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# Universal Values or Particular Agendas – Can We Still Speak Credibly of "Human Rights"?

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# Universal Values or Particular Agendas – Can We Still Speak Credibly of "Human Rights"?

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3rd International Human Rights Education Conference,  
Oswiecim, 9 December 2012<sup>1</sup>

*Dicentes se esse sapientes, stulti facti sunt*  
(Rm, 1, 22)

## 1. Introduction

I greatly appreciate the invitation to speak here – all the more so, because my presence at this conference is somewhat difficult to explain. The programme of this conference announces me as a human rights lawyer, but this is not quite true. I am not a human rights expert, and make no claim to be one. On the contrary, I am a declared non-expert, and proud of it. I hold no professorship on human rights, nor do I represent Amnesty International, Human Rights Watch, or a similar NGO, nor do I occupy any function in one of the UN treaty monitoring bodies, the European Court of Human Rights (ECtHR), or any similar institution. I am simply a lawyer like many others, and my professional activity has little or nothing to do with human rights. If I have written several critical papers on human rights, it is not because I believe that I believe to be an expert, but because I am perplexed by what I see happening to human rights these days. Thus, I rather think of myself as of the little child in Andersen's tale who innocently asks: *"Mummy, why is the Emperor naked?!"*

Indeed, 'human rights' seem to enjoy unquestioned authority, just as Emperors did in previous times, and some of their glory shines not only on the institutions that have been set up for their protection, but also on academic experts, NGOs, and – ultimately – on anyone who manages to give himself the aura of a "human rights activist". But with disturbing frequency, the affirmations of these institutions, experts, and activists, nowadays cause perplexity and astonishment, as they do not seem to have much in common with the moral intuition of average people.

Some weeks ago, for example, the European Parliament has nominated as one of the candidates for the Sakharov Peace Prize a Russian punk group that had acquired worldwide notoriety for performing group-sex actions in public places and for desecrating a Cathedral, claiming that these were "art performances" and a legitimate

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<sup>1</sup> Author's note: During the Conference in Oswiecim it was unfortunately only possible to read out a small part of this paper, which, as I must admit, was too long for the 25 minutes that had been scheduled for it. This publication contains the full original manuscript, to which footnotes have been added. In particular, given the reactions of some in the audience to what I said with regard to the anthropology that should underpin human rights, I have found it useful to add a footnote (FN 38) that develops the point I was making in some further detail. This is not to be understood as an apology to those who may have felt offended by my remarks (for they have no reason to feel offended), but as a clarification. J.C.

form of "political protest". No doubt, there may be many valid reasons to protest the Russian government – but since when are group sex and church desecration worthy of a prize that honours human rights defenders? If Andrey Sakharov were still alive, what would he say of this?

Another example is the decision of a Chamber of the ECtHR, adopted by unanimity, that the presence of crucifixes in school classes constituted a human rights violation, as non-Christian children might feel unwelcome.<sup>2</sup> The decision was later overturned, but in the meantime a similar, even more spectacular decision was adopted by a law court in Germany: it prohibited the religious practice of circumcision of boys, which was described as a violation the right to bodily integrity.<sup>3</sup> Who would have thought this: sixty years after Auschwitz a German judge outlaws a central marker of Jewish (and Muslim) religious identity. If that decision is not overturned<sup>4</sup>, or the law not changed<sup>5</sup>, then Jewish communities in Germany will face the choice either to give up their religious practice or to emigrate.

Another example: in mid-November, I was at the European Parliament to watch the hearing of Dr Tonio Borg, who was going to be appointed as a new member of the European Commission. Everyone agreed that he performed well and had all the capacities that are required for the job. But from the moment his designation was made public there was an aggressive campaign by certain NGOs and Members of Parliament who questioned his commitment to "Fundamental Rights".<sup>6</sup> Why? Because of his views on issues such as abortion, same-sex marriage, research on embryonic stem cells, etc. which marked him as a social conservative. What we see here is the deliberate radicalization of the political discourse: for certain pressure groups, if someone does not share their agenda, he is a "human rights offender". This way of displaying concern over fundamental rights could be described as a form of political hooliganism: its apparent purpose is to preempt a rational debate from taking place by denigrating the political adversary.

These are but a few of many such episodes. What they reveal is that, while human rights seem to stand at the summit of their glory, they are, at the very same time, in

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<sup>2</sup> ECtHR, *Lautsi v. Italy*, Application no. 30814/06. The Chamber decision issued on 3 November 2009 was later overturned by a Grand Chamber judgment of 18 March 2011.

<sup>3</sup> LG Köln, 7 May 2012 - 151 Ns 169/11

<sup>4</sup> In the case at hand, the defendant, a Muslim doctor who had performed a circumcision on a boy aged 4 at the request of his parents and who had not committed any medical malpractice, was acquitted, as the court found that he had been in justifiable ignorance of the law. Given this acquittal, there was for formal reasons no possibility (and no reason) for him to appeal against the decision. But given the great media attention for this case, it is clear that any future defendants cannot expect to be acquitted on these grounds.

<sup>5</sup> On 12 December 2012, the Federal Diet has adopted a law to amend the Civil Code (*Bürgerliches Gesetzbuch*) in order to specifically allow for the circumcision of male infants.

<sup>6</sup> Cf. the joint statement published on 29 October 2012 by the International Planned Parenthood Federation (IPPF), the International Lesbian and Gay Association (ILGA-Europe), The Stop AIDS Campaign, Catholics for a Free Choice (CFFC), the European AIDS Treatment Group, and the European Parliament's LGBT Intergroup. Similar statements were published by the European Humanist Federation (EHF) and – rather surprisingly – by the Confederation of Family Organisations in the European Union (COFACE).

deep crisis. We all agree on human rights, but do we really? Or is the situation not better characterized by saying that human rights nowadays provide institutions and vocabulary that everyone can use for his own purposes?

We seem to be facing a new type of human rights abuse: the abuse of human rights language by certain pressure groups in politics and media. But it would be a great mistake to believe that the views and the agenda of those groups are generally accepted. If people still maintain their attitude of deference and do not dare to speak up, it is because, just like in Andersen's tale, they fear being reviled for being stupid, inept for their jobs, outdated, or worse. However, it becomes increasingly clear that, while we all seem to agree on the importance of human rights, the consensus on what those rights foresee, if it ever existed, is quickly eroding.

## **2. The West against the Rest?**

Various UN agencies and treaty monitoring bodies, the ECtHR, and the Council of Europe (CoE), have been playing an important part in this. Instead of monitoring the application of rights standards that are uncontroversial, they are now trying to impose novel rights that are controversial. While they show no great efficiency in dealing with "ordinary" human rights violation cases<sup>7</sup>, they display a strange receptiveness for the frivolous "strategic litigation" or the "shadow reporting" of certain pressure groups.

The authority enjoyed by those institutions is due to the fact that they were entrusted with the mission to be the guardians of rules and principles on which there was a nearly worldwide consensus. But they do not seem to fulfill this task anymore; instead, they appear to have discovered a new mission for themselves, acting as the spearheads of a global movement that seeks to impose a new value system on the world.

