned amendments, cutting mandatory proportional quota to a quarter of seats, the permissible magnitude of a single district may shrink to just four seats. In case of such a scenario, the issues of fair representation can arise again. Furthermore, the case for an electoral formula with an implicit majority, in our opinion, may become weaker. In com-

parative perspective, we need to recall the 1992 judgment of the Bavarian Constitutional Court[81] and the 2001 judgment of the Constitutional Court of the Czech Republic,[82] which explicitly forbade the use of the electoral system with an implicit majority bonus in electoral districts of small magnitude, as inimical to the very principle of proportional representation.

The judicial standard of fair representation in application to inter-party relationships in a particular proportional system presupposes three major goals:

1) to maintain legitimacy of the legislature,
2) assure its multi-party nature, and
3) broadly retain its proportional nature.

The third component of the standard, in our opinion, shall preclude not only the systems where a party list with less votes may win more seats (for example, as the 1960s electoral systems of Italian regions of Sicily and Trentino-Alto Adige),[83] but also the ones which allow for non-representation of party lists, satisfying the electoral threshold. The case for unconstitutionality of such systems is further strengthened by the position of the Constitutional Court on the prohibition to obstruct the will of the electorate.[84] Thus at the very least, the current prohibition of excessively small proportional districts shall be expanded from the municipal to the regional level. However if the will shall not be obstructed, does it mean that it cannot be distorted as well? In this respect, we can identify two opposite positions – one that beyond electoral threshold no dilution is possible and a particular electoral formula must be as close as possible to the ideal-typical model of proportionality, and the other, that implicit in-built majority bonuses are permissible. If current jurisprudence is to be the guide, the latter position is more likely to gain traction, unless a clearer standard of proportionality is introduced in the framework electoral law.

3. Intra-party aspect of fair representation

Another aspect of the operation of any proportional election system is the distribution of mandates within the successful party list, which is intimately intertwined with the conflict between individual candidates and party as a whole for the primacy in a proportional system. Starting with the 1993 State Duma election, the electoral legislation envisaged a closed-list system, whereby positions of individual candidates and hence their chances of winning a mandate are predetermined, before the election, by party leaders rather than by voters. In contrast, an open list system, where voters can pick a certain candidate within the list, whereby directly influencing his or her chances of being elected, has been implemented only in a negligible number of regional electoral system (4 out of then 89, all having subsequently abolished them).[85]

From the onset, the Constitutional Court of the Russian Federation took the view that in a proportional system voters choose a party list as a whole, rather than the individual candidates of whom it is made up. Thus, in the November 1998 judgment on constitutionality of the State Duma election law, this feature was attributed to the very nature of a proportional electoral system.[86] One and a half years later, the Court deemed the "special role" of leading candidates of a particular party list as insufficient to warrant forfeiture of participation in an election, if a particular list was to lose at least one of its three leading candidates.[87] Such an intervention was judged to constitute a violation of both electoral rights and freedom of association.[88] The notional entrenchment of political parties as leading political actors in early 2000s legislation was endorsed by the Constitutional Court, which in its 2004 Judgment stated that "by consolidating political will of citizens, they help formulate the political will of the people".[89]

Subsequent relaxation of requirements concerning leading candidates on a party list coincided with the entrenchment of the practice of "poster candidates", who join the party list (usually occupying its top positions) solely for promotion purposes, only to surrender their mandate immediately upon election. In this regard, the 1999 federal law on the State Duma envisaged that a mandate forfeited by one of three leaders of a party list, without a reasonable explanation, was to be transferred to another party list. No similar provisions were included in subsequent legislation. As a result, in the 2003 State Duma election a total of 37 candidates on the United Russia party list forfeited their mandates,[90] while at the 2007 election this number rose to 118.[91] Presidential plenipotentiary at the Constitu-

tional Court conceded that in practice such candidates have decisive influence on the vote.[92]

Some scholars take the view that the practice ought to be penalized by forfeiture of seats, surrendered by "poster candidates",[93] or at least those of them, who are state or municipal office-holders.[94] In 2006, the chairman of the Central Electoral Commission at the time, Mr. Aleksandr Veshnyakov stated that the use of "poster candidates" as a widespread practice may be unconstitutional.[95] In 2012 the ECtHR expressed concern over use of such a coordinated practice by United Russia Party in 2003 State Duma elections, but refused to analyze it in abstract. At the same time the ECtHR confirmed the primacy of a political party over an individual candidate for voter's deliberation in a proportional system, and deemed the voluntary forfeiture of mandates as foreseeable for a voter.[96] However, even if a provision against "poster candidates" were to be envisaged in legislation, its effectiveness would by and large depend on the correctness of implementation. For instance, although such a provision was included in regulations on elections of inaugural legislative assembly of Perm kray, it was not enforced in cases of forfeiture of mandates by leading candidates, as the electoral commission construed the provision to apply only to candidates who have actually taken up their mandates.[97]

The vision adopted by the Constitutional Court, allowed for further extension of the rights of the parties at the expense of the candidates, who make up party lists, presumably aiming at ensuring their loyalty. For example, starting from 1999 federal law on the State Duma elections, the parties were allowed discretion to expel candidates from their lists. As the use of similar practices expanded to embrace regional elections, it was challenged before the Constitutional Court, which upheld it in November 2009.[98] In its reasoning, the Court again underscored the primacy of a party list as a whole over individual candidates in proportional elections,[99] the only added caveat being a prohibition on abuse of such a power in an arbitrary or discriminatory manner.[100] In 2007, similar discretionary powers were given to parties in cases of early termination of legislator's mandate, meaning that it could be substituted by any candidate from the same (or in some cases, another) regional group, regardless of their initial order. Again, as in previous judgments, the provision was ruled constitutional. According to the Court's reasoning, with a certain amount of time having elapsed since the election, the party could take into account circumstances, which came to light during this period (for example, changes in candidate's relationship with the party).[101] However, justice Sergey Knyazev in his dissenting opinion challenged this reasoning, arguing that a party's discretionary power over its candidates' list lapses after its formation, while an election gives a particular order of candidates in a list a degree of popular legitimacy, whereby it can no longer be altered by a party.[102] He referred, *inter alia*, to the Venice Commission guidelines on Political Party Regulation, which suggested that political parties should be prohibited from altering electoral lists after the voting has commenced.[103] On the other hand, Justice Aleksandr Kokotov's opinion argued for even wider grant of discretionary powers for parties in picking a substitute candidate, based *inter alia* on the party's need to adequately evaluate the personality of a prospective substitute, especially in a context of a fledgling democracy.[104]

The current legislative regulation maintains the powers of a party over a legislator, elected on a party list, after he or she has taken office. The law forbids such a legislator from switching parties or joining another parliamentary faction, as both would lead to automatic forfeiture of his or her mandate. The 2012 judgment of the Russian Constitutional Court confirmed the constitutionality of the current prohibition on switching party allegiance for legislators, elected on party lists, deeming it necessary for the preservation of electorate's will (again understood as expression of support for a party as a whole) under the current political climate.[105] Such a regulatory regime, in our opinion, borders on "imperative mandate", which was dubbed as "generally awkward to Western democracies"[106] by a 2009 report of the Venice Commission. However, in a fledgling democracy these measures can prove indispensable in guarding legislators from the influence of vested interests.[107] Indeed, some experts go as far as to rule any change of party allegiance during the term of legislature, a direct assault on popular sovereignty.[108]

Given the fact that current regulation of a pro-

portional system both on federal and regional level presumes a single constituency, the majority of regional laws envisage division of a party list into territorial subgroups. This mirrors the State Duma election, which has provided for the mandatory creation of such subgroups since 1995. The tendency in recent years has been for territorial subgroups to mirror the FPTP constituencies.[109] In St. Petersburg, where all members of a legislature are elected on a party list, territorial subgroups essentially recreate the erstwhile constituency scheme (especially if taking into account the fact that the groups in question consist of a single person). On the one hand, such a system creates a certain relationship between the electorate and a person on a party system (typically absent in a closed-list system). On the other hand, such a system may be a tool to pressure political parties by forcing the withdrawal of such a number of subgroups, which would make the whole list ineligible to stand in the election. The Russian Constitutional Court in its 2008 judgment sought to prevent precisely such a danger by deeming unconstitutional a provision in the Vologda oblast electoral law, which allowed for the exclusion of a party list on the basis of a withdrawal of a single subgroup.[110] Underscoring yet again the primacy of the party's interests, the Court judged that such a measure constituted an impermissible interference into its operation.[111]

The final issue is the eventual distribution of mandates between the regional subgroups. While the State Duma election law and the majority of regional laws envisage the percentage of a vote achieved by a party list in a particular region as the benchmark for the purposes of such distribution, this approach is not universal. Constitutional permissibility of alternative approaches was at the center of a case before the Constitutional Court, where a former candidate challenged party discretion in distributing mandates between subgroups. The Court ruled in his favor, arguing that such discretion amounted to dilution of the voters' will.[112] In similar fashion a year later the Constitutional Court ruled against the practice of "substitute mandates", namely a case of resuming a previously terminated mandate in State Duma, when a new vacancy arises. Such practice has also been found unconstitutional due to, *inter alia*, dilution of voters' will and consequent inequality of candidates.[113]

At first glance, the judicial standard on intra-party relationships within the proportional system seems contradictory, favoring parties in some instances and candidates in others. However things may become clearer if we discern an implied standard, differentiating between purely discretional decisions of a party, and those motivated by real or potential disloyalty of a candidate or a deputy. The former are unconstitutional due to the dilution of voters' will, while the latter are tolerated to an extent due to the conditions in which parties operate in a fledgling democracy, where they lack deep roots and ought to be protected from competing political actors and vested outside interests.

Conclusion

The evolution of the system of proportional representation in Russia was marked by several key turns, which left a deep impact. Initially it began as a half-hearted effort to help nurture "genuine" political parties, lacking strong support either from the center or the regions. In early years of Putin's presidency, however, the proliferation of the proportional system became a useful tool for centralizing the political class and cementing the ascendant power of the Kremlin. In conjunction with burdensome requirements for ballot access, this had an effect of severely limiting political competition. In the wake of the protests of 2011-2012, however, an opposite tendency gained traction. Proportional components of the electoral systems were either curtailed or completely discarded as Kremlin sought a more flexible *modus operandi*, allowing for taming the opposition and disguising pro-government candidates as notional independents. This volatility of legislation had a negative effect on the development of clear judicial standards for the fair representation.

Regarding the inter-party competition, the judicial standard spells out only the basic requirements such as in particular, democratic legitimacy, multiparty character of an assembly, and basic proportionality of its composition in relation to the vote. However, the standard is not nuanced enough to either prescribe a particular method of counting votes or to explain the existence of an implicit or explicit majority bonus. Some doubts may be cast

over the relationship between the electoral threshold and the effective functioning of an assembly, in the absence of a clear relationship with the executive power. In case of intra-party relationships, the judicial standard has a realist gist and takes into account the realities of party functioning, and while it generally protects the finality of vote, exceptions exist to tackle the purported disloyalty of party members.

Notes

1 These systems are found in the Republic of Ireland, Northern Ireland, Malta and with certain variations in India and Australia.

2 A. De Gasperi *La "legge Acerbo" e le elezioni politiche del 1924*, URL: http://www.degasperi.net/navipage_percorsi.php?id_cat=p1&id_bio=b3&id_bio_sub=4.

3 *Yumak and Sadak v. Turkey*, application no. 10226/03, judgment of 8 July 2008.

4 Judgment of the Constitutional Court of the Turkish Republic of 18 November 18th 1995, E. 1995/54, K. 1995/59.

5 Judgment of the Constitutional Court of the Republic of Latvia of 23 September 2002 № 2002-08-01.

6 *Figueroa v. Canada (AG)*, [2003] 1 S.C.R. 912, 2003 SCC 37, §39.

7 Decision of the Constitutional Court of the Republic of Slovenia of 9 March 2000, no. U-I-354/96.

8 *Reynolds v. Sims* 377 U. S. 556 (1964).

9 Although such an argument could be challenged by referring to the explicit refusal on the part of the US Supreme Court to deal with political gerrymandering.

10 *Sheynis, Vzlet i Padeniye Parlamenta: Perelomnye Gody v Rossiyskoy Politike*, pp.580-581.

11 *Ibid*, pp.590-596.

12 Decree of the President of the Russian Federation of 1 October 1993 No 1557.

13 Lyubarev A., A.Ivanchenko A. *Rossiyskie vybory: ot perestroyki do suverennoy demokratii*, pp.88-90.

14 Federal Law of 21 June 1995 No. 90-FZ.

15 Federal Law of 24 June 1999 No.121-FZ.

16 Basic Guidelines on Organization and Operation of the bodies of state power of krays, oblasts, federal cities, autonomous oblast and autonomous okrugs of the Russian Federation during the phased constitutional reform, established by the Decree of the President of the Russian Federation of 22 October 1993 No.1723.

17 Mari El and Tyva republics, Krasnoyarsk kray, Kaliningrad, Pskov, Saratov and Sverdlovsk oblasts, Koryak and Ust-Orda Buryat autonomous okrugs.

18 S. Avtonomov, A. Zakharov, E. Orlova *Regional'nye parlamenty v sovremmenoy Rossii*. pp.15-22.

19 Krasnoyarsk kray, Kaliningrad and Sverdlovsk oblasts.

20 A. Lyubarev "Novye regional'nye zakony o vyborah: problemy vvedeniya smeshannoy izbiratel'noy sistemy", *Pravo i zhizn*, 2003, No.61 (9) p.166.

21 *Ibid*.

22 G.Golosov "The Vicious Circle of Party Underdevelopment in Russia: The Regional Connection", *International Political Science Review*, 24, 4, October (2003); "Electoral Systems and Party Formation in Russia: A Cross-Regional Analysis", *Comparative Political Studies*, 36, 8, October (2003); G.Hale *Why Not Parties in Russia? Democracy, Federalism, and the State* (Cambridge, Cambridge University Press, 2006).

23 Cameron Ross *The Rise and Fall of Political Parties in Russia's Regional Assemblies'*, Europe-Asia Studies, (2011) '63: 3, 431.

24 Michael McFaul (2000) "*Party Formation and Non-Formation in Russia"*, Carnegie Endowment for International Peace, Working Paper, 12, May.

25 Federal Law of 24 July 2002 No.107-FZ.

26 St. Petersburg, Moscow oblast, Dagestan, Ingushetia, Kalmykia, Amur oblast, Chechen Republic, Kabardino-Balkar Republic, Nenets autonomous okrug, Tula oblast, Kaluga oblast. See A.Lyubarev "Electoral Legislation in Russian Regions", *Europe-Asia Studies*, 63: 3 (2011), p.419.

27 Moscow City and Kalmykia Republic had it set at 10 per cent.

28 Judgment of the Constitutional Court of the Russian Federation of 1 February 2005 No.1-П.

29 *Ibid*.

30 Judgment of the Constitutional Court of the Russian Federation of 16 July 2007 No.11-П.

31 *Ibid*.

32 *Republican Party of Russia v. Russia*, application no. 12976/07, judgment of 12 April 2011, §119.

33 *Ibid*, §114.

34 Federal Law of 12 May 2009 No.94-FZ.

35 Federal Law of 22 April 2010 No.63-FZ.

36 *Ibid*.

