CONSTITUTIONALISM, UNIVERSALISM AND DEMOCRACY

THE DUTCH VIEWS

THE DUTCH CONTRIBUTION TO THE FIFTH WORLD CONGRESS OF THE INTERNATIONAL ASSOCIATION OF CONSTITUTIONAL LAW IN ROTTERDAM (JULY 1999).
CONSTITUTIONALISM, UNIVERSALISM AND DEMOCRACY

The Dutch contribution to the fifth World Congress of the International Association of Constitutional Law in Rotterdam (July 1999)

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Advocates of human rights are not much concerned with systematic reflection on human rights and even less with criticism on the concept of human rights. Criticism of human rights comes from the dictators, the torturers, the people who trample on the fundamental rights of others, and - understandably - no scholar feels inclined to join their company. I hope I can avoid the impression that I have any sympathy for those who violate human rights. And yet, every tradition that wishes to remain vital has to adapt itself to the changing circumstances. Advocates of human rights cannot relax and lean over backwards, but from time to time they have to put to themselves annoying but extremely important questions like the following. How many human rights should we accept? Is there a limit? Is it advisable to rephrase discussions on world poverty in terms of human rights? Can judges, interpreting broad clauses of human rights declarations contribute to the refugee problem or should these political problems be solved in the democratic assemblies and by the usual political means? Do civil servants have the right to free speech or do they undermine the democratic system with opinions contradicting their political superiors? Should we, after the collapse of the Soviet Empire, eliminate the social and economic rights from the Universal Declaration that were comprised in that declaration as a compromise between East and West? And is the human rights tradition hopelessly anthropocentric with its insistence on human rights and its negligence of the interests of other inhabitants of this world?

Annoying questions indeed.

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In this paper, I want to introduce what seems to me a viable concept of human rights and subsequently point out some difficulties we have to cope with in the human rights tradition. My general aim is to show that human rights have a promising future, but that we, scholars, should be careful in our dealings with human rights. We should be more careful than the politicians, the demagogues, the advocates of partial interests. What I advocate - in short - is a prudent and moderate approach to human rights.

1 The concept of human rights

But first some remarks on the concept of "human rights". To start with: the concept of "human rights" is very vague. In the broadest sense it can stand for every reference to an ideal. If the elimination of poverty in the world is a attractive ideal, you can proclaim a "right to food". If freedom of speech is an ideal, you can proclaim a "right to free speech". If "the greatest happiness of the greatest number" is an attractive ideal, as utilitarians like Jeremy Bentham think it is, you can proclaim "the right to be happy". But in this broad sense, human rights evaporate in ordinary political and ethical speech. There is no real difference between human rights and rights proclaimed in the classical natural law tradition. When legal scholars, in distinction to political activists, speak about human rights they usually refer to something more narrow and more pedestrian. They refer - I think - to:

* fundamental rights
* that are proclaimed in legal documents (constitutions or treaties)
* that are protected by constitutional courts or the ordinary judiciary.
* And because these human rights still have the ambition of being basic and universal, there still is the link with the tradition of natural law.

How did this modern or legal concept of human rights come about? It is the product of a historical development. Five stages in this development present themselves to us.
The first stage: human rights as higher law

The first stage of the development of human rights is the emergence of a higher law. This is the period of higher law as natural law. A clear manifestation of the natural law thinking we find in Sophocles' play *Antigone.* After some political events that are not necessary to reveal here, Antigone decided to bury her brother. However, this burial was an evident refusal to obey the orders of the tyrant, holder of the legislative power in the state. To justify her act of defiance, she refers to *higher law, divine law, a law that is superior to that of the tyrant.*

It did not end well with Antigone. The tyrant decreed that she should be burned alive. This did not happen, however, because she hanged herself. Her beloved, the son of the tyrant who spoke the death verdict, committed suicide (it was a real Greek tragedy).

Antigone still lives forth in books on jurisprudence because:
(i) She makes a plea for higher law;
(ii) This higher law is seen as something that limits the power and the competence of the king.

This puts us on the track of the first characteristic of human rights. Human rights are higher law, that can be evoked in a conflict with the legislative power of the state. At this stage the tradition of human rights is still indistinguishable from that of natural law. Higher law is seen as something that is 'naturally' valid, or valid as the will of 'the gods' and not the will of man.