That value system – how can I describe it? I am probably not wrong in saying that it represents the values of the cultural and political mainstream in North America and Western Europe at the end of the 20<sup>th</sup> century. It embraces the achievements of the 1968 Cultural Revolution – in particular in all matters pertaining to sexual mores, social welfare, and individualism. The key concepts are "choice" and "equality": every individual is entitled to make its own choices, the morality or rationality of which must not be questioned by anyone. The State's role is not to question or to criticize, but to facilitate and to empower: hence the attachment to a generous welfare state providing for health, education, social security, housing, etc., all of which are new "human rights". However, it is noticeable that, while radical liberalism holds sway in the domain of sexual mores, there is in many other respects a certain distrust against individualism, and even an outright rejection of the idea that people should be allowed to make their own free decisions: how else can it be explained that human rights nowadays includes an ever increasing quantity of "anti-discrimination" laws that radically restricts the contractual freedom of citizens?

While those values may be the prevailing ones in contemporary Western societies, they can hardly be described as "universal". In non-Western societies they are upheld only by

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<sup>7</sup> Such as the ethnic cleansings in Darfur, the religious discrimination of non-Muslims in nearly all Muslim countries, the persecution of Christians in China, North Korea, and other countries, the prevention of war crimes in Central Africa, etc. ...

a thin elite, and even in Western societies there are some pockets of resistance. Besides this apparent lack of general acceptance, one has also reason to question the sustainability of the Western post-1968 code of values: the societies that have embraced them are now over-aged, over-indebted, and in a state of slow but steady decline as regards their political and economic influence. This is no wonder. The deconstruction of institutions like marriage and family and the adulation of individual self-fulfillment pre-suppose a strong welfare system that non-Western societies could never afford. It now turns out that Western societies cannot afford it either. What will remain are atomized and destitute societies, in which everyone has a lot of theoretical rights and entitlements, which unfortunately will not be of much practical use in reality. This is what the social engineers of our time call the “rights-based approach”: to give new rights to people, and hope that the rest will follow. I am not sure it will.

Rather than agreement on universal values, what we are seeing is a cultural conflict in which the dividing line is between the West and the Rest, but even within the West it seems to be the project of a generation that was young in 1968, but which today is approaching the age of retirement. Their concept of human rights is certainly "modern" in the sense that it is neither universally shared nor of long standing – but is it not by now also somewhat outdated?

### 3. The Manipulation of Human Rights and the Decline of Human Rights Institutions

Be that as it may, the post-1968 generation is still in control of much of the institutional apparatus that originally was set up to protect human rights, but which, if those in charge so choose, can also be used to manipulate and overturn them.

Is there any need for me to provide detailed evidence for this observation? I think not. The facts should by now be notorious. ECtHR decisions like *Goodwin vs. the UK*<sup>8</sup>, *Lautsi vs. Italy*<sup>9</sup>, *Tysi c vs. Poland*<sup>10</sup>, *Schalk and Kopf vs. Austria*<sup>11</sup>, *A, B, and C. vs. Ireland*<sup>12</sup>,

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<sup>8</sup> ECtHR, *Goodwin v. United Kingdom*, Application no. 28957/95. The case, in which the Court found that transsexuals who had undergone a procedure of "gender reassignment" should have the right to marry, is remarkable for two reasons: firstly, because the Court embraces the theory of "gender" being a social construction rather than an objective biological given, and secondly, because it swiftly discards its own prior case law, saying that "social changes" mean that the European Human Rights Convention has changed its meaning.

<sup>9</sup> See above FN 2

<sup>10</sup> ECtHR, *Tysi c v. Poland*, Application no. 5410/03. This judgment is the first one to contain a remarkable argument that was re-iterated in various subsequent decisions: while the Court explicitly recognizes that there is as such no "Right to Abortion" in the European Human Rights Convention, it argues that if and where a country makes the decision to legalize (or not to prohibit) abortion, it must ensure that women have effective and real access to it. That includes, according to the Court, not only a legal framework to guarantee such access, but also an obligation for doctors who refuse performing abortions for reasons of conscience to refer the woman to another practitioner who is willing to perform the procedure. The glaring absurdity of this reasoning, which has no basis at all in the text of the Convention, is quickly understood when the newly discovered principle is applied to other circumstances. Nobody would agree, for example, that the State has an obligation to guarantee the availability of any other elective surgery (such as cosmetic surgery). Nor would anybody agree that a State that tolerates (i.e., does not criminalize) prostitution is under an obligation to guarantee the

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availability of prostitutes, or that a woman not wishing to prostitute herself is under an obligation to refer anyone who so requires to another woman who has no such objections. Thus the argument appears to have been crafted for the sole purpose of promoting abortion – but it fails to explain why (only) in this specific context of abortion the toleration of a practice should be considered to immediately create an entitlement to it.

<sup>11</sup> ECtHR, *Schalk and Kopf v. Austria*, Application no. 30141/04. In this decision, the Court decided that the Convention does not include an obligation for a State to allow for same-sex "marriages". This outcome is undoubtedly correct, but what is nevertheless surprising is (1) the fact that this manifestly ill-founded application was not dismissed *a limine*, (2) the very narrow four-to-three majority by which the Chamber adopted this decision, and (3) the fact that in the decision the Court seems to say that if the trend among European countries to legislate for same-sex "marriages" continues it might at some stage be argued that a new human right has emerged, and that the other States would have to follow. Cf. par. 105 of the decision: "*The Court cannot but note that there is an emerging European consensus towards legal recognition of same-sex couples. Moreover, this tendency has developed rapidly over the past decade. Nevertheless, there is not yet a majority of States providing for legal recognition of same-sex couples. The area in question must therefore still be regarded as one of evolving rights with no established consensus, where States must also enjoy a margin of appreciation in the timing of the introduction of legislative changes...*". Reaching far beyond the specific issue of same-sex "marriages", the Court makes a statement that is truly breath-taking. It seems that if there were a (simple? or qualified?) majority of States providing for same-sex "marriages", the margin of discretion enjoyed by States would disappear, or at least be reduced. But this implies that the Convention has no certain meaning and that the Court's task, rather than interpreting the text of the Convention, is to take note of trends and tendencies, and to reinforce them. Strangely enough, however, the Court did not intervene to call back to order the first few States that had introduced such legislation. At that time, the general consensus was that a marriage is between a man and a woman, and only one or two States started to act in contradiction to this consensus. Similar arguments could be made with regard to many other issues, such as abortion, euthanasia, divorce, assisted procreation, etc. The argument frequently used by the Court that the Convention is a "dynamic instrument" is thus used only to impose the choices of "progressive" jurisdictions on the conservative ones, and never the other way round. It is for this reason that one can say that there is a deeply entrenched bias in the jurisprudence of the Court, which has embraced progressivism as its unofficial guiding ideology. Obviously, there is no mandate for this in the Convention itself.

<sup>12</sup> This judgment follows the line of reasoning opened by the *Tysi c* case (FN 9), finding that, given that Ireland does allow abortions in cases where the continuation of a pregnancy would constitute a serious and real threat to the life and health of the pregnant woman, a legal procedure should be available to ascertain *ex ante* whether or not, in a given case, abortion is justified. This idea seems as reasonable as requesting States to foresee legal procedures that would allow assessing *ex ante* whether someone has the right to kill somebody else in an act of legitimate self-defense. Besides that, this case is also remarkable for a number of other reasons. Firstly, the ECtHR accepted to hear it although it had never been brought to any Irish law court, so that, given that the Court itself does not have a procedure to verify facts, it is unclear whether the underlying facts were not completely fictitious. Secondly, the case was built upon physical sufferings of the three applicants (such as pain and heavy bleeding) that were not the result of having had to comply with Irish legislation, but of having circumvented it. Had the three applicants complied with the Irish law in force, they would not have had abortion, and hence suffered no pain, no bleeding, no anguish, which were the (not untypical) consequence of the legal (but apparently botched) abortions they had undergone in the UK. It is difficult to understand why the applicants, rather than filing lawsuits against the medical practitioners who had performed the abortions in the UK, preferred to hold the Irish State responsible for their sufferings. In the light of all these circumstances, it is difficult not to view this case as a particularly conspicuous piece of evidence for the ECtHR's leanings towards judicial activism.