37 Federal Law of 2 April 2012 No.28-FZ.

38 Federal Law of 2 May 2012 No.41-FZ.

39 URL: http://ntc.duma.gov.ru/duma_na/asozd/asozd_text.php?nm=303-%D4%C7&dt=2013.

40 Decision of the Constitutional Court of the Russian Federation of 9 June 2014 215-О.

41 Judgment of the Russian Constitutional Court of 17 November 1998, No. 26-П.

42 *Ibid*.

[43] *Ibid*.

[44] Lyubarev A., A.Ivanchenko A. *Rossiyskie vybory: ot perestroyki do suverennoy demokratii*, p.123.

[45] Nudnenko L. "Novelly Federalnogo zakona 'O vyborakh deputatov Gosudarstvennoy Dumy Federalnogo Sobraniya Rossiyskoy Federatsii'", *Gosudarstvennaya i munitsipalnaya vlast*. 2006, No.6, p.17.

[46] Decision 1997/04/02, Pl. ÚS 25/96, URL: http://www.usoud.cz/en/decisions/?tx_ttnews%5Btt_news%5D=598&cHash=ea38443d890976ec5207e9f634e0817f.

[47] The Court further suggested that such distortion could happen, if the electoral threshold is raised from 5% to 10%

[48] *Ibid*.

[49] Resolution 1547 (2007), URL: http://assembly.coe.int/Mainf.asp?link=/Documents/AdoptedText/ta07/ERES1547.htm.

[50] *Ibid*.

[51] *Ibid*, §113.

[52] *Partyja «Jaunie Demokrati» and Partyja «Musu Zeme» v. Latvia*, applications nos. 10547/07 and 34049/07, decision of 29 November 2007.

[53] *Mathieu-Mohin and Clerfayt v. Belgium*, judgment of 2 March 1987, Series A no. 113, §54.

[54] *Yumak and Sadak v. Turkey*, application no. 10226/03, judgment of 8 July 2008.

[55] Order of 9 November 2011 2 BvC 4/10, 2 BvC 6/10, 2 BvC 8/10, URL: http://www.bundesverfassungsgericht.de/pressemitteilungen/bvg11-070en.html.

[56] *Ibid*.

[57] See e.g. L.G.Kuzmina *Ekspertnoye zaklyuchenie na zakon o vyborakh deputatov Samarskoy gubernskoy dumy*, URL: http://www.vibory.ru.

[58] Procedure used in 2005-2012 instead of direct elections.

[59] See e.g. Judgment of the Constitutional Court of the Russian Federation of 21 December 2005 No. 13-П.

[60] *Republican Party of Russia v. Russia*, application no. 12976/07, judgment of 12 April 2011, § 113.

[61] See e.g. Ruling of the Supreme Court of the Russian Federation of 29 November 2006, No.46-Г06-26.

[62] See e.g. Arend Lijphart, *Electoral Systems and Party Systems: A Study of Twenty-Seven Democracies, 1945-1990*. Oxford: Oxford University Press, 1995.

[63] *Ibid*.

[64] Nezavisimaya gazeta, 28.06.2007.

[65] N.Shalaev, "Opyt Ispol'zovaniya Sistemy Deliteley Imperiali v Regionakh Rossii", *Rossiyskoe Electoral'noe Obozrenie*, 2009, No.1, pp.4-11.

[66] A.Lyubarev "Ispol'zovanie Metodov Deliteley na Rossiyskih Vyborah", *Rossiyskoe Electoral'noe Obozrenie*, 2009, No.2, pp.4-22.

[67] Shalaev *Op.cit.*; A.Lyubarev, N.Shalaev "O Kriteriyakh Proportsional'notsi pri Raspredelenii Mandatov mezhdu Partiynymi Spiskami", *Konstitutsionnoe i Munitsipalnoye Pravo*, 2009, No.23, pp.23-27

[68] Ibid; *Metod Imperiali, kak i ozhidalos, srabotal v polzu Yedinoi Rossii*, URL: http://www.votas.ru/imperial-2.html.

[69] Lyubarev 2009, A.Lyubarev *Electoral Legislation in Russian Regions*, Europe-Asia Studies, 63: 3 (2011), pp.415-427.

[70] Federal Law of 22 April 2010 No.63-FZ.

[71] For example, the St. Petersburg City Court in its decision no. 3-75/07 of 5 March 2007 ruled that an individual position on admissibility of a particular mathematical rule does not warrant it contrary to the federal legislation.

[72] See Decision No. 78-Г07-30 of 1 August 2007, Decision N 46-ГО7-21 of 1 August 2007.

[73] A.Ivanchenko, A.Kynev, A.Lyubarev *Proportional'naya Izbiratel'naya Sistema v Rossii: Istoriya, Sovremennoye Sostoyanie, Perspektivy*, 2005, pp.178-182.

[74] BVerfGE 1 (1952) 208–263 [246], zitiert in Pukelsheim F. *Mandatszuteilungen bei Verhältniswahlen:Idealansprüche der Parteien,* Zeitschrift für Politik 47 (2000) 239-273.

[75] Judgment of 3 July 2008 – 2 BvC 1/07, 2 BvC 7/07, URL: http://www.bverfg.de/en/press/bvg08-068en.html.

[76] Judgment of 25 July 2012 - BvF 3/11, 2 BvR 2670/11, 2 BvE 9/11.
URL: http://www.codices.coe.int/NXT/gateway.dll/CODICES/precis/eng/eur/ger/ger-2012-2-019.

[77] See e.g. Kryukov V. "Optimalnaya proportsionalnost", *Zhurnal o vyborakh*, 2009, No.4-5, s.111-112.

[78] Judgment of the Constitutional Court of the Russian Federation of 7 July 2011 No 15-П.

[79] *Ibid*.

[80] Federal Law of 16 October 2012 No.173-FZ.

[81] VerfGH 45 (1992) 54–67, zitiert in Pukelsheim F. *Mandatszuteilungen bei Verhältniswahlen:Idealansprüche der Parteien* // Zeitschrift für Politik 47 (2000) 239-273.

[82] Decision 2001/01/24 - Pl. ÚS 42/00, URL: http://www.usoud.cz/en/decisions/?tx_ttnews%5Btt_news%5D=591&cHash=9be5ff03277670d41bfa0582e75e6861.

[83] D.McKean (ed.) *The Government of Republican Italy*, 1966, p.174.

[84] See e.g. Judgment of the Constitutional Court of the Russian Federation of 10 June 1998, No.17-П.

[85] Lyubarev 2011, p.422.

[86] Judgment of the Constitutional Court of the Russian Federation of 17 November 1998, No.26-П.
[87] Judgment of the Constitutional Court of the Russian Federation of 25 April 2000 No.7-П.
[88] *Ibid*.
[89] Judgment of the Constitutional Court of the Russian Federation of 15 December 2004 No.18-П.
[90] *Communist Party of Russia and Others v. Russia,* application no. 294000/05, judgment of 19 September 2012 §8.
[91] Vedomosti, 05.12.2007.
[92] Krotov M. *Vystypleniya Polnomochnogo Predstavitelya Prezidenta RF v Konstitutsionnom Sude RF*, 2009, s.556.
[93] Avakyan S. "Probely i defekty v konstitutsionnom prave". *Kostitutsionnoe i munitsipalnoe pravo*, 2007, No.8.
[94] Kolyushin E. *Vybory i izbiraltelnoe pravo v zerkale sudebnykh reshenii*, Chapter 8, Paragraph 1.
[95] Veshnyakov opasaetsya organizovannoy diskreditatsii vyborov, URL:http://www.ng.ru/politics/2006-11-30/1_veshniakov.html.
[96] *Communist Party of Russia and Others v. Russia*, §136.
[97] A.Kynev *Vybory parlamentov rossiyskih regionov*, p.215.
[98] Judgment of the Constitutional Court of the Russian Federation of 9 November 2009 No.16-П.
[99] *Ibid*.
[100] *Ibid*.
[101] Decision of the Constitutional Court of the Russian Federation of 6 March 2013 No.324-О.
[102] *Ibid*.
[103] Guidelines on Political Party Regulation, available at URL: http://www.osce.org/odihr/77812.
[104] *Ibid*.
[105] Judgment of the Constitutional Court of the Russian Federation of 28 February 2012 №4-П.
[106] Report on the Imperative Mandate and Similar Practices, CDL-AD(2009)027, URL: http://www.venice.coe.int/webforms/documents/CDL-AD(2009)027.aspx.
[107] The effects of this phenomenon, explicitly referred to in the Judgment of the Constitutional Court, can be vividly seen e.g. during the Ukrainian parliamentary crises of 2006-10.
[108] V.Lapayeva *Formirovaniye konstitucionnogo bol'shinstva v Gosudarstvennoy Dume: volya naroda ili parlametskiye protsedury*, URL: http://www.vibory.ru/analyt/lapaeva2.htm.
[109] E.g. in Moscow City, Kostroma and Novosibirsk region, Republic of Bashkortostan.
[110] Judgment of the Russian Constitutional Court of 11 March 2008 No.4-П.
[111] *Ibid*.
[112] Judgment of the Russian Constitutional Court of 19 December 2013 №28-П.
[113] Judgment of the Russian Constitutional Court of 16 December 2014 №33-П.

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Конституционализм и судебный контроль
Constitutionalism and Judicial Review

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The Categorical Other: Going Beyond the Gender Binary in Law in India

Abstract

The paper looks into specific aspects of the 2014 decision of the Indian Supreme Court which introduced a new "third gender" category and analyses the decision in light of the diversity of the trans* people in the Indian sub-continent. It summarises the salient features of the decision, and then critiques it, and briefly looks into the aftermath of the decision.

Keywords: trans*, India, Hijra, constitutional rights, third gender, colonial laws.

Иная категория: преодоление гендерной бинарности в праве в Индии

Аннотация

Автор статьи рассматривает решение Верховного суда Индии, который в 2014 году установил категорию «третий пол», и анализирует это решение в контексте разнообразия проживающих на Индийском субконтиненте представителей социальных групп, которых можно отнести к категории трансгендера. В статье даётся общая характеристика решения, его критический анализ, а также рассматриваются его последствия.

Ключевые слова: трансгендер, Индия, хиджра, конституционные права, третий пол, колониальные законы.

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The Categorical Other: Going Beyond the Gender Binary in Law in India

Introduction

In this day and age of human rights, it may seem that there is recourse against violations of fundamental rights on the basis of perceived difference as well as actual difference. However, constitutionally entrenched rights and claims against the state are often hard for certain groups of people to access, where, despite the constitutional notion of equality, they remain socially unequal.

Sexual and gender minorities may be said to be such a bloc. While the LGBTQI movement has gained momentum across the world, the T (as in trans*[1]) bloc is a minority within a minority – doubly marginalised, they have often been swept under the carpet in the larger rhetoric comprising of Lesbians and Gays. The perceived difference and the actual difference being stronger with the trans* people, they have been successfully "othered" and have often required to move ahead by themselves, while they are still grouped with sexual minorities.

When the British left the sub-continental area, in their wake they left two new nations and the beginnings of a third. India and Pakistan were born, and within a few decades, Bangladesh came about. However, while the nationhood initiated was new, the legal systems, which prevailed, were a mix of the old Mughal laws and what the colonial masters with their Victorian ideals had left behind. The colonial masters, with little understanding of the sub-continental values and cultures, had stepped out to "civilise" the natives in the 18th and 19th Century[2]. In turn, they, inadvertently, criminalised a full section of society under the penal codes on the basis of their sexual behaviour as well as gender dysphoria. The British imposed the Criminal Tribes Act[3], criminalising various bands of people including nomads and the transgender communities who identified themselves as *Hijras*. It was not till the late 20th Century that they were decriminalised in India – almost 40 years after the independence. However, decriminalising did not give them the social recognition they required – of being identified equal citizens, but under a separated gender marker beyond their bodily gender. Thus they kept on living on the fringes of the social fabric. Social acceptance of a trans* person in India is still a distant reality.[4]

When the new Constitution of India was drawn up, great care was taken to incorporate what the Indian Constitution calls Fundamental Rights (civil and political rights) and Directive Principles of State Policy (used to empower economic, social and cultural rights). It was written in the wake of the Second World War, when the world was just about coming to terms with the concept of human rights.

The Constitution of India guarantees fundamental rights to all its citizens, irrespective of sex and gender. However, in practice, it has been something of a challenge to try and create a space where rights are not seen as privileges granted to a meagre few, but universal claims against the State. Unlike countries like South Africa and Brazil, both of which have very detailed rights entrenched within their Constitutions (which were written about forty years after the Indian Constitution), India did not make any specific space within the legal framework for sexual and gender minorities. However, as we shall read below, the Constitution has been interpreted to include rather than exclude.

It was not till the National AIDS Control Organisation[5] took cognizance of the fact that HIV was a health hazard within the transgender community in India that people from the community achieved mainstream status – however, it was always under very specific circumstances – health issues, national conferences, and the spectre of HIV. The gaze was always that of difference, deviance and disease.

2009 was a landmark year in the field of LGBT activism in India. Many years of mainstream activism finally achieved the decriminalising of the LGBT community of India by the Delhi High Court[6]. This epoch-making decision angered many groups, es-

pecially the religious right wing. The case was taken on appeal to the Supreme Court of India by them, where, after many months of being in legal limbo, in 2013, the LGBT people were re-criminalised on the basis of their sexual behaviour. In other words, henceforth it was perfectly legal to be gay, but not to have gay sex.

However, in barely a few months from then the Supreme Court of India created a wave by granting trans* people the right to their own gender identification – male, female or other[7]. Thus, in a way, while the earlier decision takes away the right to sexual gratification in non-procreative manners, the latter decision gives transgender people autonomy over their bodies– to determine which side of the gender spectrum they fall on, or whether they are a separate category - a third gender[8] – thus creating legal space for them to exist within the constitutional ambit. The decision, however, was received with misgivings within the trans* community itself with the way it has handled various definitions and exactly what it is supposed to be interpreted as.

This article engages with the decision handed down by the Supreme Court of India and analyses it. I shall go through the way the issue reached the Supreme Court's jurisdiction, from which I shall draw out the main features of the decision. Going from there, I shall analyse the decision in light of the previous decision on Section 377 of the Indian Penal Code, and point out its shortcomings and limitations in implementation, and the way forward.

1. Judicial Progress through the Courts of Law

When the case against Section 377 was initially filed, it was filed for the entire queer community but from the perspective of health issues, specifically HIV and how it affected the MSM, trans* and *Hijra* communities in India because of them being forced to carry on with their lives in a clandestine manner. In the mean time, in 2012, the instant case was filed to get trans* people the socio-legal space they have been denied for centuries as equal citizens and to ask for the recognition of the third gender category.

The National Legal Services Authority (henceforth referred to as NALSA) was set up as a statutory body[9] to aid people who were incapable of hiring legal help for themselves. In this case, NALSA brought a public interest litigation as the primary petitioner (more in line with the US Class Action Suits), representing the trans* people of India, especially the *Hijras*, asking the Court to give recognition to their plight, and their unengaged existence within the constitutional set-up of India. The other petitioners were Poojya Mata Nasib Kaur Ji Women Welfare Society and Laxmi Narayan Tripathi, more famously known as Laxmi, a *Hijra* activist.

The matter was filed directly at the Supreme Court of India[10] in September, 2012, as a civil Writ Petition.[11] The judgement was passed in April, 2014. It was heard by a two-judge bench, the judges being K.S. Panicker Radhakrishnan and Arjan Kumar Sikri, JJ[12].

1.1. Salient features of the decision

The decision acknowledges the marginalisation of the transgender community in India, and considers the non-recognition of their gender identity as a constitutional violation of articles 14 and 21 which state:

"Article 14. Equality before law.

