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# THE GREAT HUMAN RIGHTS SPECTACLE: ON POLITICIZED LAW AND JURIDIFIED POLITICS IN EUROPE

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Prof. Kirchhof's paper is an overview of the legal literature on the concept of human dignity and anthropology as it relates to international human rights and to the German constitution.[1]

It is a rich and very interesting *Ideengeschichte* about European legal philosophy and meta-legal concepts, and the author makes it very clear that the concept of human dignity has a specific, objective meaning. This dignity, which is the basis on which rights is founded; is above the law and pre-existing to it. This is e.g. expressed in the preamble to the Universal Declaration, which expressedly states that the rights therein are 'inherent' and 'inalienable' because they are founded on human dignity.

Kirchhof notes that all declarations about rights contain preambles that provide warranty that human dignity, as a predetermined starting point, is at the same time a legal axiom of a constitutional concept. Ultimately, this concept cannot be proven or refuted... (p. 3-4).

He further notes how the suppressed have used the 'rights' concept to argue for freedom and political entitlement, and that human dignity has been the universal starting point for this: rights based on dignity are not Englishmens' rights, as the Americans argued, and prior to this, they were not the rights of the lords, but of all free men in the Magna Charta.

The paper then moves on to discuss the impact of Christian anthropology on European law. Dignity to the ancient Greeks and to the Romans,

[1] The English translation of the paper (it was obviously written in German) is not good; I had considerable difficulty in making out the precise meaning in many places. There may therefore be some errors on my part in this commentary.

argues Kirchhof, was equal to fame, reputation, and honour: 'The ancient Greeks had no general conception of dignity' (*Ibid*., p. 6). Here I would venture to object: Socrates, as we know him through the Platonic dialogues, certainly speaks about a common human dignity which enables the person to become virtuous – he or she can choose between virtues and vices, and has a free choice. This anthropology is very similar to the Christian one – free will, striving for human virtue, *askesis* to that end, etc. The Christian 'addition' to this are the so-called cardinal virtues of 'faith, hope and charity'. But the dignity that Plato presents is far from outwardly or superficial – Socrates takes the hemlock precisely because he is a just man who does not compromise for personal advantage. In Aristotle's *Politics* we find the same view of the just and noble man, evident in the classification criteria of good and bad regimes. The Roman law makers also have a concept of *dignitas* in the Stoa, as Kirchhof remarks.

The contribution of Christianity to the concept of human dignity is connected with the novelty in this religion that man is created in the image of God, which implies a radical equality. The doctrine of redemption also implies that the weak and the 'non-performers' in terms of virtue share in the very same dignity as the rest, and that the weak and sick are God's special 'children'. Charity regardless of 'deservedness' is the new element. Law also becomes universal through Christianity – there is 'neither Greek nor Jew.' But from the very beginning of political philosophy the city of God and the city of man are separated – politics and law have their own autonomy, and the state is separate from religion. The gods of the state were the state's own in ancient times; no longer so.

Empirically this influence can be traced; take the 'hard' case of my own country, where the pagan Viking king Olav Haraldsson became a Christian (approx. 1012-15) and later introduced Christianity as the state's religion in Norway. The legal system, well developed by the Vikings, was changed in terms of marriage laws, laws about 'utbur' – the abandonment of sick children to die in the woods, and in terms of the same procedure for the old and sick. Human and animal sacrifices were outlawed, and the legal changes were so substantial that the legal system was renamed 'Kristen-retten' (the Christian Law). As the sagas of Snorre Sturlason relate, these changes were so unpopular that they had to be enforced by might.[2]

[2] J. Haaland Matlary, 'Restaurer les racines chretiennes de la politique europeenne', *Sedes sapientiæ*, 90., Societe Saint-Thomas-D'Aquin, Chemere-le-Roi, December 2004, pp. 77-99.

There is no doubt, then, about the empirical influence of both Roman law and Christian concepts on European jurisprudence, but the problem today which Kirchhof goes on to address after his historical expose, is that *human dignity and human rights today mean a variety of things to a variety of people*. There is no agreement on how to define these concepts.

I remember discussing the concept of human dignity with Norwegian radical feminists prior to the Womens' Conference in Beijing in 1995. They wanted to delete the concept from the concluding text, thinking that it meant some kind of *bourgeouis* complacency for women – 'you can get dignity and sit at home and be nobly quiet'. I pointed out that the concept is a standard one in all human rights documents, and then they said: 'What does it mean?' Well, that is not easy to explain; it is a little like the term 'cultivated': we recognize someone as a cultivated person, but it is not easy to put in word when perhaps the other person does not know what it means already. The Norwegian feminists had a point: what in fact does it mean in a culture that is radically pluralist and certainly post-Christian? And it is important in today's politisation of human rights when they are redefined anyway?