*E.B vs. France*<sup>13</sup>, and *Costa and Pavan v. Italy*<sup>14</sup> have raised widespread critique with regard to the ECtHR's poorly reasoned judicial activism, and this is but a very small selection of cases that could be cited in this regard. There is no reason to believe that these are isolated hiccups of a court that otherwise works reasonably well; instead, there is every reason to suspect that the judges of the Strasbourg court, or at least some among them, have an agenda of their own.<sup>15</sup>

Also, it has been amply demonstrated that the UN and its treaty monitoring bodies have for many years been following a concerted and systematic policy of subjecting

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<sup>13</sup> ECtHR, *E.B. v. France*, Application no. 43546/02. The Court decided that France, which allows the adoption of children by individual persons (rather than restricting it to couples) was not allowed to use a person's homosexuality as a criterion to assess its suitability as an adoptive parent: a State is not obliged to foresee adoption by single persons, but if it does, it must do so without discrimination. The decision is questionable in that it arbitrarily extends the scope of Article 14 of the Convention, which only prohibits discrimination in regard to "the rights and liberties set forth in this Convention". In actual fact, there is no "Right to Adoption" in the Convention. There can indeed not be such a right, given that Article 21 of the Convention on the Rights of the Child (CRC) clearly foresees that in all questions related to abortion "the best interests of the child shall be the paramount consideration". That excludes any kind of entitlement to adopting children – not only for homosexuals, but for anyone. By inferring that the Convention contains such entitlement (in regard to which there could be discrimination), the ECtHR has in fact adopted a decision that stands in contradiction to the CRC.

<sup>14</sup> ECtHR, *Costa and Pavan v. Italy*, Application no. 54270/10. Once again, in this decision we find the argumentative pattern we already know from: if a State does X, it must also do Y. In the case of *Costa and Pavan*, the Court finds that if a State has legalized therapeutic abortion, it must also legalize pre-implantation diagnostics in the context of medically assisted procreation procedures. Now it is certainly true that, for the reasons exposed by the Court, permitting the one and prohibiting the other would seem inconsistent. But nonetheless, the Court's reasoning is ill-founded. Firstly, it has no basis in the Convention, which contains no "Right to Consistency in Legislation". Secondly, it is ambivalent: one could with equal (or better) justification argue that a State that prohibits eugenic practices in vitro should also prohibit therapeutic abortion, and thus obtain the exact opposite conclusion. Like with the argument that the Convention is a "living instrument" (see above, FN 8 and 11), it becomes apparent that the "consistency argument" used by the Court in this case is not a neutral principle, but an instrument that the Court uses to promote the "progressive" social policies it finds desirable.

<sup>15</sup> A former ECtHR judge, Javier Borrego Borrego from Spain, attributes the ECtHR's judicial activism to the fact that a large majority of the Court's judges have little or no prior experience as judges, but predominantly a background as academics. As Borrego, in a commentary published on 17 December 2009 by the Spanish newspaper *El Mundo*, pointed out: "*applying the law to the facts of a given case is not something that interests them. Instead, they believe that once they have been appointed ECtHR judges, the time has come for them to convert their academic theories into sentences, thereby transforming the Court into a legislative organ.*" Whoever takes a closer look at the biographies of the 47 ECtHR judges (they can be found on the Court's website) finds that most of them have no genuine judicial background, but have followed academic careers from where they often were directly promoted to serve as constitutional and/or ECtHR judges. It would be worthwhile to keep this observation in mind in regard to any future reform of the Court: none of the ECtHR decisions mentioned in this paper would have been adopted by judges who simply wanted to apply the law.

international human rights treaties to new interpretations, in particular in relation to all issues related to "sexual and reproductive health and rights". That policy, which has aptly been described as "an attempt to create rights by stealth"<sup>16</sup> and as a "power shift to the un-elected"<sup>17</sup>, goes back to a meeting between those bodies and a number of select NGOs behind closed doors at Glen Cove NY in 1996, which was convoked by UNFPD following the failure of attempts to obtain international support for a "right to abortion" at the International Conference on Population and Development (Cairo, 1994) and the World Conference on Women (Beijing, 1995)<sup>18</sup>. We should therefore not be surprised by the opinions and recommendations issued by bodies such as the CEDAW or the HRC, but we should also not be impressed by them. They are not legally binding and the authority of those making them is quickly eroding, as the international community is increasingly becoming aware that statements emanating from such bodies in many cases cannot be taken as credible and disinterested legal expertise.

Of course, the subtle re-programming of human rights does not take place in a political and social vacuum. They are supported by a certain fringe of society (mostly in Western countries), by a number of governments (notably from the EU and North America), by certain NGOs and those who finance them, and by certain mass media. Some of the NGOs involved, like Amnesty International, have espoused this agenda only recently<sup>19</sup>, and are now depleting the worldwide respect and appreciation they had previously earned for their advocacy work on behalf of political prisoners. Others, like the International Lesbian and Gay Association (ILGA) or the Center for Reproductive Rights (CRR), are single issue lobbies that have been specifically created for the particular purpose of promoting LGBT and abortion rights. The involvement of such groups in international policy making at UN and EU level raises some important questions with regard to international governance, given that they all seem to draw their funds from a relatively small number of wealthy international foundations (such as George Soros' Open Society Institute<sup>20</sup>, the Hewlett Foundation, the Packard Foundation, etc.), who, by financing those and similar lobbies, create a misleading imagery of a "pluralistic civil society". With regard to the LGBT pressure group ILGA, it has recently been revealed

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<sup>16</sup> Douglas A. Sylva/Susan Yoshihara, Rights by Stealth, C-Fam International Organizations Research Group, White Paper Series No. 8, New York (2007)

<sup>17</sup> Marguerite A. Peeters, Hijacking Democracy: The Power Shift to the Unelected, American Enterprise Institute Press (2002)

<sup>18</sup> More detailed accounts of the Glen Cove meeting can be found at Sylva/ Yoshihara, Rights by Stealth (supra, FN 15). The UN have published an official account: UN Population Fund, UN High Commissioner for Human Rights, and UN Division for the Advancement of Women, "Summary of proceedings and recommendations," Roundtable of Human Rights Treaty Bodies on Human Rights Approaches to Women's Health, with a Focus on Sexual and Reproductive Health Rights, Glen Cove Report (December 9-11, 1996)

<sup>19</sup> With regard to AI's sudden shift towards pro-abortion advocacy see: Ryan T. Anderson, Amnesty International's Dirty Little Secret, First Things, 2 May 2007 (on the internet available at: <http://www.firstthings.com/onthesquare/2007/05/amnesty-internationals-dirty-l> (retrieved on 11 December 2012).