The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

(…)

Article 21. Protection of life and personal liberty.

No person shall be deprived of his life or personal liberty except according to procedure established by law".[13]

It took cognizance of the different experiences submitted before the court by transgender people of specific communities. The petitioner invoked Article 21 multiple times[14] and the Court acknowledged that. It also read the Yogyakarta Principles[15] alongside the decision.

Most importantly, for the first time, the Supreme Court of India gave the Indian Judiciary a working definition of transgender as an "umbrella term for persons whose gender identity, gender expression or behaviour does not conform to their biological sex. TG may also takes *[sic]* in persons who do not identify with their sex assigned at birth, which include *Hijras*/Eunuchs who, in this writ petition describe themselves as "third gender" and they do not identify as either male or female"[16] while explaining further about the pre sexual reassignment

surgery and post sexual reassignment surgery gender identification and transsexuals[17].

Thus, the Supreme Court of India gave the following directives pertaining not just to civil and political rights, but also socio-economic rights[18]:

1. The Central and State Governments are to grant legal recognition of gender identity as chosen by the individual, be it male, female or the Third Gender.

2. The Third gender category has been officially acknowledged and recognised as the Court understands the need of fundamental rights to be available to every citizen, and considers the non-recognition of the Third Gender in all civil and criminal statues pertaining to marriage, divorce, adoption, etc. as discriminatory.

3. The Court gives the basis of the psyche of a person to determine the alternation between the gender binaries of male and female, and does not consider sexual reassignment surgery as a precondition for gender reassignment.

4. Measures need to be taken by the Central as well as State governments to mete out medical care to transgender people in the hospitals and also provide them with facilities specifically built for them. Within this scenario, it is also important that transgender people be given targeted and tailor-made measures regarding HIV interventions vis a vis cis gendered men and women.

5. Reservations are to be created in educational institutions and public appointments for transgender people as a socially and economically backward class, and other social welfare schemes are to be instituted.[19]

6. The community at large needs to be sensitised and made aware of transgender people and their need to regain their status and respect in society, and create a more inclusive environment, so that they may feel more at home with mainstream society and not live in exclusion on the fringes of humanity. Moreover, many psychological illnesses, which follow from social stigmatisation, the inability to deal with gender dysphoria and exclusion, need to be dealt with, such as self-stigmatisation, depression and suicidal tendencies.

2. Placing the decision in the socio-cultural and socio-legal context of India

2.1. Giving it a place in history

In order to base its decisions in the context of India, the Supreme Court looked into the historical background of the trans* people in India. It looked into religious texts, which speak of transgender people, such as the epics of *Ramayana* and *Mahabharata*[20], while also looking into the *Puranas*[21].

The Supreme Court looked into the role of transgender people in more recent times, such as in the courts of the Ottomans and the Mughals, and then looked at the British Colonial Empire in the sub-continental region where the first criminalisation of transgender people started as a specific group. A statute was put into place - the Criminal Tribes Act, 1871 - which allowed arrest without warrant of any of the people listed in the Act. The Act was repealed in 1949, but at the time, there was no debate on the need to step out of the sexual binary in the newly formed Parliament of India, for they were still trying to put together the Constitution.

At the same time, the Supreme Court of India briefly looked into Section 377 of the Indian Penal Code of 1860, which has been the subject of much litigation in the recent past as it criminalises peno-non-vaginal sexual behaviour without any exception[22]. As the Supreme Court had recently given its judgment on the constitutionality of the section, and why it should be retained as a blanket ban, the current bench refused to opine on it.

2.2. Modern Human Rights and India in the Comparative Perspective

India became independent from British domination in 1947, when the world was just recovering from the aftermath of the Second World War. A new rhetoric in human rights was taking shape, and the foundations for several organisations were laid around the same time, starting with the United Nations. In order to secure its own place in the new world order, India spoke up at the United Nations against apartheid in South Africa as soon as it was given a seat[23]. It also became a signatory to various international conventions and covenants in the following years.

The Supreme Court of India referred to multiple

international conventions[24] to which India is a signatory. It started with the Universal Declaration of Human Rights (hereinafter referred to as the UDHR), wherein India is a signatory since the very inception of the Declaration. It started with the very first article, which states "that all human beings are born free and equal in dignity and rights". Article 3 of the Universal Declaration of Human Rights states "that everyone has a right to life, liberty and security of person"[25].

While it is considered to be *jus cogens* today, at the time of its promulgation, it was a just a declaration. However, many of its values were laid out later in the International Convention on Civil and Political Rights (hereinafter referred to as the ICCPR) in 1966, from which the Supreme Court gleaned through Article 6 "that every human-being has the inherent right to life, which right shall be protected by law and no one shall be arbitrarily deprived of his life"[26]. It also read Article 5 of the UDHR with Article 7 of the ICCPR, from which it drew that "no one shall be subjected to torture or to cruel inhuman or degrading treatment or punishment"[27]. Article 12 of the UDHR and Article 17 of the ICCPR were read together, which call for the State's protection of a person from "arbitrary or unlawful interference with his privacy, family, home or correspondence". Article 16 of the ICCPR was given specific importance, wherein "[e]veryone shall have the right to recognition everywhere as a person before the law", an issue which has assailed trans* people across the globe, and not just in India.

The Supreme Court also referred to the United Nations Convention against Torture and Other Cruel Inhuman and Degrading Treatment or Punishment of 2008 that aims at the protection of persons or peoples marginalised or discriminated against. Specifically, it looked at paragraph 21 of the Convention, which requires ratifying States to prevent torture of and protect all people from ill treatment, irrespective of sexual orientation and gender identity, especially in contexts of people being in the custody of the State. It went further to look into the General Comment No. 20 of the UN Committee on Economic, Social and Cultural Rights on the issue of non-discrimination that also mentions sexual orientation and gender identity: "'Other status' as recognized in article 2, paragraph 2, includes sexual orientation. States parties should ensure that a person's sexual orientation is not a barrier to realizing Covenant rights, for example, in accessing survivor's pension rights. In addition, gender identity is recognized as among the prohibited grounds of discrimination, for example, persons who are transgender, transsexual or intersex, often face serious human rights violations, such as harassment in schools or in the workplace."[28]

While looking at documents such as the UDHR and the ICCPR, the Court also referred to the Yogyakarta Principles on the application of International Human Rights law in relation to sexual orientation and gender identity and acknowledged the validity of the Principles, citing various UN bodies who have also acknowledged the Principles. The main aspects referred to by them are as follows[29]:

"Principle 1. The Right to the Universal Enjoyment of Human Rights

All human beings are born free and equal in dignity and rights. Human beings of all sexual orientations and gender identities are entitled to the full enjoyment of all human rights.

States shall:

a) Embody the principles of the universality, interrelatedness, interdependence and indivisibility of all human rights in their national constitutions or other appropriate legislation and ensure the practical realisation of the universal enjoyment of all human rights;

b) Amend any legislation, including criminal law, to ensure its consistency with the universal enjoyment of all human rights;

c) Undertake programmes of education and awareness to promote and enhance the full enjoyment of all human rights by all persons, irrespective of sexual orientation or gender identity;

d) Integrate within State policy and decision-making a pluralistic approach that recognises and affirms the interrelatedness and indivisibility of all aspects of human identity including sexual orientation and gender identity.

Principle 2. The Rights to Equality and Non-discrimination

Everyone is entitled to enjoy all human rights without discrimination on the basis of sexual orientation or gender identity. Everyone is entitled to equality before the law and the equal protection of

the law without any such discrimination whether or not the enjoyment of another human right is also affected. The law shall prohibit any such discrimination and guarantee to all persons equal and effective protection against any such discrimination.

Discrimination on the basis of sexual orientation or gender identity includes any distinction, exclusion, restriction or preference based on sexual orientation or gender identity which has the purpose or effect of nullifying or impairing equality before the law or the equal protection of the law, or the recognition, enjoyment or exercise, on an equal basis, of all human rights and fundamental freedoms. Discrimination based on sexual orientation or gender identity may be, and commonly is, compounded by discrimination on other grounds including gender, race, age, religion, disability, health and economic status.

States shall:

a) Embody the principles of equality and non-discrimination on the basis of sexual orientation and gender identity in their national constitutions or other appropriate legislation, if not yet incorporated therein, including by means of amendment and interpretation, and ensure the effective realisation of these principles;

b) Repeal criminal and other legal provisions that prohibit or are, in effect, employed to prohibit consensual sexual activity among people of the same sex who are over the age of consent, and ensure that an equal age of consent applies to both same-sex and different-sex sexual activity;

c) Adopt appropriate legislative and other measures to prohibit and eliminate discrimination in the public and private spheres on the basis of sexual orientation and gender identity;

d) Take appropriate measures to secure adequate advancement of persons of diverse sexual orientations and gender identities as may be necessary to ensure such groups or individuals equal enjoyment or exercise of human rights. Such measures shall not be deemed to be discriminatory;

e) In all their responses to discrimination on the basis of sexual orientation or gender identity, take account of the manner in which such discrimination may intersect with other forms of discrimination;

f) Take all appropriate action, including programmes of education and training, with a view to achieving the elimination of prejudicial or discriminatory attitudes or behaviours which are related to the idea of the inferiority or the superiority of any sexual orientation or gender identity or gender expression.

Principle 3. The Right to recognition before the law

Everyone has the right to recognition everywhere as a person before the law. Persons of diverse sexual orientations and gender identities shall enjoy legal capacity in all aspects of life. Each person's self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom. No one shall be forced to undergo medical procedures, including sex reassignment surgery, sterilisation or hormonal therapy, as a requirement for legal recognition of their gender identity. No status, such as marriage or parenthood, may be invoked as such to prevent the legal recognition of a person's gender identity. No one shall be subjected to pressure to conceal, suppress or deny their sexual orientation or gender identity.

States shall:

a) Ensure that all persons are accorded legal capacity in civil matters, without discrimination on the basis of sexual orientation or gender identity, and the opportunity to exercise that capacity, including equal rights to conclude contracts, and to administer, own, acquire (including through inheritance), manage, enjoy and dispose of property;

b) Take all necessary legislative, administrative and other measures to fully respect and legally recognise each person's self-defined gender identity;

c) Take all necessary legislative, administrative and other measuresto ensure that procedures exist whereby all State-issued identity papers which indicate a person's gender/sex — including birth certificates, passports, electoral records and other documents — reflect the person's profound self-defined gender identity;

d) Ensure that such procedures are efficient, fair and non-discriminatory, and respect the dignity and privacy of the person concerned;

e) Ensure that changes to identity documents will be recognised in all contexts where the identification or disaggregation of persons by gender is required by law or policy;

f) Undertake targeted programmes to provide social support for all persons experiencing gender transitioning or reassignment.

Principle 4. The Right to Life

Everyone has the right to life. No one shall be arbitrarily deprived of life, including by reference to considerations of sexual orientation or gender identity. The death penalty shall not be imposed on any person on the basis of consensual sexual activity among persons who are over the age of consent or on the basis of sexual orientation or gender identity.

States shall:

a) Repeal all forms of crime that have the purpose or effect of prohibiting consensual sexual activity among persons of the same sex who are over the age of consent and, until such provisions are repealed, never impose the death penalty on any person convicted under them; (…)

c) Cease any State-sponsored or State-condoned attacks on the lives of persons based on sexual orientation or gender identity, and ensure that all such attacks, whether by government officials or by any individual or group, are vigorously investigated, and that, where appropriate evidence is found, those responsible are prosecuted, tried and duly punished.

Principle 9. The Right to Treatment with Humanity while in Detention

Everyone deprived of liberty shall be treated with humanity and with respect for the inherent dignity of the human person. Sexual orientation and gender identity are integral to each person's dignity.

States shall:

a) Ensure that placement in detention avoids further marginalising persons on the basis of sexual orientation or gender identity or subjecting them to risk of violence, ill-treatment or physical, mental or sexual abuse; (…)

d) Put protective measures in place for all prisoners vulnerable to violence or abuse on the basis of their sexual orientation, gender identity or gender expression and ensure, so far as is reasonably practicable, that such protective measures involve no greater restriction of their rights than is experienced by the general prison population; (…)

f) Provide for the independent monitoring of detention facilities by the State as well as by non-governmental organisations including organisations working in the spheres of sexual orientation and gender identity;

g) Undertake programmes of training and awareness-raising for prison personnel and all other officials in the public and private sector who are engaged in detention facilities, regarding international human rights standards and principles of equality and non-discrimination, including in relation to sexual orientation and gender identity.

Principle 18. Protection from Medical Abuses

No person may be forced to undergo any form of medical or psychological treatment, procedure, testing, or be confined to a medical facility, based on sexual orientation or gender identity. Notwithstanding any classifications to the contrary, a person's sexual orientation and gender identity are not, in and of themselves, medical conditions and are not to be treated, cured or suppressed.

States shall:

a) Take all necessary legislative, administrative and other measures to ensure full protection against harmful medical practices based on sexual orientation or gender identity, including on the basis of stereotypes, whether derived from culture or otherwise, regarding conduct, physical appearance or perceived gender norms;

b) Take all necessary legislative, administrative and other measures to ensure that no child's body is irreversibly altered by medical procedures in an attempt to impose a gender identity without the full, free and informed consent of the child in accordance with the age and maturity of the child and guided by the principle that in all actions concerning children, the best interests of the child shall be a primary consideration; (…)

e) Review and amend any health funding provisions or programmes, including those of a development-assistance nature, which may promote, facilitate or in any other way render possible such abuses;

f) Ensure that any medical or psychological treatment or counselling does not, explicitly or implicitly, treat sexual orientation and gender identity as medical conditions to be treated, cured or suppressed.

Principle 19. The Right to Freedom of Opinion and Expression

Everyone has the right to freedom of opinion and expression, regardless of sexual orientation or gender identity. This includes the expression of identity or personhood through speech, deportment, dress, bodily characteristics, choice of name, or any other means, as well as the freedom to seek, receive and impart informational and ideas of all kinds, including with regard to human rights, sexual orientation and gender identity, through any medium and regardless of frontiers.

States shall:

a) Take all necessary legislative, administrative and other measures to ensure full enjoyment of freedom of opinion and expression, while respecting the rights and freedoms of others, without discrimination on the basis of sexual orientation or gender identity, including the receipt and imparting of information and ideas concerning sexual orientation and gender identity, as well as related advocacy for legal rights, publication of materials, broadcasting, organisation of or participation in conferences, and dissemination of and access to safer-sex information;

b) Ensure that the outputs and the organisation of media that is State-regulated is pluralistic and non-discriminatory in respect of issues of sexual orientation and gender identity and that the personnel recruitment and promotion policies of such organisations are non-discriminatory on the basis of sexual orientation or gender identity;

c) Take all necessary legislative, administrative and other measures to ensure the full enjoyment of the right to express identity or personhood, including through speech, deportment, dress, bodily characteristics, choice of name or any other means;

d) Ensure that notions of public order, public morality, public health and public security are not employed to restrict, in a discriminatory manner, any exercise of freedom of opinion and expression that affirms diverse sexual orientations or gender identities;

e) Ensure that the exercise of freedom of opinion and expression does not violate the rights and freedoms of persons of diverse sexual orientations and gender identities;

f) Ensure that all persons, regardless of sexual orientation or gender identity, enjoy equal access to information and ideas, as well as to participation in public debate."