But according to critics of the tradition of higher law this reference to broad ethical ideals is simply nonsense, nonsense upon stilts, in the famous phrase of Jeremy Bentham. Bentham's pupil John Austin, the first lecturer in Jurisprudence formulated this criticism with great emphasis. He said:

The most pernicious laws, and therefore those which are most opposed to the will of God, have been and are continually enforced as laws by judicial tribunals. Suppose an act innocuous, or positively beneficial, be prohibited by the sovereign under the penalty of death; if I commit this act, I shall be tried and condemned, and if I object to the sentence, that it is contrary to the law of God (...) the court of justice will demonstrate the inconclusiveness of my reasoning by hanging me up, in pursuance of the law of which I have impugned the validity. An exception, demurrer, or plea, founded on the law of God was never heard in a Court of Justice, from the creation of the world down to the present moment.

What Austin brings to our attention is a point that has been made time and again against the natural law tradition. 'Law', from the nature of the concept, is something 'made' or 'enacted'. All talk about "natural law", law that has not been made, but that exists as the stars and the trees, is nonsense. The only law that really exists is the law that has been made by the lawgiver, the legislative power. What is the use of a plea for higher law than the ordinary law found in the usual statutes? No use. When I trespass a law and I would justify my behaviour with the proposition that this law violates natural law the judge still will enforce the unjust positive law. The 'inconclusiveness of my reasoning' is made clear by 'hanging me up'. In fact, this is what happened with Antigone, and happens time and again with all the political convicts in the prisons of the world. Antigone committed suicide, but if not, surely the king would have spoke the death verdict. So what is the use of all that rhetoric about a higher law?

To a certain sense this criticism on natural law is understandable and even justified. Jeremy Bentham and John Austin thought they had won their case. Reference to higher law than the ordinary law found in the usual statutes would simply vanish, they thought. But the idea of a higher
law proved to be an elusive idea. The tradition adapted itself and improved itself in the light of criticism that had been made by Bentham, Austin and other critics. The higher law tradition was modified in such a way as to make it effective and give it practical significance. The shortcomings of classical natural law lead to the wish to make higher law:

(i) visible;
(ii) stable;
(iii) and effective.

This led to a further development of the higher law tradition.

3 The second stage: codified and entrenched higher law

The second characteristic of human rights is that it is written law and as such is 'made visible'. Among others, the American colonists committed themselves *to write down* the principles that justified their separation from the British Empire. The Declaration of Independence (1776) starts with the phrase:

> When in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the Powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.

The American colonists were dissatisfied about the rule of the British king, as Antigone was dissatisfied with the decrees of the Greek tyrant. Subsequently, they declared themselves independent and not bound to the laws that were laid down by the tyrant.

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.
This was 1776. In 1787 the Americans adopted a constitution with entrenched clauses. So, historically, we have now higher law, made visible and stable against the whims of the moment.

4 The third stage: judicial review

The third stage in the development of human rights is the introduction of judicial review as a means to make higher law effective. John Marshall, chief Justice in the American Supreme Court, presented the argument to adopt judicial review as an essential part of the tradition of higher law. This was in 1803 in Marbury v. Madison. Marshall said:

The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction, between government with limited and unlimited powers, is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation.

And then the famous words follow: "It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by any ordinary act". These words were of great significance for the modern concept of higher law. Marshall integrated judicial review as an essential element of the modern concept of higher law and of human rights.

In 1803 the modern concept of human rights was almost finished. Since then, little serious improvement has been made. The only important development was perhaps the universalization of the human rights idea. The rights enshrined in the American constitution were right for Americans.
5 The fourth stage: universalization of the human rights idea

After the Second World War the fourth stage in the development of the modern concept of human rights came to the fore: the universalization of the human rights idea. A declaration of rights was presented with a universal pretension: in 1948 the Universal Declaration of Human Rights was adopted. This declaration was proclaimed as a "common standard of achievement for all peoples and all nations". The notion of universality is evident from this choice of words. But there was a second remarkable dimension to the Universal Declaration that was a further development of the American ideas: the Universal Declaration is founded on the idea of human dignity. This was new. Never in the history of mankind was higher law proclaimed on no other basis than human dignity. All the previous declarations were presented as the expressions of the will of God. 'All men are created equal', the Declaration of Independence states. But the Universal Declaration was a-theistic in the sense that no reference to the will of God was made. The Sinai-model that we find in Moses receiving the commandments of God was in 1948, for the first time in world history, abandoned. The Dutch protested against the secularist foundation of the Universal Declaration, I have to confess reluctantly. But Father Beaufort, our representative in the United Nations, committed to the task of adopting the Declaration, found no political support for his wish to refer to the will of God as the foundation of modern human rights. Atheist nations like the Soviet Union, Poland and China objected to this idea, and we can be very happy with this refusal of those marxist states. Because this elimination of a reference to the god of only one part of humanity made the universal aspirations of the Declaration possible.

So much for the development of the modern human rights idea. Let us now consider whether there are any tensions in this idea; whether there are contradictions to be solved, developments to be expected.
The modern concept of human rights: the End of History?