<sup>20</sup> George Soros is a major donor not only of Amnesty International and Human Rights Watch (to which he made a donation of 100 million US\$ in 2007), but also of ILGA Europe, Catholics for a Free Choice, and a true plethora of similar organizations.



that it receives roughly 70% of its funds from the EU budget and other government sources, thus raising doubts with regard to its status as "civil society" and "non-governmental organization".<sup>21</sup>

With particular regard to Europe, it is certainly noteworthy that the EU has set up its own human rights catalogue, the EU Fundamental Rights Charter, which once again follows the same pattern of "re-interpretation". When the Charter was drafted in the late 1990s, it was said that the task was not to create new human rights, but to improve the visibility and accessibility of existing human rights standards<sup>22</sup>. But how can the Charter achieve that objective, given its unclear relationship to the European Human Rights Convention? In some instances, the texts of the Charter and the Convention are very similar, but in other cases they differ widely.<sup>23</sup> How is that going to improve visibility? Or is this in fact a calculated attempt to subject the Convention to novel interpretations, cheekily suggesting that the text of the Charter, albeit quite different from that of the Convention, is how the Convention should really be understood? What implication does it have for human rights if the Charter introduces a veritable inflation of new rights, putting the "right to a high level of consumer protection"<sup>24</sup> and "the right to paid holidays"<sup>25</sup> on a par with the right to life or the freedom of opinion? Do EU policies on "equality" and "anti-discrimination"<sup>26</sup> really represent an internationally agreed pre-existing human rights

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<sup>21</sup> The group's financial statements can be retrieved from its website (<http://www.ilga-europe.org/>).

<sup>22</sup> Cf. the Conclusions of the Cologne European Council (June 1999)

<sup>23</sup> One of many examples is that, while Article 12 of the Convention states that "men and women of marriageable age have the right to marry and to found a family", the Charter, in its Article 9, simply states that "*the right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights*". This could be more than the Convention foresees, or it could be less, but it is certainly not the same. The intention clearly is not to make the pre-existing right more visible, but to change its meaning. In its decisions *Goodwin v. the UK* and *Schalk and Kopf v. Austria*, the ECtHR quotes Art. 9 of the Charter in order to demonstrate that there is a new trend in Europe to legally recognize homosexual partnerships, and uses it as a pretext to conclude that the term "family life" (in Art. 8 of the Convention) should henceforth be construed to include homosexual relationships. Quite obviously, those references to Article 9 of the Charter would have made no sense if the Charter said the same as the Convention.

But it would be wrong to say that Article 9 of the Charter simply widens the concept of "marriage" and "family" without potentially damaging them. Indeed, under a strictly positivistic interpretation of Article 9 the State's obligation is that it must legislate for legal institutions that are called "marriage" and "family", but there is no further specification of what these names mean. Theoretically, therefore, a State could legislate that henceforth "marriages" can be concluded only by two persons of the same sex, and not by different-sex couples, or that they can be concluded only by three or more persons. The traditional concepts of marriage and family are therefore protected *only* under Article 12 of the Convention, whereas they are *diluted* beyond recognition by Article 9 of the Charter.

<sup>24</sup> cf. Art. 38 of the Charter

<sup>25</sup> cf. Art 31.2 of the Charter

<sup>26</sup> Cf. in particular Art. 21 and 22 of the EU Fundamental Rights Charter, Art 19 of the EU Treaty, and the secondary EU Law based thereupon.

standard? Or are they not Marxism clad in human rights vocabulary, providing the basis for unprecedented interference into citizen's lives?

And what, finally, should I say of the EU Fundamental Rights Agency? In the short time of its existence, this new institution has really done all it could to acquire a very questionable reputation. This has to do not only with the initial doubts whether yet another human rights institution was really needed<sup>27</sup>, but also with the biased way in which the Agency seeks to involve certain civil society groups in its work while excluding others<sup>28</sup>, its unbalanced choice of priorities, and the rather shoddy output it has produced so far. Its official task of "providing expertise" on fundamental rights to EU institutions appears to be of little interest to the Agency, which instead seeks to play a role as political agenda-setter. The focus of the Agency is set on a narrow set of politically rather controversial issues, among which the relentless fight against "homophobia" seems to be the most important one. But the reports that the Agency has published<sup>29</sup>, and the surveys it is carrying out<sup>30</sup>, can hardly be viewed as the result of objective and disinterested research. It is more appropriately described as propaganda.

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<sup>27</sup> Terry Davis, then Secretary General of the CoE was quoted by the Financial Times (7 May 2005) as saying with regard to the new Agency: "With all the best will in the world, I can't understand what it (i.e., the new agency) is going to do". Of course, as it often happens in such cases, he may have had the CoE's own institutional interests in mind. But the point he made is a valid one: to ensure the protection of human rights in Europe, one supranational judiciary system (namely that of the CoE) is sufficient. If there are grounds for dissatisfaction with the CoE system, this system should be improved, but there is no need for a second one. The new Agency's function was thus restricted to "providing expertise and data on fundamental rights" to the EU and its Member States. But this also raises questions: there are specialized human rights research institutes all over Europe, and there is certainly no lack of academics researching on human rights. But here as elsewhere, competition and plurality are likely to lead to a better output than the setting up of a central EU institution that will tend to monopolize its role as a provider of human rights related expertise. Regrettably, the output of the Agency has so far fully confirmed this concern.

<sup>28</sup> In this context, mention should be made of the Agency's "Fundamental Rights Platform", which is designed to be the interface between the Agency and "civil society". The rules that the Agency has set up for this Platform foresee that the Agency's Director is free to decide which non-governmental organizations are accepted as members of the platform, and which are not. There is a serious risk that this will ultimately not lead to a dialogue with the *real* civil society outside the Agency's precincts, but only to a dialogue with an *artificial* civil society that the Agency has made up according to its own purposes. One might describe this as political ventriloquism: in speaking to this platform, the Agency seems to speak to itself.

<sup>29</sup> I may refer to my detailed analysis of the Agency's report on 'Homophobia and Discrimination on Grounds of Sexual Orientation in the EU Member States': J. Cornides, *Human rights pitted against man (II) – the network is back*, International Journal of Human Rights Vol. 14, No. 7, December 2010, pp. 1139–1164.

<sup>30</sup> In spring 2012, the Agency, closely co-operating with the advocacy group ILGA-Europe, has carried out an 'LGBT Survey'. According to the Agency's website, this was done "to establish an accurate picture of the lives of lesbian, gay, bisexual and trans people" and to "set the agenda for years to come". The outcomes of the survey remain to be published. But is it really necessary to await them? The methodology that has been used is absurdly far away from any scientific standard that such studies are normally required to comply with. The survey was carried out via a website that was freely accessible on the internet, and there was

Last but not least, I should not forget to mention the activities of certain academics, some of whom hold offices in UN institutions, who, through the publication of declarations such as the “Yogyakarta Principles”<sup>31</sup> or the “Equality Principles”<sup>32</sup>, seek to pass off controversial social agendas as “established human rights standards”.

## 4. Points of Discernment

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nothing to prevent a person from responding however often it wanted. The initial questions related to the respondent's own sexual orientation, making sure that only persons identifying as LGBT were allowed to fill out the rest of the questionnaire (while non-LGBT persons were apparently not supposed to contribute to the Agency's intended "agenda setting"). The remaining questions were drafted in a highly suggestive way, so that it was hardly possible for any respondent to fill out the questionnaire without stating that he (1) had experienced "discrimination based on sexual orientation" and (2) endorsed new legislative proposal to strengthen protection against such discrimination. The anonymity of the survey means that no verifiable information on *real* cases of discrimination has been collected, but only the views of persons who are highly motivated to "tell their story" as self-perceived "victims". Without wishing to downplay the issue of "homophobia", and with all due respect for the Agency: such a survey can under no circumstances be qualified as serious-minded research. The fact that in times of economic crisis more than 300.000 Euro were spent on this project raises urgent questions with regard to this Agency's management.