*Politics and Law: Variations on a Theme*

Kirchhof spends the latter part of his paper in a critique of modern Western anthropology, and he is undoubtedly right in pointing pout that there are strong tendencies of greed, egoism, decadence, etc. at hand. In terms of respect for life, the latest development in the direction of euthanasia as a 'human right' is disturbing indeed. But it does not do to invoke legal definitions to answer the questions posed – of which there are many in the paper. If human dignity is nothing and everything to most people, it is because there is no experience of human nature and the human condition that is common to all any more. Kirchhof asserts that

> 'In a constitutional system characterized by the idea that man is endowed with dignity, the majority will never oppress the minority. The democratic development of man's will continually respects the pre-existing, and for this reason legally pre-determined, dignity of each person... (p. 23)'.

This quotation betrays wishful thinking rather than reality. The current reality is that even lawyers state that human rights instruments are 'political statements', as Norwegian Constitutional Court Judge Karen Bruzelius said at a recent seminar.[3] The 'legal method' for their interpretation is called

[3] Intervention, Conference on Legal Integration in Europe, Sept 16-17, 2005, Faculty of Law, Oslo University.

'the dynamic method' which essentially means that political changes in the definition of human rights will be reflected in the case law of the courts, be it in Strasbourg or Luxembourg, Oslo or Karlsruhe. Bruzelius, herself a lawyer, hastens to add that 'we judges do not do policy-making'. But this is dangerously close to a semantic exercise.

Kirchhof laments the 'decline' in human standards, if we can call them that, and the implications this has for the *Rechtsstaat*. However, his leaves off where the analysis becomes very interesting, viz. in the present period. There is in fact a logic at work in the relationship between human rights and democracy: If we opt for total freedom to define and redefine human rights, we undermine the very concept of human rights, and also the idea of a *Rechtsstaat* because parliamentary majority will decide everything. There will be nothing left for the constitutional court to stand on, as it were – judicial review becomes impossible. The *Rechtsstaat* presupposes that human rights can be defined objectively, or at least that there is a distinctly legal way of reviewing redefinitions of them. It is clear that human rights 'evolve' with time – new rights are discovered that were not in the original declaration, but these cannot contradict the fundamental human rights. What is law and what is politics in this highly important 'cocktail' is deeply contested, but my point is simply that the logical connection between upholding human rights and democracy at the same time – in fact, upholding the *Rechtsstaat* – presupposes that human rights are not products of the ongoing political process, but that they are objective standards against which political majority decisions may be tested.[4] Human rights are to act as the guarantee of fundamental rights for the person against state power, not as the instrument of the state against the citizen.

Human rights, emanating from the concept of human dignity, are today what we call 'essentially contested' in all Western states. The law in most of them follows the evolution of politics, even if there are states like Germany where the power of the constitutional court is great. The strongest *Rechtsstaat*-tradition in Europe is found in Germany precisely because of the experience of democratic politics 'gone wild' in the Hitler years. But this court-politics balance is also a political choice in the end. There is no recipe for the 'best of all possible worlds', to paraphrase Voltaire. In the US judges are elected, not named; and the Supreme Court decides the value questions

[4] I publish a book on this topic in early 2006, *When Might Becomes Human Right*, St. Ulrich Verlag, Augsburg.

that are the most controversial in the polity. Most Europeans would say that this system represents a severe degree of politicization of law, and we find the idea of an elected judge highly improper, a 'mesalliance' between politics and law. How can the political impartiality of judges be upheld in such a system?

My point is that the law and legal system always reflects the religious, political, and cultural setting of a given polity. This is complicated enough, but today the law is increasingly supra-national: the paradox is really in the Bruzelius quotation above: Judges, often in supra-national courts, adjudicate in human rights cases based on more or less political trends, but nominally present them as law – they *become* law by virtue of this proecure – and these cases are then transposed into national law, setting precedent legally and politically. Most European states, regardless of whether they have a monist or dualist system, accept the ECHR and the European Court of Justice (now also adjudicating in human rights cases to an increasing extent in connection with the large internal market portfolio) as law that is above their own. The irony is that this law may be a largely political product that is not only made by judges, but also by foreign judges.

### *Supra-National Juridification: Double Democratic Deficit?*

In my institute we directed and conducted a five year study (1997-2002) entitled *Maktutredningen* (the Norwegian Power Study)[5] assigned by the government, investigating how has which kind of power in society. We found ample evidence of the trend towards 'juridification' of politics and also that this took place internationally to a growing extent. Human rights is the name of the game for all politics these days, and entails an almost complete relativism in changing human rights. Kirchhof's hope that there can be one understanding of human dignity and the specific human rights is therefore not likely to be fulfilled. The problem is rather that there is a pluralist view – an essential contestation – of all these rights.