Apart from looking into the above-mentioned principles, the Court considered persuasive jurisprudence from around the world on sexual reassignment surgery, starting with the United Kingdom. *Corbett v. Corbett*[30] was a decision narrowly tailoring gender requirements as fixed at birth, despite any sexual reassignment surgery. The same decision was followed in *R. v. Tan.*[31] Other countries in the Commonwealth such as Australia and New Zealand have not upheld the decision of Corbett, and have actually criticised it for being a poor decision. The Court positively acknowledged the New Zealand case of *Attorney General v. Otahuhu Family Court*[32] and decided that once a Transsexual is operated on, the person cannot "operate in his or her original sex"[33] thus making it imperative for the post-operative scenario to be suited for the person to embrace his or her new gender. Australia went a step further in a case regarding the validity of a marriage, in *Re Kevin*[34] by saying that the relevant statute defining marriage should be allowed to mean "man" and "woman" in a marriage in a contemporary capacity – thus it should include people in their post-operative capacities.

Another case from New Zealand, *Secretary, Department of Social Security v. "SRA"* [35] specifically pointed out that *Corbett* and *Tan* should not be followed as the decisions were based on biological determinism and did not take other aspects into consideration.

In *Bellinger v. Bellinger*[36], the House of Lords, once again, went ahead on the same path as Corbett and did not give any importance to the psychological factor in the case of trans* people.

Malaysia, however, took *Corbett's* principle of biological determinism in *Re J G*[37], but backed it up by medical counsel and affirmed the gender reassignment of a woman post- surgery while including the psychological aspect of the person.

The Supreme Court of India looked into the European Court of Human Rights' judgment in *Christine Goodwin v. United Kingdom*[38] which stated that the UK not following up a sexual reassignment surgery by a gender change on paper is bad in law as it infringes upon human dignity and freedom. After this decision, the UK passed the General Recommendation Act, 2004, wherein even without sexual

reassignment surgery, gender reassignment may be carried out on the basis of a person's psyche.

Australia, while it had the Sex Discrimination Act, 1984, in place to prevent discrimination on the basis of gender, amended it in 2013 to redefine gender identity to go beyond biological and medical determining factors, and considers a person to be aggrieved if discriminated against on the basis of sexual orientation or on the basis of gender identity.

The United States of America is considered to be inconsistent due to its highly federalist nature. State Laws differ from each other, but nevertheless the Center has passed the The Matthew Shepard and James Byrd. Jr. Hate Crimes Prevention Act, 2009, which increases the extent of Federal Hate-crime Law by expanding it to offences incited by actual or perceived gender identity.

South African laws provide for the change of gender status post-operation under the Alteration of Sex Description and Sex Status Act, 2003. However, South Africa does not give a very inclusive definition of transgender, and excludes any person who does not undergo sexual reassignment surgery.

At the same time, Argentina has shown greater inclusiveness[39] than South Africa, where gender reassignment is not dependent on sexual reassignment surgeries[40] (akin to the General Recommendation Act of the UK).

Germany has promulgated law allowing non-cis gendered children to be named without sexual categorisation, as well as allowed "X" as a category for passport gender identification along with "M" and "F" for those trans* people who do not identify with either male or female[41].

Thus, the Indian Supreme Court, while being very careful to point out that they wouldn't consider any international law repugnant to the Indian Constitution and laws, it very firmly planted the decision in the lap of an intersection of international covenants to which India is party to, persuasive international jurisprudence to the fundamental rights guaranteed to each and every citizen within the Indian Constitution, as is described below.

3. The Indian Take on Transgender people

Importantly, the Supreme Court of India gives descriptions of the indigenous transgender communities in India, who have existed throughout the history of the sub-continent, and have parallel communities in Pakistan, Nepal and Bangladesh. It examines the report of United Nation's Development Programme, "*Hijras*/Transgender Women in India: HIV Human Rights and Social Exclusion", published in December 2010, which looks at the specific populations of sexual and gender minorities as well as statistical details of HIV prevalence.

In this context it outlined various recommendations for lowering HIV prevalence rates, which the Supreme Court of India looked into, while at the same time acknowledging that there are community-specific issues faced by gender non-conforming people:

" 1. Address the gape *[sic]* in NACP-III: establish HIV sentinel serosurveillance sites for *Hijras*/TG at strategic locations; conduct operations research to design and fine-tune culturally-relevant package of HIV prevention and care interventions for *Hijras*/TG; provide financial support for the formation of CBOs run by *Hijras*/TG; and build the capacity of CBOs to implement effective programmes.

2. Move beyond focusing on individual-level HIV prevention activities to address the structural determinants of risks and mitigate the impact of risks. For example, mental health counseling, crisis intervention (crisis in relation to suicidal tendencies, police harassment and arrests, support following sexual and physical violence), addressing alcohol and drug abuse, and connecting to livelihood programs all need to be part of the HIV interventions.

3. Train health care providers to be competent and sensitive in providing health care services (including STI and HIV-related services) to *Hijras*/TG as well as develop and monitor implementation of guidelines related to gender transition and sex reassignment surgery (SRS).

4. Clarify the ambiguous legal status of sex reassignment surgery and provide gender transition and SRS services (with proper pre-and post-operation/transition counseling) for free in public hospitals in various parts in India.

5. Implement stigma and discrimination reduction measures at various settings through a variety of ways: mass media awareness for the general public to focused training and sensitization for police and health care providers.

6. Develop action steps toward taking a position on legal recognition of gender identity of *Hijras*/TG need to be taken in consultation with *Hijras*/TG and other key stakeholders. Getting legal recognition and avoiding ambiguities in the current procedures that issue identity documents to *Hijras*/TGs are required as they are connected to basic civil rights such as access to health and public services, right to vote, right to contest elections, right to education, inheritance rights, and marriage and child adoption.

7. Open up the existing Social Welfare Schemes for needy *Hijras*/TG and create specific welfare schemes to address the basic needs of *Hijras*/TG including housing and employment needs.

8. Ensure greater involvement of vulnerable communities including *Hijras*/TG women in policy formulation and program development."[42]

The Supreme Court also acknowledged the fact that gender non-conformists face social exclusion and discrimination, and while there may be a growing space for different gender narratives when it comes to male-to-female trans people in India (including *Hijras*), female-to-male trans people lack visibility. However, the fact that their visibility is low does not mean that they have a lesser violence, social exclusion or discrimination to deal with. They also acknowledged that the Constitution of India does not use the gender binary when it refers to individuals, but to "persons, thus giving them the scope to expand and elucidate the inclusiveness of the Constitution.

Among the Fundamental Rights in the Constitution of India[43], the Supreme Court based its decisions on the following articles:

- The right to equality[44], comprising of equality and equal protection before the law, non-discrimination on any grounds, including caste[45] and sex. This constitutional provision also gives the parliament the authority and power to provide affirmative action where required.

The Constitution of India often uses the word "person" as opposed to the gender binary, which gave the Supreme Court the scope to expand on the inclusiveness of the Constitution. In order to mitigate the extreme discrimination faced by the non-recognition of trans* people in India, the Supreme Court read them with the Directive Principles of State Policy asking for social equality[46].

The Supreme Court also looked into Articles 19 (1) and 21[47], which guarantee the right of freedom and the right to life and liberty to all citizens. The right to freedom includes speech and expression, assembly and unionization and the right to practice any line of work as long as it is lawful – something which is particularly pertinent for trans* people, given that they are socially shunned, thus making it difficult for them to attain mainstream employment.

Thus, after acknowledging the fact that Pakistan and Nepal have already upheld the recognition of local trans* people in their own chosen identity, and that various states within India have taken measures to alleviate the plight of trans* people already, the Supreme Court of India gave legal recognition to the need for a "third gender" and directed the government to make necessary changes across all laws so as to not infringe on any right, especially to equality, privacy and family[48] and spoke of gender identity as one of the most fundamental aspects of life and defines it in detail –

"Gender identity is one of the most-fundamental aspects of life which refers to a person's intrinsic sense of being male, female or transgender or transsexual person. A person's sex is usually assigned at birth, but a relatively small group of persons may born with bodies which incorporate both or certain aspects of both male and female physiology. At times, genital anatomy problems may arise in certain persons, their innate perception of themselves, is not in conformity with the sex assigned to them at birth and may include pre and post-operative transsexual persons and also persons who do not choose to undergo or do not have access to operation and also include persons who cannot undergo successful operation. Countries, all over the world, including India, are grappled with the question of attribution of gender to persons who believe that they belong to the opposite sex. Few persons undertake surgical and other procedures to alter their bodies and physical appearance to acquire gender characteristics of the sex which conform to their perception of gender, leading to legal and social complications since official record of their gender at birth is found to be at variance with the assumed gender identity. Gender identity

refers to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body which may involve a freely chosen, modification of bodily appearance or functions by medical, surgical or other means and other expressions of gender, including dress, speech and mannerisms. Gender identity, therefore, refers to an individual's self-identification as a man, woman, transgender or other identified category."[49]

For the first time in the judicial history of independent India, the Supreme Court of India gave a highly comprehensive non-legalistic definition of gender, which may open up the gateways for more rights' litigation in the future, and is being viewed most optimistically by lawyers and activists alike.

4. Not All is Rosy: The Problematics of the Judgment

4.1. Of Bemusements and Confusions

At the outset, the judgment seems to be a paean on self-determination and the right to bodily autonomy. However, while going through it, one cannot help but feel that it is more about putting the trans*/*Hijra* populations of India into a manageable category. For instance, on page 102 of the judgment, the Court says the following:

"In order to translate the aforesaid rights of TGs into reality, it becomes imperative to first assign them their proper 'sex'. As TGs in India, are neither male nor female, treating them as belonging to either of the aforesaid categories, is the denial of these constitutional rights."

Paragraph 34 of the judgment goes to the extent of stating that, in order to determine transgenderism/transsexuality, among trans* people who have undergone sexual reassignment surgery, a Psychological test ought to be used, as the person's thought process would receive primacy "because psychological factor and thinking of transsexual has to be given primacy than binary notion of gender of that person. Seldom people realize the discomfort, distress and psychological trauma, they undergo and many of them undergo "Gender Dysphoria' which may lead to mental disorder." This language, at best, is ambiguous and confusing.

In paragraph 106, the confusion goes unchecked, when the Court goes to the extent of stating that "a person has a constitutional right to get the recognition as male or female after SRS, which was not only his/her gender characteristic but has become his/her physical form as well." This suggests that those who identify themselves as the third gender are not required to undergo any gender alignment surgery, but those who want to be identified on either side of the gender binary – as either male or female – cannot do so merely on the basis of a psychological evaluation[50]. Fortunately, the final judgment in paragraph 129, sub-paragraph 5, in contradiction to whatever has been previously stated, says "any insistence for SRS for declaring one's gender is immoral and illegal."

When reading the judgment, the conflation of terms and the ambiguous nature of various parts of the decision is highly pronounced, not to mention the glaring mistakes it makes in getting to where it did. For instance, page 93 of the judgment states:

"107. At the outset, it may be clarified that the term 'transgender' is used in a wider sense, in the present age. Even Gay, Lesbian, bisexual are included by the descriptor 'transgender'."

It continues on a similar note, and specifically mentions that Hijras are incapable of being parents in their biological capacity and that all of them refer to themselves under the umbrella of the third gender[51]. This is problematic on a variety of levels as not all *Hijras* undergo castration, emasculation or sexual reassignment surgery. Also, many of them may refer to themselves as cis-gendered men or women.

4.2. The Problem of Reservations under the OBC Categorization

From the very outset of the Indian Constitution, room had been made for affirmative action in order to make marginalized groups and minorities enjoy equal rights enshrined in the Constitution. Scheduled Castes and Scheduled Tribes are affirmative action categories, which are given a high degree of reservations in seats across governmental institutions. Another category is the "Other Backward Castes" or OBC category, under which people are given reservations as well, over and above Scheduled Castes and Tribes.

However, in a place like India, there is no blanket identity solution for all. Every region has its own set of social rules and regulations, dominant religions and so on. The intersection of caste with the *Hijra* population in India is as intricate as caste interactions with every other Hindu citizen. Within the *Hijra* population, there are people who identify themselves as upper caste, as Dalits[52] (some of whom are categorized under Scheduled Caste) and some identify as Muslim or Christian (both minority religions in India, and which are part of affirmative action programmes) as well. Thus, the Supreme Court's decision to categorise all *Hijras* as OBC has brought about a dilemma[53] – what happens to those who identify as upper caste? What happens to those who are already under the Scheduled Caste?

5. Who is trans* enough?

5.1. Subjecting all Indian Trans People to a Similar Classification*

India was formed as a unionisation of several princely states that (for the most part), in 1947, acceded to the Indian constitution in favour of a constitutional democracy. This brought together different ethnicities, different religions, different languages and ideas of internal self-determination which are practiced till today, with larger states breaking up to form smaller states along ethnic lines and language lines[54]. With all these regional differences, even trans* people are regarded differently in different states, and by the time the Supreme Court decision came out, some states had already taken several steps to make local trans* people feel more included and protected.

Indian trans* people do not all identify within the ethnic indigenous markers of *Hijra* and other regional group names. Many of them feel uncomfortable about identifying themselves with the indigenous trans* groups because of the social stigma attached to them.

Thus, with a decision which talks mostly about granting a "third gender" status for all trans* people in India, those who are not a part of the majority rhetoric can fall through the sieve of the identity markers being decided by the court of law.

5.2. The Aftermath of the Decision

After the Supreme Court handed down the decision, the celebrations were marred by discontent from some activists for whom the decision was felt to be half-hearted[55]. Also, the issues of quota and affirmative action politics have come to the surface as well. With new trans* welfare boards being set up in different states which do not yet have an established rule book on who is trans* enough to qualify for the special benefits[56], different politics are playing in regional politics. Those trans* people who do not identify with indigenous trans* markers may not get the recognition they deserve.

Several higher education institutions took on the initiative of including quotas for trans* people in their admission rules[57]. However, several children who start identifying as trans* in their adolescent years often drop out of school due to the fear of being bullied or being misunderstood, thus making it impossible for them to reach higher education. As pointed out by the transgender activist Simran Shaikh, "a more holistic approach within the education system would definitely encourage more trans* children to finish schooling and pursue higher education".[58]

In 2015, a new bill on transgender issues was passed in Rajya Sabha, the Upper House of the Indian Parliament. This bill was brought in by a political leader, Mr. Tiruchi Siva, and encompassed several issues including "social inclusion, rights and entitlements, financial and legal aid, education, skill development to prevention of abuse, violence and exploitation"[59]. However, this bill would require more working on, and can

With all this has come the need voiced by several people of having a National Commission to bring about a parity in the functioning of the various state level boards which are being formed.

Conclusion: A Pessimistic Take on an Optimistic Decision

The queer rights movement has suffered a definite setback because of Section 377 being kept intact in the *Naz* case, despite ample pressure from non-governmental bodies, people's movements and the primary stakeholders speaking out, along with support offered by some sections of the Indian government.

When embarking on deciding on the NALSA case, the Supreme Court mentioned that they would not go into the previous decision of the Court on Section 377, which had been decided by a different bench.[60]

However, just the way the *Naz* case had depended on the HIV gaze, so did this decision - with health needs being cited as the mainstay of the decision, from which, of course, the Supreme Court went further, iterating the long suppressed rights of the trans* population of India.