<sup>31</sup> The "Yogyakarta Principles" (YPs) are a document adopted by a group of 29 "international human rights experts", some of whom enjoy considerable prominence, which uses generally recognized international human rights standards as a basis for a comprehensive "LGBT rights" agenda. The approach is clever but fallacious: from the (uncontroversial) insight that LGBT persons enjoy human rights as everybody else, it infers that the (highly controversial) "LGBT equality" agenda is in fact nothing but the practical application of human rights to their specific situation. The document contains no less than 120 rights claims, each of which begins with the words "States shall...", as if these were generally recognized rights standards. But obviously, for any lawyer who is not ideologically blindfolded it must be obvious that many these warped claims (such as the claim for same-sex marriage, homosexual adoption, access to medically assisted procreation procedures, or – last but not least – gagging orders against critics of this agenda) do not reflect any existing human rights standards, but that they represent the most audacious attempt at manipulation that human rights have ever been subjected to. The document erects thus a monument to the intellectual dishonesty of its authors, but very disconcertingly those authors continue occupying high-ranking posts in the UN or in academia.

<sup>32</sup> The "Declaration on the Principles of Equality" is a document that has been drafted by a group of lawyers that, according to its authors, "reflects a moral and professional consensus among human rights and equality experts". It is promoted through a London based NGO, the Equal Rights Trust (ERT). The document is certainly more honest than the Yogyakarta Principles in that (even if the authors might not object to seeing it interpreted that way) it avoids making the bold assertion that its content represents a summary of existing and generally recognized rights standards. It should thus be read as a roadmap indicating the direction into which the authors intend to steer the concept of human rights in the years to come. But even under such a cautious interpretation the document is disconcerting. It turns "equality" into a new fundamental right with wide implications not only for the relationship between individuals and the state, but also for the relationship between citizens, and in particular with regard to private autonomy (i.e., the freedom of contract).

All these developments are well-documented and, by now, widely known and understood. There is no denying it: human rights today have no certain and universally agreed meaning anymore, but are subject to change. Some might describe that change as “progress”, while others call it “manipulation”.

This raises important questions: is it not in the nature of human rights to evolve, and to be adapted to the needs of the time? Is there no room for progress, for improvement? Are those who, as UN officials, judges, academic experts, or NGO activists, seek to push forward this evolution not perfectly legitimized to do so? If we think that this evolution leads to the creation of “false” human rights, where do we find the “true” human rights that we could oppose to the false ones?

### **a.) Human Rights or Natural Law?**

It all depends what we understand by the term “human rights”. The term suffers from a certain ambiguity. On the one hand, it can refer to those rights that are enshrined in relevant international documents such as the Universal Declaration of Human Rights (UDHR), the European Convention on Human Rights (ECHR), the ICCPR, or similar instruments. On the other hand, we often hear that human rights are “pre-positive legal principles”, i.e. legal rules that are pre-existent to, and should be complied with by, any written legislation.

But obviously, both cannot be true at the same time. What we read printed black on white in international conventions is *positive law*, i.e. it is part of the written legislation that should be *compliant with* those higher-ranking pre-positive principles, but it cannot itself be part of those principles. Inversely, one of the main characteristics of “pre-positive legal principles” is that they are pre-positive, i.e. not part of any written legislation.

I would thus propose to carefully distinguish between the principles and their expression, giving the name of “human rights” only to the rights enshrined in widely recognized international conventions or in national constitutions, whereas for the “pre-positive principles” I would suggest using the term that was traditionally used for them: Natural Law. I am aware that the term “Natural Law” is somewhat unfashionable these days, and that some will say that its meaning is uncertain. But I object that (1) the clear distinction between unwritten principles and their written expression is a necessity, and that (2) the problem of uncertainty with regard to the content of the pre-positive principles will always remain, whatever name is given to those principles. So, for the sake of clarity I think we should all stick to the term “Natural Law”. For the comfort of the more secular-minded I should add that “Natural Law” is not a Catholic or Christian invention, but that it was known to the Romans long before they became acquainted

with Christianity<sup>33</sup>, and that it was also generally and unquestioningly accepted in the era of enlightenment<sup>34</sup>.

By speaking of Natural Law, we simply give expression to the insight that there is a moral law that is pre-existent to all positive legislation, because it is part of our human nature. This moral law is of universal application, remains the same at all places and at all times, and is accessible to human reason. All positive legislation must comply with it. Positive laws that contradict principles of Natural Law have no legitimacy; they are injustice clad in the outward appearance of legality. There is no moral obligation to abide by such laws, but there can be an obligation to oppose them.

It follows that human rights should, like all other positive legislation, comply with Natural law. It also follows that, like with all other positive legislation, it can happen that human rights (or their interpretations) stand in contradiction to Natural Law, and hence lose their legitimacy. In such a case the provisions called "human rights" would not only not be binding, but we would actually be bound to disobey and oppose them. And even in the best of cases, human rights law is only a reduction of Natural Law, always open to improvement, and sometimes open for error or, worse, for deliberate distortion. It is never possible to capture the full content of Natural Law in a short catalogue of rights, however well drafted.<sup>35</sup>

Although the concept of Natural Law is disliked by many, I do not believe that anybody seriously calls into question its existence. On the contrary: those seeking to promote the

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<sup>33</sup> See, for example, M. T. Cicero, De re publica III.33 (from Lactantius Inst. Div. VI, 8.6-9), one of the most famous definitions of Natural Law: *"Est quidem vera lex recta ratio naturae congruens, diffusa in omnes, constans, sempiterna ... nec vero aut per senatum aut per populum solvi hac lege possumus ... nec erit alia lex Romae, alia Athenis, alia nunc, alia posthac, sed et omnes gentes et omni tempore una lex et sempiterna et immutabilis continebit"*

<sup>34</sup> Notably, the *déclaration des droits de l'homme et du citoyen*, which was adopted by the French National Assembly in 1791 and can be viewed as the founding document of modern human rights, makes explicit reference to Natural Law in its preamble: *"Les Représentants du Peuple Français ... ont résolu d'exposer, dans une Déclaration solennelle, les droits naturels, inaliénables et sacrés de l'homme"*.

<sup>35</sup> Among the many differences between Natural Law and (positive) human rights, I would point out the following to be the most important ones: (1) Natural Law exists as a single organic body, whereas there is a plurality human rights. (2) While there can be a conflict between competing human rights, there can be no self-contradiction within Natural Law. (3) Natural Law is not the subject matter of any political or legislative process, but of exploration and discernment. There are primary directives on Natural Law (which are self-evident), secondary directive (which any person of average intelligence can easily derive from the primary directives), and tertiary directives (the discernment of which require a particular level of insight and reflection). Debates on the content of Natural Law usually concern only this tertiary level. For example, the precept "you shall not kill" is self-evident, and it does not require an extraordinary level of insight to derive from it the prohibition of reckless behavior that might result in the unintentional killing of a person. But issues such as abortion or medically assisted procreation are less easily resolved, as this requires insight regarding the status of the human embryo. This is the area where expertise is needed. But such expertise is decidedly different from the subjectivism that is often displayed in these debates.

re-programming of "human rights" do so on the basis of what they appear to believe are precepts of Natural Law (- always supposing, of course, that they are sincere in their convictions). For example, if the abortion lobby wants a new "right to abortion" to be formally recognized as a human right, it does so because (1) it knows that currently such a human right does not exist and (2) it believes that women are morally entitled to have access to abortion. If the gay lobby says that same-sex marriage is a human right, what it actually means is that it should be made a human right, because gays have a natural right to marry.<sup>36</sup>

Thus, the real question that we need to discuss is not *whether Natural Law exists*, but *what it contains*.