Specifically, we found that Norwegian use the *concept of human rights in a general sense in order to promote their political claims;* not referring to any specific human right in any specific convention or declaration, but rather in the sense of a 'good thing' – it is my human right and it is my dig-

[5] NOU (Norwegian Public Investigations) 1999:19, 'Domstolene i samfunnet', Ø. Østerud, F. Engelstad and P. Selle, i Makten og Demokratiet: En sluttbok fra Makt – og Demokratiutredningen, Oslo 2003.

nity that demands this – here we also have the concept of human dignity invoked in the political discourse. Increasingly this concept is used to justify ever new claims to new rights, such as right to more pension, work, more parental leave when a child is born, better medical treatment for handicapped, elderly, the sick in general, improved conditions for women, improved rights to children – 'it is undignified for them to have to labour with home work when adults can decide on how to spend their off-work hours', etc. Undoubtedly many of these claims are really questions of dignity – can there ever be good enough care for the sick and old? If we accept that equality is the basic democratic norm, the answer is that human dignity is only fulfilled when all citizens have absolutely top quality health care all their lives, regardless of income and social status. Thus, we cannot easily dismiss the everyday usage of the terms human dignity and human rights for pressing issues politically. Everyone agrees on the importance of human rights – again undoubtedly a good thing – and it is also true that they can almost always be improved upon. The medical care given old people, as an example, was much worse before than now, when medical improvements are enormous. The issue is where to say stop; not that there are valid claims based on human dignity.

Second, we found that Norwegians invoke specific legal claims to human rights under the ECHR increasingly when they disagree with Norwegian authorities or courts. The Norwergian state has been sentenced in the Strasbourg court several times over the last years, and has complied each time, changing national legislation. Now citizens are familiar with the convention and the court, and use the threat of bringing a case to Strasbourg as leverage in highly medialised political processes. They can concern issues such as the mandatory teaching of Christianity in public schools – a contravention of the human right to religious freedom? Or the state church, a violation of the same right? Right to medical treatment outside the state if such treatment is not possible in Norway; etc. The threat of using the court system, including the national courts, is growing in importance. The usual process is one in which the media portray a case of say, alleged discrimination – a state church pastor is denied a job because he lives with a homosexual partner, which is allowed in the 'partnership law' – can the state force the state church to accept this or not? The Norwegian state then has to calibrate its standpoints to international human rights standards, anticipating the outcome of a prospective court ruling, and argue in human rights terms. The whole political process becomes 'juridified' as well as 'internationaliased'.

Another source of supra-national legislation in also the human rights field is the ECJ (European Court of Justice) in Luxembourg. As ECJ judge and scholar Allan Rosas, professors Hjalte Rasmussen and Joseph Weiler have shown,[6] this court not only engages strongly in judicial activism which as also teleological, as the court is treaty-bound to aim at integration ('an ever closer union'), but it also sentences more and more human rights cases. Rosas documents how the court has started to refer to the ECHR and to human rights as early as in 1969 when it referred to 'the fundamental human rights enshrined in the general principles of Community law and protected by the court' and stated that these belong to the basis on which the court adjudicates.[7] Throughout the years the ECJ has expanded greatly in its human rights 'portfolio', interpreting its mandate in internal market treaty rules as also a matter of human rights. For instance, an affirmative action policy proposed by the University of Oslo in order to increase the number of female professors by instituting professorships for women only, was struck down by the ECJ as discriminatory of men, and was therefore abandoned.[8]

The relevance of these two examples to our theme is the following: European states are developing more and more of a supra-national court system for the adjudication of human rights. As these rights are universal, this is a positive development, as the problem is often that human rights are not enforced and therefore have no teeth. But there are problem with this development as well: If judges are more policy-makers than they like to admit; we have a system of *supra-national and unelected policy-makers* that define our human rights standards.

Returning to the Bruzelius quote; she said that 'human rights paragraphs are really policy statements', meaning that there are few indications of how a lawyer should interpret them.[9] Even if one uses a positivist defi-

[6] Hjalte Rasmussen, *On Law and Policy in the European Court of Justice*, Dorcrecht, Boston, 1986, and Joseph Weiler, *The Constitution of Europe*, Cambridge Univ. Press, Cambridge, 1999.

[7] Case 29/69 *Stauder vs City of Ulm*-ECR 419 and Case 11/70 *Internationale Handelsgesellschaft*-ECR 1125.

[8] Norway is not in the EU, but is bound by ECJ adjudication through an agreement with the EU which obliges Norway to accept all EU directives and which has its own intermediate court. In practice, the ECJ decides.