In the NALSA decision, the Supreme Court has definitely given hope by empowering one aspect of the sexual and gender minorities, wherein it has accepted and acknowledged that "gender identification becomes very essential component which is required for enjoying civil rights by this community. It is only with this recognition that many rights attached to the sexual recognition as 'third gender' would be available to this community more meaningfully viz. the right to vote, the right to own property, the right to marry, the right to claim a formal identity through a passport and a ration card, a driver's license, the right to education, employment, health so on"[61] but has given out a decision which seems to be conflicting with its previous decision on Section 377. When the Court has decided that the right to marry and have a family life is to be enforced for trans* people, it overlooks the situation wherein non-procreative sexual acts have been re-criminalised but they are the primary sexual behaviour of the gender minority in question. Does the Supreme Court, thus, mean that a trans* person has the right to marry, but cannot have sexual intercourse with his/her/zher partner?

The Supreme Court of India has indicated that the Constitution grants equal rights to all humans, and that it is time for "social justice"[62] to be done for the trans* population. However, the social reality of trans* people in India is such that mere legal changes will not be enough - there are several hundred *Hijras* out there who still lack basic amenities to survive on, have to beg for a living and often are ignorant of their HIV status. Empowered trans* people who have access to medical facilities, courts of law and other things which cis-gendered men and women take for granted are few and far between.

Deciding on a matter of constitutional importance, the Supreme Court of India has openly discussed legal theorists in its judgment and taken the idea of Rule of Law and advanced it beyond the definition and made it expansive. This also allows for future endeavours in making social justice claims on the basis of legal theories both old and new coupled with lived experiences.

This paper has endeavoured to shed light on certain aspects of the decision, as given its magnitude, it is not possible to look into every minute aspect of it in one article. While holding the beacon of great expectations for the decision, the paper has tried to critique the ambiguities that have come to light within the judgment itself.

In light of the decision, we can hope that it is not going to be a matter of tokenism, and that economic and political justice will actually be done for a much-maligned segment of the population.

Notes

1 For the sake of this paper, Trans* (and trans*) shall be used to include all groups of transgender, transsexual and transvestite people in India, as well as *Hijras*. *Hijras* are defined as a cultural group found mainly on the sub-continental area of India, Pakistan and Bangladesh, of mostly male-to-female cross dressers who may identify themselves as transgender, but have more often referred to themselves as a "third gender".

2 While the sub-continental region was colonized not just by the British, but also by the Portuguese and the French, it was the British domination which left a far more lasting mark on the peoples of this area, including the law.

3 Promulgated originally in 1871, covering many tribes of people, including traveling salesmen, gypsies and the indigenous trans* tribes referred to as the *Hijras* (who were identified as eunuchs). This Act went into great details about what made these tribes dangerous and criminal in nature – either through "inborn" criminal tendencies or nurturing. In 1952, after the independence of India, this Act was replaced with the Habitual Offenders' Act, and many tribes were de-notified (de-criminalised), including the *Hijras*. This would probably be the best example of the imperial need to regulate and classify everyone and everything seen as the colonized.

4 A report by the United Nations' Development Programme states that "[a] primary reason (and conse-

quence) of the exclusion is the lack of (or ambiguity in) legal recognition of the gender status of *Hijras* and other transgender people" in Chakrapani, Venkatesan and Narrain, Arvind, *Legal Recognition of Gender Identity of Transgender People in India: Current Situation and Potential Options,* in UNDP Policy Brief, 2012, India. However, while the legal reality may have changed, social realities are often hard to evolve.

5 The National AIDS Control Organisation, often referred to as NACO, was formed in 1992 in India, in order to implement the National AIDS Control Programme which was brought about a few years after the first case of HIV was detected in India. In order to find out more about their programmes and areas of implementation, please refer to http://www.naco.gov.in/.

6 *Naz Foundation v. Government of NCT and Delhi* (2009), 160 Delhi Law Times 277, overturned by the Supreme Court of India in *Suresh Kumar Kaushal and Anr. v. Naz Foundation and ors.,* Civil Appeal No. 10972 of 2013 (referred to as Kaushal v. Naz hereinafter). The law in question is Section 377 of the Indian Penal Code, 1860, which, by itself does not outlaw non-normative sexuality, but non-normative, non-procreative sexual behavior.

7 *National Legal Services Authority v. Union of India*, WP (Civil) No 604 of 2013, decided on April 15, 2014, henceforth referred to as the Judgment, available online at http://supremecourtofindia.nic.in/outtoday/wc40012.pdf (last accessed 09-09-2014).

8 This, by itself, is problematic as it does not take into account various aspects of gender fluidity which is a highly debated topic by itself. The decision catered in many ways to the *Hijras* of India, more than the trans* population, but does expand its scope. The negative aspects have been discussed later in the paper.

9 The National Legal Services Authority Act, 1994. For the full text of the Act, please go to http://nalsa.gov.in/actrules.html (last accessed on 09-09-2014).

10 The Supreme Court of India is the highest Court of the land, and a court of original jurisdiction if any person wants to raise an issue of constitutional importance. Otherwise it acts as an appellate court for all the High Courts of the various states, who also have a limited original jurisdiction, and act as an appellate jurisdiction for all lower district-level Courts. The decision of the Supreme Court of India is binding across the country, and the Legislature is expected to follow it up with legislations to help strengthen it.

11 The Indian Judiciary has been very proactive in initiating public interest litigation, especially under the aegis of the former Justice P N Bhagwati. This was a way for the judiciary to react against the high-handedness of the Prime Minister, Indira Gandhi, and her actions during the period of "emergency" she had declared in India between 1975-77. This period saw the absolute derogation of fundamental rights (aka human rights). For more information on the emergency, and its aftermath, refer to Kuldip Nayar, *The Judgement: Inside Story of the Emergency in India* (1977-Vikas Publishing House).

12 The main body of the decision was drafted by Radhakrishnan J., with Sikri J. agreeing with every aspect of it, adding to the critique of the historical discrimination faced by Trans* people in India. Instead of taking the name of the justices individually, for the sake of brevity, I have referred to the judgment as that of the Supreme Court of India.

13 The full text of the Constitution of India is accessible online on http://www.constitution.org/cons/india/const.html.

14 P. 5, Judgment.

15 "In 2006, in response to well-documented patterns of abuse, a distinguished group of international human rights experts met in Yogyakarta, Indonesia to outline a set of international principles relating to sexual orientation and gender identity. The result was the Yogyakarta Principles: a universal guide to human rights which affirm binding international legal standards with which all States must comply. They promise a different future where all people born free and equal in dignity and rights can fulfil that precious birthright." – taken from http://www.yogyakartaprinciples.org/ (last accessed 09-09-14). These principles are considered to be the first of its kind wherein sexual and gender minorities are expressly spoken about in a highly inclusive manner, and specific issues faced by them due to non-recognition, mis-recognition by multiple countries are outlined and the need to prevent atrocities arising out of them is also given out.

16 P. 9, Judgment.

17 The Supreme Court of India hastens to state that it is deciding only on the matters of the Indian transgendered people, notably the *Hijras*, and not the umbrella term of transgender as generally understood globally. I have delved into this later on in the paper.

18 Distilled from the judgment. The Court gave these directives in light of the Ministry of Social Justice and Empowerment Expert Committee Report on Issues Relating to Transgenders, available online at http://socialjustice.nic.in/transgenderpersons.php.

[19] The state of Tamil Nadu instituted a pension programme for transgender people, which was announced in September 2012, and has been launched since. For the press release, please go to http://www.tn.gov.in/advanced_search/pension?page=12&set=1.

[20] The *Ramayana* and the *Mahabharata* are two epics of the subcontinent in which the heroes are supposed to be incarnations of the Hindu God Vishnu, and characters (also often tied to various Hindu Gods) in the epics are seen to change their gender as well as act as transvestites. These epics are considered to be not just of mythological significance, but also of religious significance, given that they are tied to the Hindu pantheon. For more information through a non-religious ontological account on the Hindus, please read Doninger, Wendy, *The Hindus: An Alternative History* (New York: Penguin, 2009).

[21] The *Puranas* are ancient Indian texts eulogising various divinities of the Hindu Pantheon, and often refer to various Gods and Demi-Gods taking of the form of the opposite gender as characters in stories.

[22] *Kaushal v. Naz*.

[23] The United Nations General Assembly of 1946, where India was given a seat even before gaining independence. For a detailed analysis of India's position in the UN General Assembly, please refer to Lloyd, Lorna, 'A Most Auspicious Beginning': The 1946 United Nations General Assembly and the Question of the Treatment of Indians in South Africa, *Review of International Studies*, Vol. 16, No. 2 (Apr., 1990), pp. 131-153, Cambridge University Press, available online at http://www.jstor.org/stable/20097216.

[24] Judgment, pp. 53-54, para. 47.

[25] *Ibid.*

[26] *Ibid.*

[27] *Ibid.*

[28] See Judgment, para. 23, p. 28.

[29] For the sake of brevity, I have omitted certain parts of the principles.

[30] (1970) 2 AER 33 at 48 f/g.

[31] (1983) Q.B. 1053, a case of a transgender woman being sentenced for prostitution, which brought up the issue of whether she was to be tried as a man or a woman, the effect being harsher penalties for males.

[32] (1994) 12 FRNZ 643.

[33] Judgment, p. 30.

[34] (2001) Fam CA 1074.

[35] (1993) 43 FCR 299.

[36] (2003) 2 All ER 593.

[37] JG v. Pengarah Jabatan Pendaftaran Negara (2006) 1 MLJ 90.

[38] Application No.28957/95, Judgment of 11 July 2002.

[39] Argentina Gender Identity Law (2012) – the English translation is available online at http://tgeu.org/argentina-gender-identity-law/.

[40] *Ibid.*, Article 3.

[41] An article on it in The Guardian described the situation succinctly, as well as what the reactions were from all parts of society:, Nandi, Jacinta, "Germany got it right by offering a third gender option on birth certificates", *The Guardian*, November 10, 2013, available online at http://www.theguardian.com/commentisfree/2013/nov/10/germany-third-gender-birth-certificate.

[42] Page 12, "*Hijras*/Transgender women in India: HIV, Human Rights and Social Exclusion" *United Nations Development Programme Issue Brief*, December 2010, available online at http://www.undp.org/content/dam/india/docs/Hijras_transgender_in_india_hiv_human_rights_and_social_exclusion.pdf.

[43] Part III, Constitution of India.

[44] Articles 14,15 and 16 viz.:

14. Equality before law.

The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

15. Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.

(1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

(2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to-

(a) access to shops, public restaurants, hotels and places of public entertainment; or

(b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.

(3) Nothing in this article shall prevent the State from making any special provision for women and children.

(4) Nothing in this article or in clause (2) of article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.]

16. Equality of opportunity in matters of public employment.

(1) There shall be equality of opportunity for all citizens in matters relating to employment or appoint-

ment to any office under the State.
(2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.
(3) Nothing in this article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an office _11[under the Government of, or any local or other authority within, a State or Union territory, any requirement as to residence within that State or Union territory] prior to such employment or appointment.
(4A) Nothing in this article shall prevent the State from making any provision for reservation in matters of promotion to any class or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes which, in the opinion of the State, are not adequately represented in the services under the State.]
(4B) Nothing in this article shall prevent the State from considering any unfilled vacancies of a year which are reserved for being filled up in that year in accordance with any provision for reservation made under clause (4) or clause (4A) as a separate class of vacancies to be filled up in any succeeding year or years and such class of vacancies shall not be considered together with the vacancies of the year in which they are being filled up for determining the ceiling of fifty per cent. reservation on total number of vacancies of that year.]
(5) Nothing in this article shall affect the operation of any law which provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination.

[45] Caste is a unique feature of the social scenario in India and Nepal, which is followed by the Hindus. What was essentially a relatively fluid system of social demarcations became rigid over the warping of the system over many millennia and has often been abused by the upper castes. This plays a dual role in the context of trans* people, especially *Hijras*, as caste issues often engage with gender issues, and dual discrimination can play a vital role in marginalization. While caste was constitutionally abolished, the Constitution guarantees special treatment as affirmative action to specific castes who have historically faced marginalization, thus creating a justification for upper castes to keep on propagating it socially.

[46] Article 38, Part IV, Constitution of India.

[47] Right to Freedom
19. Protection of certain rights regarding freedom of speech, etc.-
(1) All citizens shall have the right-
(a) to freedom of speech and expression;
(b) to assemble peaceably and without arms;
(c) to form associations or unions;
(d) to move freely throughout the territory of India;
(e) to reside and settle in any part of the territory of India;
(f) (removed by amendment)
(g) to practise any profession, or to carry on any occupation, trade or business.
21. Protection of life and personal liberty.
No person shall be deprived of his life or personal liberty except according to procedure established by law.

[48] Judgment, para. 70, p. 70.

[49] Judgment, para. 1c9, pp.14-16.

[50] This view is my opinion on the matter, but is also shared by Aniruddha Dutta, mentioned in Dutta, Aniruddha, "Thoughts on the Supreme Court Judgment on Transgender Recognition and Rights"*, The Hindu,* May 20, 2014*,* available online at http://www.thehindu.com/todays-paper/tp-features/tp-sunday-magazine/equal-in- every-way/article5973899.ece.

[51] Judgment, para. 11, pp. 9-10.

[52] Formerly referred to as "untouchables", they took on the term "Dalit", which means "trampled" in order to bring out the oppression faced by them from upper castes. For more on the Indian caste system, please refer to Dirks, Nicholas B., "Castes of Mind". *Representations*, no. 37 (1992), pp. 56–78,University of California Press.

[53] On January 18, 2016, The Telengana Intersex and Transgender Samiti responded to the judgment and the bill which was passed in the Upper House of the Parliament in an open letter on http://orinam.net/telangana-samiti-response-msje-trans-rights-bill/, and brought out the issue of the overlapping caste situations in Indian trans* people.

[54] This has been explained in a comparative study between Europe and India in Doornbos, Martin and Kaviraj, Sudipta (eds.) *Dynamics of state formation : India and Europe compared,* New Delhi: Sage

[55] The discontent has been primarily because of the paradox around Section 377 that has been highlighted throughout the judgment. Some queer rights activists voiced their concern in Johari, Areefa, "How the Supreme Court's Transgender judgment contradicts its own stance on gay sex*", Scroll.in,* April 16, 2014, available online at http://scroll.in/article/661903/

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[56] Gandhi, Jatin, "Bill promises welfare board, job quotas for transgenders", *The Hindu*, April 25, 2015, available online at http://www.thehindu.com/todays-paper/tp-national/bill-promises-welfare-board-job-quotas-for-transgenders/article7139547.ece.

[57] There are several press articles online which talk about various universities in India reacting to the Supreme Court's decision and included a third gender category in their admission forms and quotas, even before the Government put down any guidelines. One such article talks about one of the top business schools in India, the Indian Institute of Management, Ahmedabad, and its inclusive policies, by Rana, Niyati, "IIMs rise above sexual bias, open doors to third gender", *Daily News Analysis*, May 9, 2014, available online at http://www.dnaindia.com/ahmedabad/report-iims-rise-above-sexual-bias-open-doors-to-third-gender-1986697.

[58] Interview with Simran Shaikh, on August 17, 2015.

[59] Gandhi, Jatin and Ramachandra, Smriti K., "Rajya Sabha passes Bill on transgender rights", *The Hindu*, April 24, 2015, available online at http://www.thehindu.com/news/national/rajya-sabha-passes-private-bill-on-transgenders/article7138056.ece.

[60] At the time of this article, several curative petitions on Section 377 had just been filed at the Indian Supreme Court, and had been referred to a constitutional bench, as the matter was considered to be of constitutional importance.