## b.) The Anthropology of Human Rights

But which criteria can we use to find out what is, and what is not, contained in Natural Law? I think that the answer to this question ultimately has to do with the anthropology that underpins human rights, i.e. our understanding of human dignity.

It appears that nowadays human dignity is an inexhaustible source of new rights and entitlements. Especially where the discussion is about "sexual rights" or "respect for different sexual orientations", the reasoning seems to be that because someone is a human being he must have the right to do whatever his sexual urges compel him to do, and that each and every choice is equally worthy of "respect". This is also what lies at the heart of the ECtHR's oftentimes rather excessive interpretation of Article 8 of the European Human Rights Convention, the provision protecting the right to privacy. This "privacy", it seems, is the right to do whatever one pleases, without being disturbed by anyone raising questions regarding the morality or practical impact of one's choices.<sup>37</sup> Even more, it is oftentimes pretended that our choices are not really choices, but that they are pre-determined in our individuality, our urges and instincts, likes and dislikes, preferences and inclinations.

Such a concept of human dignity is, of course, self-defeating: it boils down to saying something in the sense of: *we are human; therefore we have the right to behave like animals*.<sup>38</sup>

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<sup>36</sup> I made that point in more detail in: *Natural and Un-Natural Law*, C-Fam Legal Studies Series, No. 2 (2010)

<sup>37</sup> Hence the ECtHR's unquestioning acceptance of choices such homosexuality, transsexuality, abortion, use of medically assisted reproduction techniques (including sperm and ova donation, surrogate motherhood, pre-natal and pre-implantation diagnostics), euthanasia, assisted suicide, pornography, prostitution, etc. The Court never discusses the moral implications inherent in any of those choices, nor their practical consequences both for the individuals involved and for society at large, but simply treats them as part of "private life".

<sup>38</sup> At this point, there was heckling from some in the audience who said that this argument was "homophobic", and that I had described homosexuals as "animals". But this is not the case. The point I am making here is quite different - it is about the *anthropologic assumptions* of those who affirm that all sexual orientations should receive the same respect.

The underlying assumption seems to be that because somebody who is homosexual has no other choice than to behave homosexually, and that, therefore, he must also be allowed to behave in such a way. In other words, people have compulsions that they have no choice but

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to follow, and they should be criticized neither for these (non-elected) compulsions, nor for the sexual actions that, driven by those compulsions, they perform.

This raises several questions. The first (and certainly not the least important one) is whether someone can actually “be” homosexual: is the auxiliary verb “to be” really in its right place here? Certainly, one cannot “be” homosexual in the same way as one is a man or a woman, or in the same way as a dog is a dog. Many self-declared homosexuals did not always declare themselves such. Many have children from prior heterosexual relationships, which shows that their “sexual orientation” was not necessarily always the same one. Rather, it appears that sexual orientations can be transient. In the common language, we call “thief” someone who has stolen something. But does a thief always remain one, even if he has committed only one single theft during his lifetime? Or is he only one at the moment of the theft? What if he repents? If someone exercises the profession of a bookseller, we call him by this name. But does he continue to be a bookseller when he ceases selling books? No, and we would stop calling him such. In all those circumstances, the word “to be” describes rather different realities.

What is certain is that some people experience homosexual compulsions. Those compulsions can vary in strength and frequency, they can be transient or of longer duration. Some people indulge in them whereas others suffer from them and (in some cases successfully) try to overcome them. When we say that someone “is” homosexual, we should be aware the diversity of situations, and of the different modes of the word “to be”. This has evident implications for the question to which extent homosexuals need specific protection against discrimination.

The second point is that the anthropology described above discards the fact that man is not driven by his instincts and urges alone, but that he is capable of forming reasonable moral judgments. This is precisely what distinguishes us from animals, and what lies at the basis of our specific human dignity. It is possible for man to overcome his instincts and urges (not only sexual urges, but also his emotions such as anger, jealousy, greed, fear, etc.) and to act in contradiction to them, if his moral insight so demands. This is why we can be responsible for our actions.

Thus, what I have said is not that homosexuals are animals. They are certainly no more animals than any of us. But what I have in fact said is that the anthropology upon which the claim for “LGBT equality” is built discards the humaneness of humanity and reduces man (indeed every man, not only homosexuals) to the status of animals without reason. This is a reasoning which appears to stand in contradiction to human dignity, and which I find highly offensive.

That homosexual behaviour is found in many animal species (including our own) and should therefore be accepted is nowadays a frequently used argument in favour of legal recognition of “LGBT equality” (see for example K. Goodall, International Journal of Human Rights, 14:7, at p. 1181). A group of Norwegian biologists even went so far as to organize an exhibition on the issue to prove the point (2006 in the Natural History Museum, University of Oslo). But this argument seems unconvincing for several reasons. Firstly, it is *superfluous* to recur to the homosexuality in animal species, when in fact it would seem completely sufficient to say that *“homosexuality in the human species occurs in nature, ergo homosexuality is natural for human beings”*. Why point to animals when it suffices to point out the (uncontroversial) fact that some human beings have homosexual compulsions? Does this not unwittingly betray that those making such arguments view animals as our true role models? Secondly, one must ask what would follow if similar arguments were accepted in other contexts than homosexuality: could one not justify pedophilia, polygamy, incest, or cannibalism, in exactly the same way? All occur in various animal species. Thirdly, even if the argument - as I have proposed a few lines above - were reduced to concluding from (occasionally occurring) *human* behaviour to the *human* nature, would then not theft, murder, corruption, tax evasion, and even “homophobia”, also be part of that human nature? In that case, is there anything that we could prohibit without doing violence to that human nature? That would be the end not of sexual mores, but of morality *tout court*.

Clearly, what is at fault here is the underlying concept of “human nature”. Not everything that occurs among human beings corresponds to the human nature. But what clearly belongs to

But the difference between us and animals is that we, by virtue of our reason and free will, are capable of making moral choices, whereas animals do not have this capability. Our human dignity is derived precisely from this capability of making moral choices rather than being enslaved to our instincts and urges. This means that we enjoy a freedom that animals don't have, but that freedom is associated with responsibility. In other words, we have the *faculty* of freely choosing between good and evil, but we have no *right* to choose evil instead of good. Saying that human dignity confers on each of us a right to do as he pleases, or to adopt an autonomous moral code according to his own taste, is thus a patent absurdity.

In a recent paper<sup>39</sup>, British scholar Christopher Mc Crudden has observed that human dignity, while it is generally accepted to be the foundation upon which the whole edifice of human rights is built, has no certain meaning. *"Beyond a basic minimum core"*, he writes, it *"does not provide a universalistic, principled basis for judicial decision-making in the human rights context, in the sense that there is little common understanding of what dignity requires substantively within or across jurisdictions. The meaning of dignity is therefore context-specific, varying significantly from jurisdiction to jurisdiction and (often) over time within particular jurisdictions. Indeed, instead of providing a basis for principled decision-making, dignity seems open to significant judicial manipulation, increasing rather than decreasing judicial discretion. That is one of its significant attractions to both judges and litigators alike. Dignity provides a convenient language for the adoption of substantive interpretations of human rights guarantees which appear to be intentionally, not just coincidentally, highly contingent on local circumstances."*

As McCrudden demonstrates, the variety (and mutual contradiction) of rights claims that can be built on the concept of human dignity is indeed remarkable. It serves thus as a mere placeholder, but *"unlike in linguistics, where a placeholder carries no semantic information"*, it carries *"an enormous amount of content, but different content for different people"*.<sup>40</sup> In other words: anyone can read in it whatever he likes. There is only a very limited consensus, consisting of three elements, which McCrudden summarizes as follows: *"The first is that every human being possesses an intrinsic worth, merely by being human. The second is that this intrinsic worth should be recognized and respected by others, and some forms of treatment by others are inconsistent with, or required by, respect for this intrinsic worth. The first element is what might be called the 'ontological' claim; the second might be called the 'relational' claim."* The third element is *"is the claim that recognizing the intrinsic worth of the individual requires that the state should be seen to exist for the sake of the individual human being, and not vice versa (the limited-state claim)"*.<sup>41</sup>

But McCrudden also offers some further thoughts, which, I think, open a path for fruitful reflection. Pointing out the original meaning of the Latin word *dignitas*, he writes: *"The*

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the human nature and distinguishes it from that of animals is the capability to form reasonable moral judgments.