[9] Intervention at the conference 'European Legal Integration: Contemporary Challenges', Faculty of Law, University of Oslo, September 16 and 17, 2005.

nition of law and says that 'law is what lawyers do', there is a problem of legal method here. Norwegian lawyers are in fact very worried about the internationalization trend for this very reason: which legal sources and methods should they employ? Professor Hans-Petter Graver characterizes the present situation as one of 'liquid law':

> The main argument ... is that in a situation where legislators, judges and subjects of the law have to cope with a law that is increasingly polycentric, with an abundance of sources and higher degree of instability and change than within the traditional national legal order, no fixed points of reference exist for drawing lines between 'activism' and 'restraints' in judicial decision-making.[10]

He adds that Robert Bork's[11] argument that judges engage in judicial activism globally now seems borne out by the trends in Europe, and points out that the terms has several meanings (and that none of them is an agreed-upon definition). His concern is mainly that Norwegian judges, accustomed to a pragmatic view of law which is very faithful to precendent and national sources; now are introduced to a pluralist setting in Europe where the question of method and legislating from the bench are wide-open: 'Failure to use the established "tools of the trade" is another form of "judicial activism"'[12] and this happens because 'Norwegian courts are forced to ... engage in a formalist approach based on foreign rules and legal principles'.[13]

This situation eventually leads to a blurring of legality and politics, of what is legal and what is political. Graver's disconcerting conclusion is worth quoting in full, the more so because it comes from an eminent expert on EU law:

> Maybe the relations between different legislators and courts in the European legal order may be described by the metaphor 'liquid law' where the law is fluent, unable to hold its shape for long, undergoing a continuous change in shape when subjected to stress. Legal rules based on national legislation will prevail for a time, but change when subjected to challenges from European law. Doctrines based on precendents are abandoned or adapted when subjected to pres-

[10] H-P. Graver, 'Community Law, Judicial Activism and Liquid Rules – an EEA Perspective', paper presented at the conference 'European Legal Integration: Contemporary Challenges', *op. cit.*

[11] R. Bork, *Coercing Virtue: The Worldwide View of Judges*, Washington D.C., 2003.

[12] Graver, *op. cit.*, p. 9.

[13] *Ibid.*, p. 10.

> sures from other courts, political bodies or articulated social interests. Judges are increasingly emancipated from rules, codes, and practices and faced with conflicting demands from a polycentric web of legal authorities. One can no longer distinguish sharply between the political function of legislation and the judicial function of interpretation and application (my emphasis, *Ibid*. p. 20).

The field where this is most evident is human rights. If we continue to use the Norwegian case as an example, the political process of 'judicialisation' of human rights 'politics' is clearly a development in the American direction. Several other indicators of such a general change include the end of Keynesianism and the strong dominance of New Public Management ideology, whereby the citizen is seen more as a consumer, client and rightholder than as a citizen in a polity where what is political is well defined. With the end of the Cold War, the nation-state in Europe has become less important, and empirically we find that 'human rights activism has proceeded after (this time), and during the 1990s the ECHR became incorporated as domestic law by most member states'.[14]

In the human rights area, international courts have acquired sovereignty that is now much more important than before because citizens invoke the rights in a transnational manner. Østerud notes, very importantly, that 'the background to the strong law-making role of transnational courts is that there is no political law-maers at the transnational level. International law, and indeed human rights, is developing from treaties with *wide and imprecise clauses*' (My emphasis, *Ibid*., p. 11). Thus, we have a complex law-politics situation in Europe today:

Judges perform 'semi-politics' when they adjudicate in human rights; but they are not politicians. These judgments bind national courts: 'Fluid' law is imposed on nation-states. But also politics becomes 'juridified' when citizens not only use the courts instead of the parliamentary channel, but insist on defining political issues as human rights issues. This endangers the model of the Rechsstaat from two sides, in a 'pincer-movement': From above, in the imposition of 'fluid' law; and from below, in the constant invocation of human rights in the political process.

Moreover, we see that the drivers behind this development are global and probably irreversible. The discourse on human rights is universal, and

[14] Ø. Østerud, 'Power, Judicialisation and Parliamentary Democracy', p. 6, paper presented at Stiftung Wissenschaft u. Politik, 2-4 June 2005.

the West exports human rights everywhere, as discussed below. The loss of political power inside the nation-state continues, as economic globalization imposes a global logic on states. National economic solutions are no longer possible. Likewise, the citizen knows and compares what services the 'service-state' created by New Public Management can provide: Is there a better cure for cancer in Australia? Then I demand that my state pays for it. The scope of human rights demands will only be determined by global possibilities and ones' own power. By creating binding international human rights instruments, states have placed themselves under the constant scrutiny of the newly empowered global citizen, who will take his claims to the supra-national level of adjudication if he has the resources to do so.

