

**Divided by a Common Heritage:
Human Rights in Europe and the United States
Joint Council of Europe - Harvard University Conference Series**

Monday, 23 September 2013
Harvard Law School, Milstein East C (Wasserstein Hall)

Synopsis

The aim of this Conference was to hold an in-depth discussion on the commonalities and divergences in approaches to human rights in general and specifically those related to liberty, privacy and security (in the context of cyber communications) and discrimination and equality. Panellists included leading Harvard and other US academics and European scholars and practitioners. The Secretary General of the Council of Europe, Mr. Thorbjørn Jagland, delivered a lunchtime keynote address entitled “Is There a Crisis of Values in the Western World?”, introduced by Prof. Martha Minow, Dean of Harvard Law School.

The present synopsis recaps the main issues and conclusions from the three panel sessions:

Panel No. 1: “Does context matter? How and Why Europe and the US Differ on Human Rights”

The short answer to the question posed in the panel’s title is yes; Prof. Samuel Moyn urged mindfulness about the historic contingencies and special conditions and the way in which they influence the US and Europe approaches to human rights. A common criticism to both seemed to be that human rights were primarily meant to be for export and as far as the US was concerned many argue that they still are.

As regards to Europe, as Prof. Jan Helgesen interestingly underlined, it came as a surprise that in post-communist Central and Eastern Europe, human rights were imported so quickly. Today, however, there is a growing scepticism in Europe about whether the human rights institutions and mechanisms should be applied the way they have been of late.

Prof. Michelman stated the shocking but obvious truth that human rights is predominantly a discursive practice and as such has little if any purchase on American law, legal institutions, courts, or on its imagination that Europeans have accepted a concept of “super positivity” meaning that a realm of binding law emerges out of a collectivity of Europe and is not solely domestic.

Ms. de Boer-Buquicchio pointed out that human rights are at the centre of the European project, that the Council of Europe’s first treaty was the European Convention on Human Rights, and established the Court. While there may be differences in conceptions and approaches as regards freedom of expression (for instance about whether it is to be considered as an absolute right or not), data protection or the fight against terrorism, in the end there might not be fundamental differences in our perceptions of the values that we deem universal.

Prof. Helgesen gave an overview of the US-European relationship with regard to human rights, characterising it initially as a dichotomy, followed by a brief period of harmony and then by the current scepticism and ambivalence toward them, which could be linked to the kind of current economic and technological developments which the second panel would discuss.

The question on how our different histories and legal institutions determine our vocabularies about human rights and form our commitments toward shared values is a question that would merit further exploration.

Panel No.2: "Cyberspace: *Terra Incognita* for Human Rights? European and US Experiences"

First the panel clarified how the right of privacy is legally manifested in Europe as well as in the United States. The focus in Europe is on privacy/data protection and can be found in Art.8 of the European Convention on Human Rights. Prof. Weber highlighted that in recent discussions about privacy rights on the internet, there was an increasing emphasis on "the right [of internet users] to be forgotten". In the US, however, privacy protection is based on interpretation of the Fourth Amendment of 1789 on "search and seizure", which translates into the fact that where a person has exhibited an actual expectation of privacy, a judicial warrant for trespassing is required. Indeed, the focus in the US lies much more in the protection of the freedom of expression. The protection of freedom of expression can be found in the First Amendment to the US Constitution, whereas it only features in Art. 10 of the European Convention on Human Rights, and is subject to some restrictions.

The moderator of this panel, Prof. Heyman, pointed out that the US does not in general protect records and data, but it rather protects places, and communication to some extent. Prof. Benkler stated that the internet has brought changes to the relationship between the state and the citizen, such as a decentralisation of the centrality of the State, i.e. the State is no longer the only or primary source of violation of citizens' privacy, nor is it the primary locus of remedy. The development of the internet has brought about a rapid parallel evolution with an inherent tension, between an enormous diffusion of power and an increase of control over the individual internet user.

The speakers on this panel also pointed out that new challenges to human rights are brought about by the internet such as internet censorship, WikiLeaks, or the case of NSA surveillance, and that those are difficult to confront with the existing systems and tools. These new challenges are mainly due to an unprecedented collection of data triggered by the advent of information capitalism, as well as to governments' reaction to terrorism, requiring companies to provide the former with individuals' data. As one reaction to the broad compliance of US companies with such requirements, corporate clients outside the US increasingly discontinue their data storage contracts with companies under US jurisdiction, putting such companies under some pressure to reconsider their privacy policies.

Such surveillance may in principle be considered as legal as long as the government's demand is backed up by a court order and, as Matthias Kettemann added, it respects proportionality. In respect of the recent revelations about quasi ubiquitous internet surveillance by US government bodies, the view was held that these have taken a new and upsetting quality, i.e. in the words of Prof. Julie Cohen, a lack of accountability.