<sup>39</sup> Christopher McCrudden, Human Dignity and Judicial Interpretation of Human Rights, European Journal of International Law (EJIL) Vol. 19 (2008) no. 4, pp. 655 – 724

<sup>40</sup> McCrudden, op.cit. supra (FN 39), at p. 678

<sup>41</sup> McCrudden, op.cit. supra (FN 39), at p. 679



*concept of dignitas hominis in classical Roman thought largely meant 'status'. Honour and respect should be accorded to someone who was worthy of that honour and respect because of a particular status that he or she had. So, appointment to particular public offices brought with it dignitas.*"<sup>42</sup> Thus, the bearer of dignity undoubtedly is entitled to be treated in a way that corresponds to his status. But he also must behave in a way that is not "below his dignity". Dignity is not only a source of rights and entitlements, but also of duty.

For Christians, the true origin of dignity is that man is created in the likeness of God. Non-believers will find it difficult to accept this point of view. But both, believers and non-believers alike, might accept the idea that the human existence is an office that brings with itself not only rights, but also obligations. An anthropology where rights are not accompanied with obligations, and where "self-fulfillment", or the pursuit of pleasure and happiness, are turned into the supreme values, is insufficient as a foundation for human rights.

### **c.) Equality or Justice?**

The over-emphasis put on the "right to privacy" (Art. 8 of the ECHR) is recently offset by a new current in the human rights discourse which puts similarly excessive emphasis on equality. While "privacy" can be considered a code word for extreme permissiveness (in particular with regard to sexual mores, abortion, birth regulation, or the family), there emerges with strange simultaneity a novel concept that is decidedly *illiberal*: it is called "anti-discrimination".

Of course, we have been taught to believe that discrimination is bad, so "anti-discrimination" must be good. But what is hidden behind this new mantra appears to be a new version of Marxist dialectics. While we used to understand 'equality' in the sense that everyone should be equal before the law, it now is interpreted as meaning that the law should make everyone equal. That is nearly the opposite. Indeed, this new understanding of equality requires that the world is divided into oppressed classes (e.g. women, disabled, LGBT, migrants...) and their oppressors (men, non-disabled, heterosexuals, whites...), and a class struggle is organised. What is presented as the solution for all problems is the gradual elimination of private autonomy (i.e., contractual freedom), a solution that is all too reminiscent of the elimination of private property in the Communist system. And of course, this also requires a 'strong state', i.e. powerful new administrative structures that are created specifically for the purpose of enforcing 'anti-discrimination' policies, and which enjoy wide margins of discretion...

The way in which 'anti-discrimination' has recently been turned into the absolute top priority of human rights policies is remarkable and, to some extent, disconcerting. The EU Fundamental Rights Agency, for example, seems to view 'equality' as the one and only human right that is worth dealing with, whereas rights of better pedigree (such as the right to life, freedom of opinion, freedom of religion, property...) receive considerably less attention, if any at all. Generally it appears that in the EU institutions 'equality' is used more and more synonymously for 'human rights'. But both are not the same.

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<sup>42</sup> McCrudden, op.cit. supra (FN 39), at pp. 656-657

Here as elsewhere, we are confronted with ideologically committed "experts" seeking to promote a political agenda through the use of human rights language. 128 such experts have signed a document called the "Declaration of Principles of Equality". For inadvertent readers the document must look like a careful and balanced legal expertise. In actual fact, however, it is a political manifesto. As the authors of the Declaration themselves assert, their document "*establishes, for the first time, general legal principles on equality as a basic human right*"<sup>43</sup>, thereby implying "*the most radical re-think of equal rights in two generations*"<sup>44</sup>.

#### **d.) Dream or Reality? Ideology or Realism?**

Certainly, there is nothing wrong in "re-thinking" human rights. Indeed, I agree that re-thinking human rights is urgently necessary, given the situation I have described. However, to regain universal consensus, they must neither result from assiduous politicking at the UN or elsewhere, nor from the particular agendas of some pressure groups, nor from a particular religion or political ideology. Instead they must be grounded in *objective truth*. Essentially, this is what Natural Law provides: that *the law must correspond to the truth*. In other words, what *ought to be* is derived from what *is*.

What does that mean? For example, if it is a scientifically proven fact that human life begins at conception<sup>45</sup>, then we cannot arbitrarily exclude the human embryo from the protection afforded by human rights. If we have reason to believe that "brain death" does not mean that a person really is dead, then we cannot accept that that person's organs are harvested for transplantation. When making laws, we cannot simply set aside reality and adopt new definitions of life and death only because that suits the interest of some pressure groups. Likewise, if a document like the Yogyakarta Principles defines a person's "*gender identity*" as "*each person's deeply felt internal and individual experience of gender*"<sup>46</sup>, and requires States to ensure that a person be allowed to change its "*gender identity*" at any time<sup>47</sup>, how does that relate to reality? A man who feels that he is a woman must be legally recognized as such? Why don't we apply this approach also to other areas? I am in fact 43 years old, but feel as if I were 65, so please let me go into retirement. I have actually never studied medicine, but feel as if I had, so please allow me to practise as a doctor. Does that not mean that a person's subjective self-identification supersedes its objective identity, and that *wishful thinking replaces reality*? By adopting legal definitions, we create an imaginary dream world all of

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<sup>43</sup> Equal Rights Trust, Mission Statement (<http://www.equalrightstrust.org/mission-statement/index.htm> - retrieved on 12 December 2012)

<sup>44</sup> Equal Rights Trust, press release of 21 October 2008: *Experts Urge New Era of Global Human Rights and Equality Amidst Economic Turmoil*

<sup>45</sup> Cf. CJEU, C-34/10, *Brüstle v. Greenpeace*

<sup>46</sup> YPs (2008), p.6; [http://www.yogyakartaprinciples.org/principles\\_en.htm](http://www.yogyakartaprinciples.org/principles_en.htm) (retrieved on 12 December 2012)

<sup>47</sup> YP 3. This wishful thinking became reality in Germany, where the Constitutional Court (Bundesverfassungsgericht) ruled that transsexual persons had an entitlement of legal gender reassignment even without undergoing any surgery, under the sole condition of producing of a certificate issued by an expert psychologist confirming the applicant's self-perception as a person of the opposite sex (see BVG, 11 January 2011, 1 BvR 3295/07).

our own, which, it seems, is more to our liking than the one we were born to live in. We are emancipating ourselves from nature, from reality, from truth. We are emancipating ourselves from ourselves.