The conclusion to this 'opening-up' or perhaps 'end of' the nation-state is that human rights and human dignity have moved to center stage of world politics. This is no small cause for celebration. But the concomitant development is that the *Rechtsstaat* at the national level cannot function as the balancing mechanism between human rights and majority politics any longer, and further, that there is no consensus on what human dignity and human rights mean. As we have seen, law and politics *are* already very blurred, and that across the national-international divide. Thus, prof. Kirchhof's regrets about the dysfunctionality of the national system may be correct, but they do not capture the complexity of the present situation in Europe, which spans the nation-international divide as well as the law-politics distinction.

Is there any way out of this labyrinth? Let's assume that we want to ensure a functioning *Rechtsstaat* at the supra-national level in some form or other – which I think is the only realistic way given the severe changes away from the nation-state – the most pressing question is not one of organization, ie. of how still national parliaments will interact with such a court – but it is the question of agreement on fundamental norms. Is it possible to agree what human dignity and fundamental human rights mean in a post-modern, post-national, and post-Christian era? If law is 'liquid', as prof. Graver calls it, paraphrasing Zygmunt Baumann's concept of 'liquid modernity' where everything 'individualised, privatized, without given or self-evident rules, codes and patterns to conform to'?[15]

To sum up; Europe has become the major exponent of human rights, democracy, and the rule of law all over the world. This modern 'trinity' of val-

[15] Graver, *op. cit.*, p. 20.

ues has become the universal standard for good government and humane politics. While democracy entails a basic equality as the main norm; it is in human rights that we today find the values about the human being expressed in the form of so-called fundamental human rights. Rule-of-law means that there is a separation of powers with an independent judiciary. There can be no real democracy and rule-of-law unless it is based on human rights.

No one today questions the legitimacy of human rights as the basis for democracy; the procedure whereby the people decide. Rule of law ideally reflects the same human rights, and constrains the majority when it deviates from these standards. Human rights hang logically together with democracy and rule of law: these legal and political institutions cannot exist without the founding, which is a certain and very specific view of the human person – an anthropology. Conversely, human rights require democracy and rule of law – these rights are not respected under tyranny, oligarchy or any kind of one-party system.

*Legal and Political Rationality: The Logic of Universals*

Josef Cardinal Ratzinger has written much on the problem of relativism versus pluralism. In his book *Werte in Zeiten des Umbruchs* (Herder Bucherei, Freiburg. 2005) he states that while relativism is a precondition for democracy, there is nonetheless a fundamental difference between pluralism and nihilism:

> Auf die einen Seite finden wir die radikal relativistische Position, die den Begriff des Guten (und damit erst recht den des Wahren) aus der Politik ganz ausscheiden will, weil freihetsgefährdend. Naturrecht wird als metaphysikverdächtig abgelehnt ... es gibt danach letztlich kein anderes Prinzip des Politischen als die Entscheindung der Mehrheit. ... Dieser Auffassung steht die andere These gegenüber, dass die Wahrheit nicht Produkt der Politik (die Mehrheit) ist, sondern ihr vorangeht und sie erleuchtet: Nicht die Praxis schafft die Wahrheit, sondern die Wahrheit ermöglicht rechte Praxis. Politik ist dann gerecht und freiehtsifördernd, wenn sie einen Gefüge von Werten und Rechten dient, dass von der Vernuft gezeigt wird ... (hier) finden wir also ein Grundvertrauen in die Vernuft, die Wahrheit zeigen kann (*Ibid*., p. 52).

The point of the second position is simply that the human being is able to use his reason to arrive at political and moral axioms, what we call justice in the tradition from Socrates onwards. Through reason and man's

ability to evaluate arguments about right and wrong goes the way to politics and law. To the ancients the difference was obvious; one could distinguish between a good ruler and a tyrant; between a usurper of power who uses it for his private interests, and a statesman. Whenever we use these distinctions, we automatically provide evidence of this moral sense that is inherent in the human being (but not in animals). Why, then, is it so hard to admit that politics is intimately connected to morals, and that human beings can reason about right and wrong in a fairly consistent manner? It seems that the opposite norm is the main one today; that of nihilism: there is only my view of things and your view of things, and no common objective standard other than in some few areas.

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

There are thus at least *two paradoxes* at work here: While Europe and the West extols the rest of the world to follow human rights and in fact uses this as conditions for aid and cooperation; European politicians simultaneously refuse to define, in an objective manner, what these rights really mean. Secondly, while these rights are appealed to more and more, they are undermined as sources of authority in the erosion of the belief that they can be defined in a clear and objective way.

These two processes are intertwined, and are symptoms of a deeper crisis in European politics: that of an ever greater irrationality, I would argue.