[61] Judgment, para. 113, pp. 99-100.

[62] Judgment, para. 119, p. 102.

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Права человека и уголовное правосудие
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Экспертные заключения по делам о «словесном экстремизме» в России: спор о методах

Аннотация

Практика обязательного использования специальных лингвистических знаний в делах, связанных с разжиганием расовой, этнической, и иной ненависти или вражды привела к бурному развитию разнообразных методов анализа «экстремистских текстов»; за последние 10 лет появилось множество методик исследования текстов на предмет наличия или отсутствия в них «словесного экстремизма». В статье дается критический обзор основных методик, используемых экспертами в делах, в которых требуется доказательство наличия «словесного экстремизма». Основной вывод автора заключается в том, что многообразие существующих подходов и серьезные противоречия в их использовании заставляют сомневаться не только в обоснованности использования существующих методик анализа текстов, но и в целом в целесообразности применения специальных лингвистических знаний к анализу текстов особой прагматики.

Ключевые слова: свобода слова, анти-экстремизм, «словесный экстремизм», судебная лингвистическая экспертиза.

Expert Witness's Opinion in Hate Speech Cases in Russia: A Dispute Over Methods

Abstract

The practice of mandatory recourse to linguistic experts' opinions in cases pertaining to the racial, ethnic, and other types of hatred and enmity, has caused the vast development of different approaches to the analysis of the texts. During last ten years, the numerous methodic recommendations of how to identify the "verbal extremism" have occurred. The author gives a critical review of the main approaches used by experts in Russia in cases where the prosecution seeks a proof of "verbal extremism". The article reveals the controversies in the usage of analyzed approaches and concludes that there are enough grounds to challenge the appropriateness of existing methods of analysis of the "verbal extremism" phenomenon, as well as their relevance in the context of analysis of texts of special pragmatics.

Keywords: Freedom of speech, counter-extremism, "verbal extremism", linguistic expert's opinion.

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Экспертные заключения по делам о «словесном экстремизме» в России: спор о методах

Введение

Развитие юридической лингвистики в западно-европейской традиции было связано, прежде всего, с ее междисциплинарным, межкультурным характером[2]. Особенностью развития исследований такого рода за океаном также является их критический характер, связанных с представлением об интерпретативной природе взаимоотношений между языком и правом, необходимостью постоянного критического прочтения и реинтерпретации языка права как способа его существования[3]. В этом смысле любопытно, что даже общее состояние юридической лингвистики в России авторы обзоров оценивают диаметрально противоположным образом.

Развитие российской юридической лингвистики, как отмечает в своей обзорной статье Лилиана Голетиани[4] , пока не привело к появлению «общей, разделяемой всеми экспертами теоретической базы лингвистической экспертизы в суде». Такая задача, по мнению автора, не может быть решена быстро, речь идет о десятилетиях, однако результат такой работы увеличил бы «доверие к экспертизе как у суда, так и у общественного мнения»[5]. Многие российские исследователи также согласны с такой постановкой вопроса. Так, профессор Александров в своей монографии «Введение в судебную лингвистику» указывает на необходимость «осмыслить природу уголовного процесса, права, доказательств в языковом аспекте»[6].

Однако не все авторы настроены столь скептически. Например, еще в 2006 году Е.И. Галяшина, оценивая состояние судебной лингвистической экспертизы по делам об экстремизме, отмечала наличие в России «…разработанных и апробированных практик лингвистического анализа экстремистских высказываний и письменных текстов СМИ»[7].

Таким образом, налицо прямо противоположное представление о том, в каком состоянии находится методологическая сторона исследований, связанных с оценкой степени наличия «экстремизма» в том или ином тексте. Представляется, что современное состояние предлагаемых подходов к исследованию текстов на предмет наличия в них искомых «вражды и ненависти» показывает всю сложность создания общей теоретической базы для судебной лингвистики в целом, с одной стороны, и, с другой стороны, противоречия, которые возникают в применении многочисленных методов исследования «экстремистских» текстов, которые существуют в российской науке.

1. Подходы к исследованию «экстремизма» в тексте

Несмотря на значительные противоречия, которые делают исчерпывающее описание подходов затруднительным[8], существуют принци-

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[1] Статья подготовлена в рамках проекта Центра независимых социологических исследований (Санкт-Петербург) «Российское экспертное сообщество и проблема прав человека», осуществляемого при поддержке Фонда Маккартуров (грант № 1066277).

[2] Lutterman K. Übersetzen juristischer Texte als Arbeitsfeld der Rechtslinguistik: G.-R. de Groos. R. Schulze, Reiner (Ed), Recht und Übersetzen, Baden-Bade, 1999, S.50. Цит. по Голетиани Л., О развитии юридической лингвистики в России и Украине. Studi Slavistici VIII (2011). с. 241.

[3] См. напр. Law and language, Stanford Encyclopedia of Philosophy. URL: http://plato.stanford.edu/entries/law-language/.

[4] Голетиани Л. Ук. соч., с. 241-262.

[5] Голетиани Л. Ук. соч., с. 247.

[6] Александров А.С. Введение в судебную лингвистику. Нижний Новгород, 2003, с. 74.

[7] Галяшина Е.И. Лингвистика vs экстремизма. В помощь судьям, следователям, экспертам. Под ред. проф. М.В. Горбаневского. М.: «Юридический мир», 2007, с. 42.

[8] Интересующихся отсылаем к следующим обзо-

пиальные вопросы методологии исследований, которые постоянно поднимаются как в ходе судебных дебатов, так и в научных и научно-практических публикациях, посвященных исследованию материалов СМИ на предмет наличия в них признаков «экстремизма»[9].

Основным аргументом, почему помощь эксперта необходима носителю языка, способному адекватно оценить наличие определенного – выраженного в форме, понятной владеющему языком в достаточной степени – призыва в тексте, является, как представляется, предполагаемое наличие в тексте «скрытых призывов» или других способов «языковой манипуляции»[10]. Причина, по которой существует потребность в лингвистах, в таком случае понятна: если речь идет о языке, который понимается всеми сторонами процесса, то единственным способом доказать необходимость привлечения эксперта-лингвиста, становится гипотетическое наличие «скрытого от постороннего взгляда» элемента, увидеть и продемонстрировать который могут только специалисты по языку.

В рассуждениях относительно обязательности или необязательности назначения судебной экспертизы по делам о разжигании ненависти и вражды, как представляется, главной проблемой являются, во-первых, пределы компетенции лингвиста-эксперта, и, во-вторых, рамки исследования, необходимого для выявления того, что называется «словесным экстремизмом»: «Когда утверждают, что лингвист-эксперт, исследуя тот или иной конфликтный текст, вообще не вправе ставить задачу определить, что хотел сказать говорящий, но может лишь ответить на вопрос, что он сказал, исходят из презумпции фатального несовпадения интенций говорящего и перлокутивных эффектов. В действительности это не так, и лингвист может рассчитывать на успех в изучении интенций говорящего, его речевых тактик и стратегий, его коммуникативных удач и ошибок»[11].

Таким образом, наиболее дискуссионным является вопрос, что именно определяет лингвистическая экспертиза, что «сказано», что «скрыто» под сказанными словами, или каково потенциальное значение сказанного в определенном контексте.

Разные авторы отвечают на этот вопрос по-разному.

Для одной из наиболее уважаемых специалистов в этом вопросе, Е. Галяшиной, «определение наличия или отсутствия события словесного правонарушения, его состава, правильная квалификация деяния без проведения лингвистического исследования текста вряд ли возможна»[12]. В другой своей работе она выска-

рам: Ратинов А.Р, Кроз М.В., Ратинова Н.А. Ответственность за разжигание вражды и ненависти. Психолого-правовая характеристика / Под ред. проф. А.Р. Ратинова. М., 2005; Подкатилина М.Л. Судебная лингвистическая экспертиза экстремистских материалов. М.: Юрлитинформ, 2013.

9 По мнению автора, следует разделять методики исследования «языка вражды» как социолингвистического феномена от методик, созданных исключительно для использования в юриспруденции. См., например: Дубровский Д., Карпенко О., Кольцова О., Шпаковская Л., Торчинский Ф. Язык вражды в русскоязычном Интернете. СПб.: Европейский университет, 2003; Верховский А.М. Язык мой… Проблема этнической и религиозной нетерпимости в российских СМИ. М.: РОО «Центр «Панорама», 2002. Обзор исследований языка вражды см., например: Дубровский Д.В. Язык вражды как исследовательская и правозащитная проблема // СМИ и межнациональное взаимодействие. Материалы научно-практической конференции 30–31 октября. СПб.: Роза мира, 2007.

10 Вопрос о самой возможности такого рода «языкового зомбирования» выходит за рамки настоящей статьи; отметим лишь, что сама постановка вопроса напоминает многочисленные и сомнительные рассуждения о «психологическом зомбировании», например, представителями религиозных меньшинств. См., например: Панченко А.А. Кровавая этнография: легенда о ритуальном убийстве и преследование религиозных меньшинств // Отечественные записки, 2014, № 1(58). URL: http://www.strana-oz.ru/2014/1/krovavaya-etnografiya-legenda-o-ritualnom-ubiystve-i-presledovanie-religioznyh-menshinstv.

11 Мишланов В.А., Салимовский В.А. К теоретическим основаниям судебной лингвистики // Сибирская ассоциация лингвистов-экспертов. URL: http://siberia-expert.com/publ/satti/stati/4-1-0-195.

12 Галяшина Е.И. Развитие судебных речеведческих экспертиз в России // Юридическая библи-

зывается более категорично: «…Толкование и интерпретация смысла устного высказывания и письменного текста требует обязательного привлечения специальных лингвистических познаний не только в случаях использования манипулятивных приемов речевого воздействия на аудиторию или камуфляжа ксенофобных высказываний средствами изощренной словесной эквилибристики, но и для выявления рефлексируемой аудиторией пропаганды и агитации, призывы к совершению тех или иных действий, угроз и подстрекательств, оправдания или обоснования осуществления экстремистской деятельности»[13]. Следовательно, «…определение наличия или отсутствия события словесного правонарушения, его состава, правильная квалификация деяния без проведения лингвистического исследования текста вряд ли возможны»[14].

Обращает на себя внимание ссылка именно на приемы «речевых манипуляций» и «камуфляжа», обнаружение которых, по версии автора, и является одной из основных задач лингвистической экспертизы.

Подходу Е. Галяшиной следует в этом отношении и М. Осадчий: «в экстремистской литературе используется скрытый призыв, который отличается от явного отсутствием главной внешней приметы призыва – императивной формы глагола. Скрытым призывом является информация, подстрекающая к каким-либо действиям, направленно формирующая у адресата желание действовать или чувство необходимости действий. Скрытый призыв нередко дает развернутую программу действий, к которым подстрекает, т.е. автор программирует поведение адресата речи, нередко используя методы речевого манипулирования сознанием, воздействия на психику, подсознание читателя или слушателя»[15].

В качестве примера такого «косвенного призыва» автор приводит признанный экстремистским известный материал «Самая конструктивная партия»[16]. Анализируя данный текст, который, по мнению автора настоящей статьи, при всем радикализме не является экстремистским, А. Араева и М. Осадчий делают вывод о том, что в нем присутствуют «скрытые призывы», которые побуждают читателя «к определенным действиям… последний увлекается текстом и незаметно встает на сторону автора»[17].

Представления об особой, «манипулятивной» технике, присущей авторам «экстремистских текстов», которые, якобы, обладают приемами манипуляции, скрытой от глаз профанов, довольно сильно распространены в методической литературе, посвященной анализу «экстремистских» текстов. Примером такого рода «манипулятивной техники», по мнению ряда авторов, является наличие «скрытых призывов».

В наиболее яркой степени методика исследования «скрытых призывов» связана с работами А.А. Леонтьева, который предлагал использовать для диагностики ксенофобии ряд психолингвистических методик, среди которых выделяется ссылка на «методику семантического интеграла» (по В.И. Батову[18]). Эти работы, как

отека «Юристлиб». URL: http://www.juristlib.ru/book_10321.html.

13 Выделено автором: Галяшина Е.И. Лингвистика vs экстремизма: В помощь судьям, следователям, экспертам . Под ред проф. М.В. Горбаневского. М: Юридический мир, 2006, с. 41.

14 Галяшина Е.И. Развитие судебных речеведческих экспертиз в России…

15 Осадчий М.А.. Классификация методов судебной лингвистической экспертизы (на материале экспертной оценки призыва). URL: http://online.rae.ru/pdf/800.

16 Николаенко А.А. Самая конструктивная партия // Газета «Курс», № 43 от 22.10.2004. Решение вынесено Беловским городским судом Кемеровской области от 09.09.2005. Источник: Министерство юстиции Российской Федерации: Федеральный список экстремистских материалов. URL: http://minjust.ru/ru/extremist-materials.

17 Араева Л.А., Осадчий М.А. Судебно-лингвистическая экспертиза по криминальным проявлениям экстремизма// Уголовный процесс, 2006, № 4. С. 47. См. также: Волков В.В. Ксенофобия как интенциональная основа вражды в судебной лингвистической экспертизе (лингвогерменевтика феномена) // Законность и правопорядок в современном обществе, 2014, № 19.

18 Леонтьев А.Н. Прикладная психолингвистика речевого общения и массовой коммуникации. М.: Смысл, 2008. Экспертизы В.И. Батова, заметим, многократно ставились под сомнение в связи с

представляется, предполагают высокую степень манипуляции, скорее, со стороны интерпретатора и практически освобождают исследователя от необходимости приведения доказательств, ограничиваясь ссылками на «приемы языковой манипуляции» и «скрытые призывы».

Идея «языковой манипуляции» повторяется и в работах проф. А. Баранова; он в 2007 году опубликовал монографию, посвященную судебной лингвистической экспертизе, в которой, в частности, затрагивается вопрос «вербальной манипуляции» [19]. Автором была предложена общая схема анализа текста, которая, по его мнению, подходит для анализа текста как с точки зрения наличия признаков экстремизма, так, и например, в делах, связанных с диффамацией. Сутью предложенного А. Барановым метода является идентификация и анализ инструментов «вербальной манипуляции» в тексте, в которых основную роль играют призывы. При этом в типологии призывов, предложенной автором, особую функцию выполняют призывы оценочно-мотивированные. Такого рода призывы могут быть сконструированы, согласно А. Баранову, следующим образом:

1. приписывание негативной или позитивной оценки группам людей на основании их принадлежности к определенной этнической, национальной или религиозной группе;

2. противопоставление одной группы другой;

3. приписывание определенных действий по отношению к группе, обозначенной позитивно или негативно;

4. дополнительные мотивировки данных действий[20].

Последователь Анатолия Баранова профессор Михаил Горбаневский и его школа уже во второй половине 2000-х годов организовали Гильдию лингвистов-экспертов по судебным спорам (ГЛЭДИС), которая часто по заказу правоохранительных органов проводит и экспертизы по делам, связанным с разжиганием розни. Их оригинальным подходом стал фактический отказ от разработки специальных подходов к анализу текстов. Гильдией было принято положение, согласно которому для адекватного анализа текста никакого специального знания или методики не требуется, а требуется лишь профессиональная квалификация лингвиста, достаточная для распознания «экстремизма в тексте». Вкратце этот подход был описан в рекомендациях для экспертов и судей, которые сталкиваются с делами «экстремистской направленности». М. Горбаневский предлагает использовать лексический и семантический анализ для установления наличия в тексте лексем и предложений, которые связаны со значениями в русском языке любой экстремистской деятельности и их вариаций, а также семантико-стилистического и лингво-стилистического анализа для того, чтобы выявить оценочные суждения, обнаружить экстремистские лексемы и определить модальность текста и оценок (позитивных или негативных)[21]. По существу, такая методика стала примером инкорпорации достаточно размытых определений экстремизма, данных в указанном федеральном Законе № 114 в методологию лингвистического анализа, что, на наш взгляд, не могло не привести к высокой доле неопределенности в интерпретации материалов участниками Гильдии.