The quest for truth is painstakingly absent from today's human rights discourse. Indeed, one might get the impression that truth is itself the greatest threat to human rights. The claim that some statement be objectively true is dismissed as intolerant, and whoever dares to affirm that it is possible for the human mind to discern objective truth is called a fundamentalist. Our pluralistic and democratic society accepts no "truths", only "opinions". People seem to believe that the rejection of truth is "tolerant", or that it is a necessity in a pluralistic society that wants to live in peace.

But the opposite is the case. It is precisely the common quest for truth that creates a common ground on which a pluralistic society can be built. To claim truth for one's opinion means to expose that opinion to scrutiny in public discourse. If there is no truth, there can be no such scrutiny, and the public discourse degenerates into a mere struggle for political power: what remain are "prevailing" and "dissenting" opinions, and the latter are outlawed.

## **5. Conclusion: the crisis of Human Rights and the crisis of Western Democracy**

I am drawing here a rather critical picture of human rights. It represents, as I must admit, only an overview of the current situation, which is maybe too negative in some respects, and which could be improved with regard to many details. But overall, I believe, the situation is correctly described. What we are facing is not just a number of more or less marginal problems in the application of human rights, but it is the idea itself that risks losing its credibility.

I foresee that some readers will accuse me of opposing human rights. Such an accusation would be absurd: I am in favour of human rights, and I do think that international mechanisms to protect them are needed. But if the human rights idea is dear to us, we must not close our eyes before the misinterpretations and manipulations to which it is subjected, and we must act decisively to restore their original credibility. This will be a difficult task, for the self-serving institutions and experts who currently exert control over them will not let go easily. What I am saying is not that we do not need human rights and the institutions that surround them, but that we should learn to view them more critically. There is no need to take each and every ECtHR judgment, CoE recommendation, or UN report, seriously, and at times it may be even wise to simply ignore them.<sup>48</sup>

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<sup>48</sup> There is indeed a growing sense of distrust against these institutions, which finds also its expression in various court decisions at national level. Cf. the decisions of the Italian Corte costituzionale 311/2009 (at §6), and the Irish Supreme Court IESC 81 (2009). Note also the speech of British MP David Cameron delivered at the CoE Parliamentary Assembly on 25 January 2012, in which he warned that: *"...the concept of human rights is being distorted. As a result, for too many people, the very concept of rights is in danger of slipping from something noble to something discredited ... And when controversial rulings overshadow the good and patient long-term work that has been done, that not only fails to do justice to the*

It is perhaps no coincidence that the current crisis of human rights comes at a time when the political and social model of the West in its entirety is going through a period of serious tribulations. The crisis of the human rights idea and the crisis of Western democracy might be interconnected, as they seem to have very similar causes.

The business model of Western democracy since WWII was economic growth, which led to a permanent increase of wealth and living standard for everybody, including the working masses. But the rapid economic growth of the post-war years has considerably slowed down already some decades ago, and the mere redistribution of the wealth that was actually generated in the industrialized societies in the West does was insufficient to maintain their living standard and to finance their ever-expanding welfare systems. Therefore, they had to seek for other solutions, and the solution they found was to redistribute wealth from future generations to the present ones: this, more than anything else, is what lies at the heart of the over-indebtedness of nearly all Western countries, and oft their current economic and political crisis. The steady expansion of the welfare state has helped politicians to in elections and to keep the population in a state of tranquillity. But this business model of the West is coming to an end now: we could speak of the end of an era, the era of social democracy. I regret it very much, for it was an agreeable era to live in.

What Western societies would really need in such a situation are reforms of the social welfare systems, of the education systems, and of the labour market, in order to ensure competitiveness and sustainability. But those necessary reforms would be difficult to carry out, and unlikely to increase the popularity of the politicians enacting them.

By contrast, granting novel human rights to people seems to be a cheap kind of reform, which allows it to generously give something to some people, seemingly without having to take it away from others. It costs the State not very much to adopt pompous new rights catalogues, introduce new anti-discrimination laws, set up new human rights agencies or similar institutions, legalize abortion, euthanasia, same-sex "marriage", and so forth. People generally are happy to get new rights and entitlements if they don't have to pay for them, and politicians endorsing those new rights have the gratifying feeling of being courageous "reformers" or "liberators", as if they were bringing freedom after centuries of darkest oppression.<sup>49</sup>

The true cost of such innovations is hidden, but it is considerable. In a certain sense, the contemporary expansion of human rights and anti-discrimination policies is a massive expansion of the welfare state<sup>50</sup> – at a time when it becomes increasingly clear that that

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*work of the Court ... it has a corrosive effect on people's support for human rights. The Court cannot afford to lose the confidence of the people of Europe."*

<sup>49</sup> A shining example for such zealous reform policies was the government of Spain led by Mr. J. L. Rodriguez Zapatero. It liberalized laws on abortion, divorce, etc., and introduced same-sex "marriage", thus styling itself as a "reform government" with an ambition to profoundly transform Spanish society. At the same time, however, it was considerably less ambitious in carrying out reforms that might have averted or at least alleviated the current economic crisis. (See: Ignacio Arsuaga Rato / Miguel Vidal Santos, *Proyecto Zapatero – Cronica de un asalto a la sociedad*, HazteOir.org, Madrid 2010)

<sup>50</sup> Nowhere is this seen more clearly than in the context of "LGBT equality". In a society that has become widely oblivious of the social purposes of marriage, marriage is simply a status that

welfare state approaches the verge of collapse. Nevertheless, we not only introduce new social benefits for those who do not seem to really need them, but we also undermine those institutions, namely marriage and family, on which people will have to rely once they discover that the welfare state is not going to keep its promises.

Although Dostoyevsky wrote these words more than 130 years ago, it seems that they fit perfectly well to describe the inflationary human rights talk of today: "...ибо права-то дали, а средств насытить потребности еще не указали".<sup>51</sup>

To summarize, I think that what we need today is a critical look at the human rights framework that has evolved over the last decades. The right place for human rights is that they must be subordinated to Natural Law. They must be founded not on cheap populism, but on a sound anthropology, in which man is seen as capable of making reasonable and moral decisions, and which therefore holds him responsible for his actions. They must be based on reality rather than on imagination. They must be oriented towards promoting the common good rather than individualistic-parasitic lifestyle choices. Finally they must be integrated into a framework where international treaty monitoring bodies assume the role of guardians, not of legislators. Only under these conditions can human rights retain their credibility.

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is connected with certain social and fiscal benefits, and it is then no wonder that homosexual couples want to have access to it. While discussions around same-sex "marriage" often have a more symbolic character, the true motivation behind "LGBT equality" appears to be the extension of social and fiscal benefits that were designed for families with one income and children to care for to same-sex couples with double incomes and no children. See for example CJEU, C-267/06, *Tadao Maruko v. Versorgungsanstalt der deutschen Bühnen*, and 147/08, *Jürgen Römer gegen Hansestadt Hamburg*. The first case resulted in the granting of a "widower's pension" and the second one in the granting of a family allowance to employees living in a registered homosexual partnership. It is hard to see why such benefits should be granted to persons who, not having to care for children, are perfectly capable of sustaining themselves. Such policies create new burdens for the welfare system that will have to be financed by the rest of society. An extreme case of such rent-seeking occurred in Austria, when former Federal Minister for Equality entered into a registered partnership after the possibility such partnerships were introduced in 2010. She died only three weeks later, and her surviving partner (another female politician who occupied a well-dotted seat in the Vienna City Council) filed a claim for a widower's pension which in her case allegedly would amount to roughly € 9.000,-- per month.

<sup>51</sup> "...for they have been given rights, but have not been shown the means of satisfying their wants." Dostoyevsky, *The Brothers Karamazov*, Part II, Book 6, Chapter 3