Human rights were codified as a response to the moral relativism of Hitler's Germany and World War II; which put in a nutshell the relativist problem of obeying orders from the legal ruler of the realm – in this case Hitler – when these orders were contrary to morality. The Nuremburg trials laid down that it is wrong to obey such orders; that there is in fact a 'higher law' – a natural law if you will – that not only forbids compliance, but which also makes it a crime to follow such orders. In the wake of this revolutionary conclusion in international affairs – it was the first time in history where a court had adjudicated in such a way – there was a growing movement to specify what this 'natural law' for the human being entailed. This resulted in the Universal Declaration of Human Rights only three

years later – a supra-national set of inherent and inalienable rights for every human being. It is very clear that the statement of human rights was to be a 'common standard for all mankind', as states in the preamble, and not something that could be changed at will by political actors. Yet this is exactly what happens in Europe today.

This placing of human rights *above* national law and politics is of extreme importance in international politics: For the first time a tribunal judged according the natural law of what a human being can demand and expect. The Universal Declaration of Human Rights in 1948 is the authoritative document in the world on this topic.

The rights defined in this document are parts of a whole, making up a fullness of rights which reflect a very specific anthropology, as Mary Ann Glendon has shown.[16] The rights are clear and concise, and the underlying anthropology is equally clear. The intention of the authors of the declaration was to put into a solemn document the insight about human dignity that could be gleaned from an honest examination, through reason and experience, of what the human being is. Therefore they wrote explicitly that 'these rights are inviolable and *inherent*'. *In other words, these rights could not be changed* by politicians or others, because they were inborn, belonging to every human being as a birth-right, by virtue of being a human being. The declaration is a natural law document which was put into paragraphs by representatives from all the world, from all regions and religions. Human rights are *pre-political* in the sense that they are not given or granted by any politicians to their citizens, but are 'discovered' through human reasoning as being constitutive of the human being itself. They are also therefore *apolitical* because they are not political constructs, but anthropological – consequences of our human nature. As one of the key drafters of the declaration, Charles Malik, said; 'When we disagree about what human rights mean, we disagree about what human nature is'. The very concept of human rights is therefore only meaningful if we agree that there is one common human nature which can be known through the discovery of reason.

This last statement is however at great odds with contemporary mentality, which is relativist and subjectivist, scorning the idea that human nature as such exists and even more so that it can be known through reason. But if this is denied, and we regard human rights as something that

[16] M.A. Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration*, Alfred Knoph, N.Y., 2003.

mere political processes can change, how can we uphold human rights as a standard for others, if not for ourselves? European foreign policy today is firmly based on human rights observation in all regions of the world, and entry into organizations such as the EU or NATO; the OSCE or the Council of Europe – the four major ones in Europe – are based on meeting human rights standards. Thus, to know what human rights objectively mean is more than a matter for the philosophically inclined.

But even more important is European politics itself: we are moving away from the nation-state based on 'nation', one common ethnic, religious, and cultural identity in a country; towards a European polity based on human rights. We are developing several identities in the post-modern period; and the traditional state based on the forging of one 'nation' – Frenchmen, Englishmen, Spaniards – will disappear. Instead we live in multi-ethnic, multi-religious, and above all, secular, society. Our only basis for common values resides in the concept of human rights. If these cannot be defined in a clear manner, we are in a state of ethical anarchy.

A further very important issue is that are undermining the very concept of human rights through 'politising' it at both the national and the international level. There is a continuous process of redefining individual human rights in areas of contention, such as the family, childrens' rights, womens' rights, and so on. The many UN conferences in the 90s were arenas for such redefinition, and at national level in Europe now we see that this activity has center stage. But when e.g. marriage and family are redefined in national laws, this seems to be a contravention of the supra-national human rights standards. Again, since human rights are 'above' politics, they are also above the nation-state. They are truly supra-national; many of them also so in a legally binding form, as treaties and conventions. Each time national politics makes its own definition of a human right, it not only redefines it, but also undermines its international commitment. This in turn undermines the whole human rights edifice. This is truly a paradox for those states which uphold the 'sanctity' of human rights to other states; often rouge or failed states. They in turn can say: 'If European states can define human rights at will, why can't we?'