Ten years ago the American political philosopher Francis Fukuyama presented a thesis on the 'End of Ideology' and also the 'End of History'. According to Fukuyama, a kind of world-wide ideological hegemony has emerged. Everyone agrees that capitalism is the key to human liberty and human prosperity, Fukuyama states. And everyone also agrees that democracy and the rule of law are the best ways to organise political decision making. Liberal democracy is the final stage of political development. Like Hegel more than hundred years ago, Fukuyama meant that the liberal ideas that are prevalent in our time are the final destination of world history. That does not mean that all the particular regimes in the real world implement these ideals fully, but only "that their theoretical truth is absolute and could not be improved upon".

It is tempting to compare the thesis of Fukuyama with our historical development of the modern concept of human rights. Can we say that the human rights concept is really finished? Is the idea of fundamental and universal rights, that are proclaimed in legal documents, and protected by the courts a 'theoretical truth' that can not be improved upon? Are there any new developments to expect?

Of course, we can argue about the amount of rights we should elevate to the status of 'human rights'. We can advocate the adoption of the declaration by all the nations of the world community. But these are not significant developments of the stature as the four stages outlined before. The question is whether there are great problems with the modern concept of human rights that have to be solved like the problems posed by Bentham and Austin were challenges that the human rights tradition had to overcome.

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I believe the central problem for the modern concept of human rights is the tension of human rights with democracy. This is a tension, of course, that only manifests itself in democracies. Where there is autocratic rule, human rights are not treat to democracy. But in democracies, like many European countries and the Uninvited States, there is a real tension between human rights and democracy.

Advocates for human rights usually feel somewhat surprised to hear that there is a tension between democracy and human rights. They are accustomed to think of human rights in rosy terms. Human rights are good. Democracy is good. So human rights should perfectly match with democracy. Yet, a little reflection on the modern concept of human rights can make us realize that there is some tension in the idea of a aristocratic council or even 'priesthood' of - in the case of the Supreme Court - “Nine old Men” (at the moment also women) striking down the decisions of democratically chosen assemblies. Some people tried to present “solutions” for this problem.

First, one has presented the semantic solution. They said: “Democracy is not simply majority rule but also respect for the rights of minorities”. But this is a semantic solution indeed. The tension remains that a kind of priestly caste can 'legislate' for the legislature without any democratic qualifications.

Second, people presented the constitutional solution. Human rights are proclaimed in constitutions and treaties. Usually a constitution is the product of intense debate and discussion. The whole community is

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involved in a kind of heightened political debate. There is nothing undemocratic reminding the community to the choices they once made in their constitution. The constitutional judge is nothing else as the 'living oracle of the law'.

Third, people presented the traditionalist solution. They said: "Democracy is also commitment to long term perspectives of a cultural community and human rights are the product of a long term democracy. This generation has no right to violate the decisions of our forefathers. The individual is foolish, the species is wise".

All three 'solutions' for the tension between human rights and democracy, the counter-majoritarian dilemma as the Americans call it, have some relevance, but they ease the tension and do not eliminate it completely. We have to realise that every time we raise an ordinary right in the elevated mode of "human rights" we take away power from the political branches and place it in the hand of a very small minority: the (constitutional) judges. In the time of John Marshall this was not considered to be a big problem. But this was the time when the judiciary was the 'least dangerous branch'. Nowadays this situation has changed considerably. An enormous proliferation of human rights has made the judiciary the foremost political force in the modern state. Every time we introduce new rights, a first generation, a second generation, a third generation - every time we must ask ourselves: 'Is the system still in balance?'

So my advise to scholars dealing with human rights would be: 'Do not only think about the utopian world you want to realise, but also think

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about the legal system in which human rights have to function'. Or even more provoking: "Think about the amount of human rights that a democracy can endure". Scholars should think about checks and balances, about the desirable relation between the legislative power and the judicial power. I believe, the history of the American Supreme Court should be compulsory reading for those who advocate the implementation of human rights in European legal systems. It is here that we can find all the problems with the implementation of higher law in a democracy.

Personally I am optimistic about the prospects for the future. It must be possible to develop a prudent way of using the concept of human rights. We should learn from the American notion of 'restraint'. Restraining from the side of the legislative: not every sympathetic ideal should be proclaimed as a human right. Restraining from the side of the judges: not every sympathetic idea should be read into the broad clauses of human rights declarations. So we also have to reflect on the notion of 'judicial interpretation'. But if such an 'integral' study of human rights with contributions of political scholars, philosophers, legal scholars is practiced, it will be possible to maintain the right core of what human rights can signify in democracies and also to make further developments in the concept.

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