Сибирский исследователь К.И. Бринев предложил схему анализа экстремистских призывов, предложив выделить неопределенные призывы, не содержащие указание на достижение

наращениям всех формальных требований как к квалификации эксперта, так и к качеству экспертного продукта.

[19] Баранов А.Н. Лингвистическая экспертиза текста: теория и практика. М.: ФЛИНТА, Наука, 2007.

[20] Баранов А.Н. Лингвистическая экспертиза текста… С. 452. В другой статье я уже обращал внимание на то, что подобная схема не является исключительно лингвистической. В социологии это называется «поляризованной репрезентативностью» и именно на этом построена методика исследования текстов языка вражды, предложенная группой сотрудников Европейского университета в СПб, включая и автора данной статьи , изданная в 2003 году. См.: Дубровский Д.В. Тексты специальной прагматики (троллинг и пародия) как исследовательская проблема // Неприкосновенный запас, 2014, № 96. URL: http://www.nlobooks.ru/node/5332#sthash.6qGbyQql.dpuf.

[21] Галяшина Е.И. Лингвистика vs экстремизма. В помощь судьям, следователям, экспертам. М.: Юридический мир, 2006. С. 53.

конкретных целей. В целом повторив типологию А. Баранова, автор предложил, по сути, квалифицировать исключительно «речевое поведение» говорящего, что сильно отличает его подход от аналогичных подходов других авторов[22].

Одним из последних подходов, опубликованных и предложенных для работы с материалами предположительно «экстремистской направленности», стала работа Сергея Кузнецова и Сергея Оленникова[23], новизна которой, по мнению авторов, состоит в том, что в ней выделена и учтена главная специфика экстремистских дел – пропагандистская или агитационная направленность противоправных действий. Авторы предлагают ряд новых терминов, среди которых – конфликтогенный текст (что означает, что текст, обозначенный таким образом, выводится из-под обвинения в экстремизме). Тем не менее, авторы уверены, что их метод направлен на понимание особенностей нормативных требований закона, которые в абстрактной правовой форме запрещают высказывания с определенными понятийно-риторическими признаками воздействия на аудиторию[24].

Схожим же образом отвечают на этот вопрос и другие исследователи, например, авторы подхода, созданного Российским федеральным центром судебной экспертизы. По их мнению, эксперт-лингвист должен «владеть методами семантического описания значений языковых единиц и приемами экспликации *имплицитно*[25] выраженных значений»[26].

Подобным же образом в одной из последних работ, обобщающих опыт проведения экспертиз и их методологических оснований, М. Подкатилина также указывает на то, что, поскольку «при исследовании текста на предмет наличия в нем признаков экстремизма приходится работать со словами… необходимой частью при проведении экспертиз является использование знаний филологии…»[27].

При этом, поскольку речь идет, прежде всего, о призывах как о лингвистической форме, с которой чаще всего связаны всякого рода «экстремистские тексты», то именно призывам посвящены многие работы, связанные с экспертной деятельностью. Так, классической является работа А. Баранова, в которой указывается, что «… исчислить все возможности передачи пропозициональной семантики призывов, связанных с возбуждением расовой, национальной и религиозной розни, …не представляется возможным»[28].

Таким образом, большинство авторов методических рекомендаций сходятся в том, что «только лингвисты владеют научно обоснованными приемами выявления истинных смыслов текста и замыслов конфликтующих сторон, обнаружения “подводных течений”, манипулятивных приемов, употребляемых сторонами конфликта»[29]. Другими словами, лингвисты представляют дело так, что знание особенностей функционирования языка дает им возможность эксклюзивного понимания текста, которого лишены представители других гуманитарных и социальных дисциплин. Более того, такого рода экспертное знание носит объективный характер, соответствующий требованиям, предъявляемым к судебным экспертизам. М.Л. Подкатилина, в частности, настаивает: «…кажущаяся простота оценки предположительно экстремистских текстов и принятие решений без использования результатов применения специ-

[22] Бринев К.И. Судебная лингвистическая экспертиза спорных речевых произведений, содержащих признаки экстремизма // Известия Волгоградского государственного педагогического университета, 2009, № 7, прим. 1 на с. 36.

[23] Кузнецов С.А., Оленников С.М. Экспертные исследования по делам о признании информационных материалов экстремистскими: теоретические основания и методическое руководство. М.: Изд. Дом В. Ема, 2014.

[24] Там же. С. 47.

[25] Курсив мой – Д.Д.

[26] О.В. Кукушкина, Ю.А. Сафонова, Т.Н. Секераж. Методика проведения судебной психолого-лингвистической экспертизы материалов по делам, связанным с противодействием экстремизму и терроризму. М., 2014, с.17.

[27] Подкатилина М.Л. Судебная лингвистическая экспертиза экстремистских материалов… С. 75-76.

[28] Баранов А.Н. Лингвистическая экспертиза текста… С. 463.

[29] Кара-Мурза Е.С. Лингвистическая экспертиза как процедура политической лингвистики // Политическая лингвистика, 2009, № 7, с. 49.

альных знаний влечет принятие порой необоснованных судебных решений»[30].

Однако представляется, что использование специальных познаний вовсе не страхует от принятия таких решений.

При этом нельзя сказать, что авторы рассматриваемых подходов не видят сложностей и противоречий в использовании лингвистического знания в судебной экспертизе по делам, связанным с разжиганием розни. Многие авторы сходятся в оценке основных ошибок и проблем, связанных с назначением и проведением экспертизы, среди которых: неверный выбор экспертов, неверная постановка вопросов, некорректное распределение обязанностей между экспертами и проблема выхода за пределы компетенции эксперта, и, наконец, отсутствие или слабость научного инструментария и подмена его «общими рассуждениями и субъективными оценками»[31]. Другие авторы добавляют сюда проблему независимости экспертов, проблему критики власти, понимаемой как экстремизм, расширенное использование термина «социальные группы»[32]. Тем не менее, как представляется, речь идет, прежде всего, не о процессуальных или технических ошибках, а о глобальном противоречии между интерпретативной природой гуманитарного знания и требованием к «объективности» и «правдивости» лингвистической экспертизы.

Следует отметить, что некоторые российские лингвисты (например, М. Кронгауз) скептически оценивает возможности и перспективы участия лингвистов в антиэкстремистских процессах. Откликаясь на скандал 2009 года с вынесением предупреждения газете «Ведомости», он писал: «*Лингвистическая экспертиза, связанная с делами по обвинению в экстремизме, во многом скомпрометировала себя.* .. Совершенно очевидно, что если высказывание разжигает и призывает, то оно призывает и разжигает массы. То есть массы способны разобраться в этом без помощи лингвиста»[33]. Продолжая скептическую линию, начатую М. Кронгаузом, А.А. Смирнов в своей пространной статье «Заметки о лингвистической экспертизе» отмечал, что «неясность и противоречивость законодательства приводит к тому, что «для квалификации деяния как экстремистского суду недостаточно здравого смысла[34] и общего знания….»[35]. В результате, отмечает автор, налицо «абсурд экспертократии», когда речь идет о том, что фактически только специалист определяет, совершил преступление подозреваемый или нет. М.Л. Подкатилина возражает «Эксперт лингвист не может диагностировать противоправный характер речевой деятельности, поскольку это относится к исключительной компетенции правоприменителя»[36]. Тогда возникает вопрос, что же именно определяет эксперт?

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30 Подкатилина М.Л. Ук. соч., с. 111.

31 Подкатилина М.Л. Ук. соч, с. 111 и далее; см. также Ратинова Н.А. Типичные ошибки, совершаемые при производстве судебно-психологических экспертиз материалов экстремистской направленности// Коченовские чтения, 2012 г. http://psyjournals.ru/kochteniya1/issue/55236.shtml;

32 Судебно-психологическая экспертиза. Психолого-лингвистическая экспертиза материалов экстремистской направленности: учебно-методическое пособие (Электронный ресурс). Сост. Л.З. Подберезкина, Е.Ю. Федоренко. Красноярск: Сибирский федеральный университет, 2012. URL: http://ipps2.sfu-kras.ru/sites/ipps.institute.sfu-kras.ru/files/publications/sudeb_psih_eksper_psih-lingvistich_ekspertiza_material_ekstrem_napravlennosti.pdf; Савинов Л.В., Дорожинская Е.А., Сигарев А.В. Экспертиза спорных информационных (экстремистских) материалов: методологические и правовые проблемы // Криминологический журнал БГУЭП, № 2(32), с.209-222.

33 Кронгауз М. Антитеррористическая лингвистика // Форбс, 17.11.2010. URL: http://www.forbes.ru/ekonomika-column/lyudi/59833-antiterroristicheskaya-lingvistika.

34 Сама по себе возможность такого развития событий возмущает экспертов. Так, М.Л. Подкатилина отмечает, что «[н]а практике отмечен прецедент, когда суд отказал в приобщении к делу заключения специалиста, мотивируя это тем, что судьи сами владеют русским языком» (Подкатилина М.Л. Ук. соч., с.109).

35 Смирнов А.А. Заметки о лингвистической экспертизе 2 (экстремизм и утрата искренности) // Текстология.ру. URL: http://www.textology.ru/article.aspx?aId=229.

36 Подкатилина М.Л. Ук.соч., с. 90.

Отдельным направлением в изучении и анализе «языка вражды» стала школа социогуманитарной экспертизы Николая Гиренко, трагическая гибель которого в 2004 году приостановила развитие этого подхода[37]. В рамках небольшой брошюры Гиренко высказал мысль, что анализировать в целом надо не столько формальную сторону вопроса, *план выражения* определенного текста (то есть, собственно, то, чем занимается лингвистика), а *план его содержания*, то есть некоторую мировоззренческую модель, выделение которой и является сутью анализа: «Собственно смысловая направленность [текста] будет заключаться в первую очередь в пропаганде этой модели»[38]. Основным в определении социальной опасности такого рода действий предлагалось считать смысловую направленность текстов. Эта школа была принята в штыки всеми вышеперечисленными авторами-лингвистами и психологами, которые указывали на недостаточную определенность проработанность методической базы социогуманитарного исследования[39].

Особняком стоят авторы, подход которых игнорирует интертекстуальную реальность, прежде всего возможность иронии, художественной провокации, религиозного многообразия или просто критики. Хорошим примером является Игорь Понкин, который в своем учебном пособии по экстремизму обращается как к примеру экстремистского текста к термину «пескотрах» (*sandfucker*) из мультипликационного сериала «Южный парк» или к священным кришнаитским текстам[40]. По сути, И. Понкин продолжает логику, в соответствии с которой любое сообщение «негатива», использование «негативных лексем» в отношении той или иной группы является признаком экстремизма. Продолжая, по сути, эту же исследовательскую логику, авторы другого пособия утверждают, что обвинение партии «Единая Россия» в фашизме и есть «истинный признак экстремизма»[41].

Таким образом, можно резюмировать, что в рассматриваемых подходах существуют многочисленные недостатки, главным из которых, на наш взгляд, является невозможность лингвистов интерпретировать тексты именно той прагматики, которая чаще всего становится предметом рассмотрения в судах, а именно, политические и художественные тексты[42].

2. Тексты специальной прагматики в судебно-лингвистической экспертизе

Одно из первых методических рекомендаций по экспертной работе лингвиста в делах по экстремизму содержало пример такого рода экспертизы, а именно, пример экспертизы по делу

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37 Винников А.Я., Гиренко Н.М., Коршунова О.Н., Леухин А.В., Серова Е.Б. Методика расследования преступлений, совершаемых на почве национальной и расовой вражды и ненависти / под общ. ред. О.Н. Коршуновой. СПб., 2002.

38 Там же. С. 89.

39 Ратинов А.Р., Кроз М.В., Ратинова Н.А. Ответственность за разжигание вражды и ненависти. Психолого- правовая характеристика. М.: Юрлитинформ, 2006.

40 Понкин И.В. Проблемы государственной политики в сфере противодействия экстремистской деятельности. Учебное пособие. М.: Институт государственно-конфессиональных отношений и права, 2011.

41 Зеленина О.В., Суслонов П.Е. Методика выявления признаков экстремизма. Процессуальные исследования (экспертизы) аудио-, видео - и печатных материалов. Научно-практическое пособие. Екатеринбург, 2009. Эти же авторы утверждают, в частности, что «[с]пециальным приемом [религиозной пропаганды] является также сознательное и целенаправленное посягательство на религиозные и национальные святыни».

42 При этом важно обратить внимание на то, что эксперт не должен отвечать на правовые вопросы, а также подменять собой судью в решении вопроса о содержании текста и его правовой квалификации. В юридической литературе это получило образное название «научный судья»; речь идет о ситуациях, когда эксперт попросту подменяет собой судью и фактически выносит решение по делу, по которому выступает как носитель специальных познания. См., например: Селина Е. Процессуальное положение сведущих лиц // Российская юстиция, 2002, № 9; Кудрявцева А., Лившиц Ю. Доказательственное значение «правовых» экспертиз в уголовном процессе // Российская юстиция, 2003, № 1.

об интервью Малики Яндарбиевой [43], в которой автор (Е. Галяшина) делает вывод о несомненной принадлежности данного текста к экстремистским на основании анализа по предложенной ею методике. Можно только согласиться с мнением А.А. Смирнова, который отметил, что «с точки зрения лингвистической прагматики этот вывод не состоятелен»[44]. Добавим, что и с точки зрения здравого смысла тоже: фактически, авторы экспертизы предложили высказывания вдовы сепаратиста Яндарбиева считать экстремистскими исключительно потому, что, передавая свою картину мира, она противопоставляет группы «мы» (куда причисляет себя, Масхадова, Басаева как представителей чеченского народа) и группу «они», «обобщенный образ России, который оценивается негативно». Учитывая политический контекст противостояния между чеченскими сепаратистами и федеральной властью, было бы весьма странно ожидать иной картины мира от вдовы убитого специальными российскими агентами лидера сепаратистов.

Таким образом, уже в первом же использовании методика ГЛЭДИС показала свою нечувствительность к прагматическим задачам текста; по сути, к любому тексту – политическому, религиозному, и даже художественно [45], что привело к многочисленным, как кажется, злоупотреблением методикой для анализа текстов разнообразной тематики, прежде всего, политической. Выше уже приводился пример экспертизы текста «Самая конструктивная партия»: политический памфлет рассматривался исследователями как прямой призыв к политическому насилию, что и повлекло его признание «экстремистским текстом».