Examples of this often well-intended subjectivism abound: Recently the Norwegian papers reported that an Islamic web-site in Oslo argued for polygamy, which is forbidden in Norway. The religious congregation behind this web-site received state subsidies, as do most churches as well, from the Norwegian state. But instead of condemning polygamy and withdrawing the subsidy, the minister of culture stated that 'in a democracy we have freedom

of expression'.[17] What ought she to have done? Polygamy contradicts the human right to marry as defined in the Universal Declaration of Human Rights. Thus, it ought to be easy to reject polygamy. But why are we so unsure about what is right and what is wrong; what is condemnable and what is not? Recently the 'poly-amourous' movement has gained press attention in Norway, and in Sweden there is a feminist political party[18] which advocates the abolition of marriage in its traditional heterosexual form – called hetero-doxy – and the introduction of 'group-marriage', which is nothing but polygamy open to various mixtures of sexes. One might, tongue-in-cheek, ask why one should not be able to marry one's dog as well.[19]

There are really only two positions on this question if there are no moral, legal or common-sensical reference points: One either sticks to the original wording of the UDHR which defined marriage heterosexually; or one agrees that human rights means just what they mean to the majority at any one time in a national legislature. In the latter case, polygamy is as logical as any other marriage definition if that is the outcome of the political process.

*The anthropological crisis in Europe, if we call it that, coincides with the greatest transformation of the European state since its inception at Westphalia in 1648.* We are at the same time transforming the legitimacy basis of the state to human rights while claiming that these human rights cannot be defined objectively. This is a 'liquid' situation which where 'normative anarchy' threatens. It is a commonplace that no state can exist without a set of common values held by all citizens.

### *Legal and Political Rationality: The Logic of Universals*

The trend towards nihilism, a hundred years after Friedrich Nietzsche wrote 'Beyond good an evil',[20] aptly sub-titled 'Precursor to a philosophy for the future', is manifested in the lack of belief in human ability, through reasoned debate and thinking, to arrive at standards about human nature and

[17] Aftenposten, 12.1.2004, front page.

[18] Feministisk Initiative, led by Gudrun Schyman.

[19] At a family conference in Holland some years ago I recall that López Cardinal Alfonso Trujillo, President of the Pontifical Council for the Family, said jokingly, 'I and my dog are a family, too', something which in all earnest was broadcast on the prime-time TV' news that day, 'The Cardinal today stated that he and his dog also make up a family'.

[20] *Jenseits von Gut und Bøse: Vorspiel einer Philosophie der Zukunft,* Wilhelm Goldmann Verlag, Munchen, 1885.

human virtue and vice. This stance is pronounced and implicit in European politics today. The very concept of truth itself is not only contested; as it has always been, but seen as fundamentalist and repressive; as something undemocratic.

This strange aversion to the concept of truth is intimately linked to the concept of 'political correctness' (PC). It is perhaps the most powerful concept we have in our modern Western democracies, and is a wholly immaterial one. The power of being PC or not has been felt by most people: one senses that something which used to be 'comme it faut', suddenly is not. The media no doubt play a key role in this process of 'shaming' and 'praising'. To think that one can discover objectively valid moral truths is certainly the most 'un-PC' position possible.

The strength of PC derives precisely from the lack of belief in the result of rational debate, viz. firm and convincing conclusions. If debate is not aimed at the discovery of truth as a possibility, then there is no point in the debate other than propaganda for own interests and values. PC today is very much about tolerance, but tolerance is an empty concept unless there is a standard for judging what is to be tolerated and what not. Should polygamy be tolerated, even if I do not like it? Clearly the minister of culture was unsure of this. Being herself a Christian-Democrat, perhaps she thought that it would be very un-PC for someone profiled as a Christian to be critical of Muslims. This is the kind of dynamism I am concerned about: the lack of standard for judgment makes tolerance a PC concept in the end: one tolerates what the majority likes of that which is promoted by strong interest groups; as one is afraid of being charged with intolerance. But one does not tolerate what PC sanctions, because PC has the power to marginalize effectively.

Perhaps one 'key' to resolving the subjectivist problem lies in a rediscovery of universals: political and legal reasoning necessarily must concern universals; i.e. the common good. It cannot be 'self-referential', because then it is not about law or politics. If I say that the law should punish stealing, it is because I argue that stealing as such is wrong, for *everyone and everywhere* and therefore should be punished. *It is about a universal, and the law condemns it as a universal.* But it I say that it is wrong to have a sailboat and that having one should be condemned, I am speaking nonsense. It simply does not make sense. This is because there is nothing universally valid about having a sailboat. It belongs in he category of private interests, and is a totally private affair.

The language we use indicates to us immediately that we speak about universals in the first case, of law and politics; but only about particulars,

i.e. about the sailboat as a private pursuit, in the second instance. This Aristotelian language is as relevant today as it was in his time, for it shows the way to the distinction between private and political, between morally relevant and irrelevant.

'Res publica' – the 'political thing' – was the polity itself, the republic or the state, as a modern rendering would translate it. The political is that which concerns the *polis*, human society. To the ancient Greek masters of political thought, political activity was the most important and noble human activity after philosophy, which crowned human endeavour because it concerned the very soul of man itself.