There was agreement among the panellists that existing human rights protection systems in Europe, and also to an extent in the US, are rather ill-equipped to respond to these threats, as they were founded to address a certain class of threats. As the new threats mostly do not constitute a formal violation of existing rules and are multisystem attacks, they require multisystem counterattacks based on a case-specific integrated systems analysis. Therefore, a new set of responses, increasingly institutionalised (and accompanied by some attitudinal changes) and in a multi-stakeholder perspective, is to be built around the existing set of institutions, including trade talks, and initiatives at the technological, social and cultural levels.

Panel No. 3: "Overcoming Intolerance: Addressing Racial and Ethnic Discrimination in the U.S. and Europe"

Prof. Jennifer Hochschild opened up the panel by contrasting the manner in which race and religion interact in the US and in Europe. She pointed out that in Europe race and religion converge in discourses on immigration and racism (Turks being Muslims, signifying "the Other" twice); in the US the terms race and religion are not used interchangeably in the discourse on immigration, or society in general. This divergence, she explained was owing to the fact that the largest group of immigrants (Mexicans) share the Christian religion of a majority of US citizens, or the number of immigrants with a religion other than Christianity is so trivial that it would not cause a sustained debate. Immigration to Europe is largely non-Christian, and therefore in Europe race and religion tend to reinforce difference. In the US race and religion are doing the opposite, religion softening the impact which being a different race might have or the other way around. Ms. Hochschild proposed another hypothesis in which religion might help to overcome ethnic or racial differences: that people want to overcome violent conflicts because of their religious convictions and belief in peace.

She then raised the question of how to address racism in our societies: which is it more useful to first change; institutions or attitudes within a society? Have we reached a time and place in which it has become unnecessary to further reform our institutions in order to fight racism and where we simply need to wait for society's attitudes to catch up? Or, do we rather need to look deeper at how at an institutional level we might be able to fight racism in its modern and more implicit ways, for instance by asking how governments could help to narrow the income gap; wealth disparities being one of the major causes of racism in the United States.

Sonja Licht focused on the situation of Roma in Europe, and by choosing this target group, demonstrated that Europe still has a long way to go in fighting racism. She deplored the lack of a comprehensive policy concerning migration in general and Roma inclusion more specifically all over Europe, since neither the European Commission, nor the member states individually have shown the will to come up with a comprehensive policy regarding this issue. She warned that Europeans who bemoan the rise of fascist parties are at the same time conspicuously silent on the situation of migrants and Roma.

Prof. Eva Smith Asmussen held the view that fighting racism in Europe has failed and that the state of affairs is worse nowadays than it was 20 years ago. According to her it is not only the financial crisis that

has helped racism resurge to the surface, but that the racist discourse adopted by mainstream European political parties has led to a legitimization of racist descriptions of immigrants and in general a racist discourse on immigration. The acceptance of a racist political discourse, unimaginable ten years ago, has also bolstered the rise of hate speech. In a closing remark, Asmussen pointed out that even existing legislation against hate speech is now used against the minorities who it is supposed to protect, citing examples of religious minorities in Denmark who are being accused of hate speech by declaring their God is superior to others.

Prof. Lani Guinier focused on racism in the United States and made an intriguing link between the terms class and race. According to her, the US is a country that does not like talking about class; instead it uses the word race to deflect attention away from class. Citing the famous Supreme Court case that forced the school of Little Rock (AR) to desegregate, she explained white parents' anger not through racism but by pointing to their fear of losing out on the American dream by having black children enter school and finding better employment than their own children. Ms. Guinier is of the opinion that the underlying reason of racism in the United States can be traced back to economic and social inequalities between different races in society, which are not addressed at the level of class difference that they should, but rather cloaked as racial differences.

Concluding Remarks

Professor Newman rounded up the day's discussion by stating that in the US, the human rights discourse is much more about individuals' rights than in Europe. In order to be heard in the US and to be productive, the European discourse needs to be translated into US terms. As an example, he demonstrated how this could work in the discourse on data protection: instead of talking about data protection as a human rights concern, the discourse could be transformed into data protection as a means to protect people's private property (here: their data) from intrusion by strangers. A new framing of the issue, focusing on individuals' rights, would prove much more effective in bringing data protection to the forefront of the US policy agenda. Also, the required institutional and attitudinal changes to counter new threats are not solely a judicial human rights project. For the Council of Europe, this means that relevant activities should not be restricted to the Court, but should embrace all issues relevant to contemporary internet developments. The Court would, typically, validate and codify at a later stage.

Ambassador Piotr Świtalski concluded the Conference on behalf of the Council of Europe by expressing his gratitude to all those present and by highlighting the remarkable quality of the debates. The dialogue was shaped by a candid representation of the panellists' views and a lively, enriching debate on the nature and *status quo* of human rights in the US as well as in Europe. Mindful of the shared philosophical and civilizational roots between the two regions, there was a responsibility on both sides of the Atlantic to think and act together to advance the idea of human rights worldwide. Against this background, the co-operation between the Harvard University and the Council of Europe is a commendable example of a joint effort between the academic community and an international organisation and therefore worth pursuing, in particular by the second conference which is foreseen to be held in 2014 in Strasbourg.