Как представляется, в целом вообще ни одна рассмотренная выше методика фактически не оговаривает исключений, то есть, не учитывает прагматику текста, считая, как верно указывает А.А. Смирнов, по умолчанию доказанным факт их «истинности», то есть, совпадения сказанного и интенции. В связи с этим, действительно, любой текст – религиозный или художественный, политический памфлет или политическая пародия – становится не просто предметом рассмотрения, но и осуждается за «экстремизм». Особо в связи с этим выделяются примеры использования психологических методик для выявления «интенций» в рассматриваемом тексте. Так, текст Э. Лимонова «Программа ненасильственного гражданского сопротивления в полицейском государстве» объявляется экстремистской на основании, например, «деструктивных» требований… “не заполнять налоговые декларации”»[46]. Помимо простого сомнения в том, что психология имеет хоть какое-то отношение к данному анализу, показательно, что этот текст напрямую говорит о ненасилии, следовании мирному гражданскому протесту, и хотя бы поэтому должен быть исключен из подозрений в экстремизме, который, очевидно, предполагает призывы к нелегитимному насилию.

Особое затруднение возникает и тогда, когда речь идет о художественном тексте. В действительности, исследователи не ставят под сомнение саму возможность анализа художественного текста на предмет экстремизма; подразумевается, что таковые экстремистские художественные произведения существуют[47]. В качестве курьеза, но вполне содержательного, можно рассмотреть анализ цитаты из произведения В. Шекспира, проведенный Н. Голевым[48].

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[43] Галяшина Е.И. Лингвистика vs экстремизма…Приложение 1.

[44] Смирнов А.А. Ук. соч.

[45] См. в связи с этим пример использования методики лингвистического анализа для цитаты из Вильяма Шекспира: Голев Н.Д. «Восстать, вооружиться, победить..» В. Шекспир и экстремизм // Сибирская ассоциация лингвистов-экспертов. URL: http://siberia-expert.com/index/vosstat_vooruzhitsja_pobedit_shekspir_i_ehkstremizm/0-44.

[46] Бакина А.В., Махова И.Ю. К вопросу о психологических критериях экспертной оценки экстремистской направленности текста // Наука и мир, 2014, т. 3, №2(6), с. 178—183.

[47] См., например, Плотникова А.М. Лингвистическая экспертиза художественного текста по делам о противодействии экстремизму // Теория и практика судебной экспертизы, 2014, №4 (36), с. 18-23.

[48] Голев Н.Д. «Восстать, вооружиться, победить..» В. Шекспир и экстремизм // Сибирская ассоциация лингвистов-экспертов. URL: http://siberia-expert.com/index/vosstat_vooruzhitsja_pobedit_shekspir_i_ehkstremizm/0-44.

Показательно, что эксперт не отказывается от анализа цитаты из «Гамлета» исключительно на том основании, что это текст художественный и поэтому не подлежит оценке в качестве «экстремистского». Он утверждает, что «…нет никаких оснований утверждать, что в трагедии «Гамлет» ее герой призывает восстать против власти и побуждает свергнуть ее насильственным методом (что и означало бы *экстремизм в политическом смысле* этого термина)... Соответственно нет оснований для утверждения наличия такого смысла и в приведенной цитате». Такой вывод оставляет место сомнению относительно того, что было бы, если бы цитата из художественного произведения, приведенная в подлежащем анализу тексте, действительно призывала бы к вооруженному восстанию.

В этой связи возникает вопрос о квалификации того или иного текста как художественного. Однако это не спасает текст от рассмотрения на предмет наличия или отсутствия в нем экстремистских высказываний. Например, Г. Иваненко, рассматривая особенности отражения образа еврея у Гоголя, приходит к выводу о том, что «в таком контексте сцены гонения евреев – не призыв к подражанию, а отражение духа описываемых исторических реалий»[49]. Представляется, что такой аргумент не является достаточно убедительным хотя бы потому, что большое количество защитников антисемитских текстов теоретически и практически будут прибегать к подобной риторике[50].

Нами уже рассматривалась ситуация, когда речь идет о сознательной пародии или провокации. К уже описанным материалам можно добавить и новые[51]. Так, пародийная пьеса «Жид-вампир», созданная коллективом красноярских поэтов, с явной отсылкой к пьесе Л. Филатова «Про Федота-стрельца, удалого молодца», пронизанная иронией и художественной игрой с ксенофобными мифами, была понята специалистами Красноярского государственного педагогического университета как экстремистская. Основанием для этого послужил лингвистический анализ, на основании которого специалисты пришли к выводу о том, что фраза «Помню, в древни времена из волшебного бревна выгрызал Жида-вампира сам рогатый Сатана» оскорбляет евреев, «ладно, заходи в избу, только поклонись грибу – говорят что Магдалина его клала за губу» – оскорбляет христиан, а «идолам буряты мажут губы кровью христиан» оскорбляет бурятов. По мнению экспертов-лингвистов, «[в] пьесе наличествует легкий абсурдный оттенок, но он проявляется только к финалу произведения»[52].

Еще более сложной задачей, по-видимому, является анализ художественных произведений, которые в художественном виде представляют мир правых радикалов. Так, книга Д. Нестерова «Скины. Русь пробуждается», содержащая условно-автобиографическую историю неонацистской активности, в 2010 году была признана экстремистским материалом[53]. Согласно заключению экспертов[54], в книге содержатся «выска-

[49] Иваненко Г.И. Судебная лингвистическая экспертиза: специфика анализа художественного текста в аспекте законодательства об экстремизме // Вестник КГУ им. Н.А. Некрасова, 2014, № 6, с. 202.

[50] См., например: Дубровский Д.В. «Что с научной точки зрения понимается…» или как эксперты защищают ксенофобов // Русский национализм: идеология и настроение. М.: ИАЦ Сова, 2006. С. 122-138. Кроме того, «историческими реалиями», например, прикрываются публикаторы расистских текстов как свидетельств «состояния исторической науки в Германии 30-х годов». Подробнее см.: Дубровский Д.В. «Что с научной точки зрения…».

[51] Дубровский Д.В. Тексты специальной прагматики (троллинг и пародия) как исследовательская проблема // Неприкосновенный запас, 2014, № 96. URL: http://www.nlobooks.ru/node/5332#sthash.6qGbyQql.dpuf. В этой статье мною рассмотрены примеры политической пародии и «троллинга» в Интернете.

[52] Моисеев В. Неполиткорректная сказка. В Красноярске поймали банду поэтов-экстремистов // Русский репортер, 12 июня 2013. URL: http://www.rusrep.ru/article/2013/06/12/vampire.

[53] Федеральный список экстремистских материалов № 1482. Нестеров Д. «Скины, Русь пробуждается» (решение Ленинского районного суда города Оренбурга от 26.07.2010 и решение Никулинского районного суда города Москвы от 24.05.2012). URL: http://minjust.ru/ru/extremist-materials.

[54] Экспертизу, согласно материалам дела, прово-

зывания, содержащие негативные оценки в адрес какой-либо национальной группы (любых "не белой расы"); высказывания побудительного характера, содержащие побуждение к насильственным действиям против лиц "не белой расы". В материалах имеются высказывания, направленные на возбуждение ненависти либо вражды. В представленных материалах имеются призывы к осуществлению экстремистской деятельности»[55].

В данном случае, как и в случае с экспертизой по интервью Малики Яндарбиевой, возникает совершенно очевидный вопрос, что именно было предметом рассмотрения экспертов? Дело в том, что роман, целиком и полностью посвященный активности наци-скинхедов не мог не содержать всех тех призывов, которые характерны для ксенофобной идеологии правых радикалов. Схожим образом в 2010 году в Саратове пытались запретить прокат фильма «Россия 88», несмотря на его очевидный антифашистский пафос, поскольку сам фильм, снятый в традициях «*mockumentary*» (как бы документального фильма), разумеется, использует риторику неонацизма для представления основного героя[56]. Производивший экспертизу профессор кафедры русского языка Самарского государственного педагогического университета Ш. Махмудов обнаружил призывы в расовой ненависти и пропаганду нацизма в диалогах главных героев. Так, например, анализируя «языковую ситуацию № 47», исследователь делает вывод о том, что «зритель может вывести смыслы "цели скинхедов благородны"…» В целом, анализируя фильм при помощи методики А.Н. Баранова, а также ссылок на собственную работу по филологическому анализу художественного текста, Махмудов приходит к заключению о наличии в фильме всех возможных призывов к насилию на расовой и этнической почве, а также к насильственному изменению конституционного строя[57].

Похожим образом выглядит и ситуация с экспертизой по делу текста В. Федоровича «*Faciam lie mei mernineris*». Главное действующее лицо текста – *alter ego* автора, который представляется как «убийца-интеллектуал»: «Больше всего Виктор радовался, когда по телевизору практически в каждой программе про скинхедов показывали нарезку из ролика «Формата 18»[58]. Так же, как и у Д. Нестерова, у Федоровича описание нападений на «расово чуждых» перемежается с философскими размышлениями лирического героя в стиле социал-дарвинизма: «Достойны ли жалости те, кто проиграли войну за выживание?» А.М. Плотникова, которая приводит эту статью в пример, явно отличает этот текст как экстремистский, в отличие от «Жида-вампира», хотя вопрос, по-видимому, заключается именно в жанре, выбранном автором. По сути же, никакой существенной разницы между текстом В. Федоровича и Д. Нестерова нет[59]. Другим похожим примером является «Моя борьба», претенциозный текст схожего содержания, в котором главный герой, плохо отличимый от автора, разнообразными видами оружия убивает своих разнообразных врагов, от «расово чуждых» до правозащитников[60]. Надо сказать, что «экстре-

дили специалисты ФГНИУ «Российский институт культурологии», по всей видимости, В. Батов и Н. Крюкова.

55 Цит. по: новости сайта ИАЦ «Сова». URL: http://www.sova-center.ru/racism-xenophobia/news/counteraction/2012/08/d25039/.

56 Автор настоящей статьи в своей экспертизе постарался это доказать; иск Прокуратурой Саратовской области был отозван. Подробнее см.: Художественный фильм «Россия 88». URL: http://russia88.ru/main.mhtml?Part=6&PubID=84. См. также: Костылева Е. «Теперь в прокате»: После года исков и экспертиз на экраны вышел фильм Павла Бардина «Россия 88». Ведомости, 05.03.2010, 8 (191).

57 Махмудов Ш.А. Заключение лингвистического исследования от 15.08.2009. URL: http://russia88.ru/main.mhtml?Part=13.

58 Неонацистская студия, в основном, снимавшая видео пропагандистского ксенофобного характера. Лидер «Формат-18» Марцинкевич был осужден по статье 282 УК РФ.

59 За исключением того, что текста Федоровича в списке экстремистских материалов нет.

60 В качестве курьеза обратим внимание на то, что в тексте «убито» довольно много реально действующих лиц, включая автора настоящей статьи: «…Через два дня я навестил митинг "*Food not bomb's*". Что-то антифа совсем расслабились.

мизм» в данных текстах исключительно связан с действиями главных героев, и ими же, разумеется, оценивается положительно. Приложение любых формальных методов анализа приводит к автоматическому зачислению в экстремистские не только таких текстов, но и, например, таких произведений, как «Заводной апельсин» Э. Берджеса, фильма «Россия-88» и аналогичных им.

Наконец, та же проблема возникает и применительно к научным текстам. Прежде всего, выяснение вопроса, является ли, например, тот или иной текст «научным», оказывается, не выводит его, с точки зрения многих, из-под рассмотрения правоохранительных органов[61]. Одним из последних примеров такого рода было рассмотрение статьи «Чеченская республика» в 58 томе «Большой Российской энциклопедии 2006 г.»[62]. Заметим, что при том, что содержание самой статьи оставляет желать лучшего как с профессиональной, так и с этической точек зрения, нерешенным остался вопрос о том, насколько вообще формально научные тексты должны запрещаться как экстремистские[63].

Заключение

Таким образом, на наш взгляд, существует очень серьезная проблема, связанная с функционированием судебной лингвистической экспертизы. Как представляется, лингвист, руководствуясь здравым смыслом, должен исключать из анализа научные, политические (прежде всего, представляющие критику политического режима и его оппонентов) и художественные (включая пародию и «троллинг») произведения. Ведь очевидно, что многие из указанных видов текстов по формальным признакам, используемым вышеперечисленными методиками, будут интерпретированы именно как экстремистские, не только в связи с их общим содержанием, но и потому, что в них воспроизводятся с разными целями – политическими или художественными – «призывы» и иные риторические приемы. Другими словами, подходы и методики, рассмотренные выше, все как одна игнорируют прагматику текста, фокусируясь в лучшем случае на формальной стороне анализируемых текстов и, таким образом, не могут достоверно зафиксировать разницу в «экстремизме» между художественным текстом, политическим памфлетом или текстом, посвященным исследованию проблем языка вражды и ксенофобии.

С другой стороны, исключение такого рода текстов из рассмотрения не снимает вопрос о том, что же должны делать лингвисты по отношению к текстам, гипотетически разжигающим вражду и рознь? Как представляется, основная проблема кроется не в недостаточно квалифицированных или прямо ангажированных экспертах, что случается в делах такого рода довольно часто[64]. Дело, как представляется, в том, что

Вижу, какой-то бомж жрёт, рядом два антифашиста. Хорошая цель. Маска на лицо. Из 7,63 Вальтера расстреливаю всех троих. А вечером из него же казню антифа другого типа – Дубровского» (Шульц (?). «Моя борьба» // По материалам праворадикальных сайтов).

61 В качестве примера можно привести историю с проф. В. Авксентьевым, по отношению к которому прокуратора Ставропольского края пыталась возбудить дело по 282 статье УК РФ за действительно ксенофобные цитаты респондентов, отвечавших на вопросы, связанные с этническими процессами в крае. Подробнее см.: Клейменов М.П., Артемов А.А. Понятие и виды криминального экстремизма // Вестник Омского университета. Серия «Право», 2010, № 3(24). С. 168-169.

62 № 680 Федерального списка экстремистских материалов. Информационный материал дефиниция (определение) «Чеченская Республика» в 58 томе книжного издания «Большая энциклопедия» (М.: издательство «Терра», 2006) (решение Заводского районного суда города Грозного от 05.04.2010).

63 При этом остается открытым вопрос о том, рассматривать ли, например, публикации «научного наследия», содержащего расизм и ксенофобию, как научные и, таким образом, включать ли их в число материалов, подлежащих судебной экспертизе. См. например: Дубровский Д.В. Расизм в российских университетах: «нечаянный расизм» или «объективное научное знание» // Расизм, ксенофобия, дискриминация. Какими мы их увидели… / Сб. статей; сост. и отв. ред. Е. Деминцевой. М.: Новое литературное обозрение, 2013. С. 256-274.

64 См. например. Эпштейн А., Васильев О. Полиция мыслей. Власть, эксперты и борьба с экстремизмом в современной России. М.: Гилея, 2011.

степень социальной опасности текста должны определять вообще не ученые. Как было показано выше, лингвистические методики, примененные к текстам различного рода, дают не только противоречащие здравому смыслу, но и прямо противоположные результаты[65]. Мы придерживаемся той точки зрения, что в выборе между сверхчувствительностью (или ангажированностью) экспертов и здравым смыслом победить должен здравый смысл. С точки зрения лингвистики, основным аргументом, на наш взгляд, должен быть такой: поскольку смысл, не тождественный значению, возникает в ходе речевого акта и включает в себя контекст произнесения как важный смыслообразующий элемент, с точки зрения теории речевых актов Джона Сёрля, умысел можно соотнести с иллокутивной целью высказывания, которая определяется прежде всего прагматическим контекстом[66]. Тот факт, что в рассмотренных подходах отсутствует анализ внешнего по отношению к тексту прагматического контекста, что они концентрируются исключительно на сказанном, как представляется, делает задачу определения истинного содержания неразрешимой, а самого эксперта ставит в затруднительное положение либо «певца здравого смысла», либо «конструктора экстремизма»[67].

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