The reason why politics is key to human happiness and subsistence is anthropological: it is because the human being is a *zoon politikon*, a political being; a social being. Man naturally lives in society; is naturally social – in the family, but also beyond it. He is also naturally *rational*; indeed, the rational ability distinguishes him from animals, according to Plato, Aristotle, and later Thomas Aquinas and the mainstream of our European political philosophy. *Because any man can reason about basic facts, including basic facts about right and wrong; he is different from animals, who also have language, but who cannot reason*. This observation is the basis for the natural law tradition which has formed European democracy.

As Aristotle and Plato pointed out; man has an ability for creating good or bad societies. The human propensity for evil lies at the root of tyranny, while the best and most virtuous thought results in what they termed aristocracy. While we prefer democracy to aristocracy today as the form of government, it is important to realize at the outset that human nature and the quality of society hang together: it can go both ways – we can have bad societies or good ones. The science of politics, founded by these ancient thinkers, was both normative and empirical: The question they asked, was this: What is the best society? Then they analysed various types of societies that they observed – Aristotle inductively and empirically, comparing known city-states; Plato deductively, through the reasoning of Socrates. Both were however informed by the over-arching question: what is *good* society? Which is the *best* society?

The point here is simply that *anthropology and politics are connected: society is a reflection of the 'goodness' or 'badness' of its inhabitants*, or to put it in more traditional terms; it is a function of virtue and vice. In a democracy the voters are themselves the decision-makers; thus it is incumbent on them to be virtuous. In a monarchy, aristocracy, oligarchy or tyranny – ancient forms of the polity – the key to society was the virtue or vice of a

few persons. A good monarchy could decline into a tyranny, and a good aristocracy could decline into an oligarchy, which was morally speaking a bad form of government.

Today this rather obvious and also substantial link between the moral qualities of the decision-makers and the ensuing political society is not reflected much on. To say that politics is about moral issues seems strange, as one would rather be inclined to agree that politics is amoral or even immoral. But even when people say that 'Politics is a dirty business', they are in fact affirming that it is supposed to be something very different: they mean that it is wrong that politics is not better, more morally sound; when they say this with regret and disdain. They are not describing what politics per se is, like money laundering or murder. They do not mean that politics is defined as a 'dirty business' as such, but that a particular political society they happen to know, is 'dirty'.

This may seem startling, even absurd: Isn't democracy about unlimited freedom and pluralism, about free choice, without authority? Isn't it the final liberation from imposition? The answer is yes and no; yes in most things political, where there are many options to choose from; but no in the sphere of fundamental virtues and vices. If one is a moral relativist, one would have to agree with Douglas and not Lincoln that slavery is OK when a majority votes in favour of it; or that Hitler must be let to rule since he was democratically elected. In our own day we would have to agree that not only is abortion and euthanasia acceptable as long as the majority wants to legislate in favour; but we would also have to accept ethnic cleansing or genocide in the same manner. Most people however would object to at least some of these propositions – I would guess that most would say that ethnic cleansing and genocide are evil, and also that Hitler was a tyrant who should be deposed.

There is something very illogical here: On the one hand we have a 'feeling' of right and wrong, but we think that it is a mere feeling because we lack the ability to justify or explain why we 'feel' like this. We do not know how to reason about these matters. On the other hand we are uncomfortable with the proposition that there can be moral laws underlying politics and that democracy is intended to promote good morals in society, that it fundamentally is about values, not about procedures. We would like to day something like this: 'Morals belongs to one's private life and has nothing to do with the freedom of democracy, which is about following rules and accepting difference'.

For many centuries European democracies have shared approximately the same moral norms, derived from the ancient and Christian legacy. The

ten commandments were more or less acceptable to all. These moral rules were also reflected in law and politics. There was no essential contestation of what should be taught in school or punished in the criminal code. The family was a given and natural institution; the right to life was not an issue in politics, and there was a basic agreement on what belonged to the private and the public sphere. True, different political ideologies had different views on the latter, and also on the role of the family in the economic and societal structure, but these were debates about the role of the state, of the relationship between economic and politics, and when it came down to the anthropological issues, it was a debate over the existence of the soul – of whether man was simply material or not.

Today there is no overt, systemic ideological debate. The political is fragmented and un-ideological because the discussion is no longer about man and society, about what the good society is based on what man is. It is rather the situation that Friedrich Nietsczhe diagnosed about a century ago in his book 'Beyond Good and Evil'.

Like Kirchhof, I have no solution to the problem of lack of common norms in European society. But the only way to determine the validity of a political or legal statement is the 'universality' test. I believe, with Socrates, that most things political and legal can be subjected to rational scrutiny and determined through human reasoning. Indeed, if this is not correct, what remains is simply that might is right.