Human Rights, The "Art" of Democracy, and the "Taste for Local Freedom"

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Looking at the Unites States to draw some lessons about the sustainability of democracy in the 21st century appears both obviously valuable and useless at the same time. On the one hand it is one of the oldest existing democracies, suggesting that at least until now it has gotten something right with respect to "sustainability." On the other hand, however, from the age and historical contingency of its constitution to the singular character of its people, America's idiosyncrasy seems impervious to generalization in the contemporary world. Perhaps counterintuitively, then, I propose to start this general reflection on fundamental rights and democracy exactly from the distinctiveness of America.

I. *The authority of transnationality in human rights and the American difference*

It is a commonplace to note that the United States is one of the most persistently resistant countries to the subjection of its laws and practices to the supervision and control of international human rights treaties and institutions (at least in any strong sense). There is much less serious reflection, however, on the underlying reasons for that resistance. Most observers, activist and political as well as scholarly, tend to ascribe it (either explicitly or tacitly) more of less entirely to American insularity and exceptionalism with respect to the world, sometimes suggesting also a substantive hostility to human rights as such.

The charge of insularity and even hostility is no doubt true in certain important ways. Whether in the form of the proposed Bricker amendments in earlier decades or

certain hyperbolic public statements about the illegitimacy of international human rights today, demonstrations of American closure toward the international are lamentably present. But pointing to that alone is both too shallow and too reductive. It begs further questions about the sources and scope of American exceptionalism, and it fails to take into account other factors that make the picture more complex, from the structural characteristics of the United States constitutional system to the centuries-old and pervasive American obsession with "rights talk".

For instance, a fuller account of American postures with regard to international human rights would need to factor in the difficulty of ratifying treaties in the United States, relative to many other countries, as well as the near-impossibility of amending the U.S. Constitution, which some other countries do regularly in order to conform to international obligations. It would recognize that federal legislation is deliberately made substantially more difficult to adopt in the United States, compared to national legislation in many other constitutional systems. Perhaps most importantly, it would have to grapple with the peculiar but central dynamics of federalism in the United States, which has a massive bearing on this question (as it does with almost any matter of comparative public law between the U.S. and other jurisdictions). Moreover, these structural features of the U.S. constitutional system are not mere historical or proceduralist curiosities, but reflect and sustain a deep set of normative justifications and aspirations.

Aside from such structural questions, one could point to the many examples in which comparative study has revealed distinctively American approaches to a broad range of specific fundamental rights, including freedom of speech, freedom of religion, privacy, and criminal process and punishment, to name just a few. Such substantive differences in understandings of rights are not themselves the focus of the present

lecture, but they begin to approach the underlying factor that I seek to isolate and explore here. The observation that different understandings of the content and scope of human rights norms are one of the important factors in explaining the divergent American attitude toward international human rights is interesting not only in a direct way – that is, because of the substance of the difference – but also because it implies to at least a degree the conviction that American understandings should be (in general, as a default, at least) preferred *because they are our own and not someone else's in origin*. The understandings of international bodies or the "international community" as such are seen to be less important, less authoritative, than those understandings of rights that are "American", precisely by virtue of being "international" and "American", respectively. This is not to deny the presence and importance in the American tradition of the idea of "self-evident" rights, in the sense that Jefferson and Paine trumpeted them. Intermingled with that universalist Enlightenment sentiment, however, there has always been also the Burkean notion that rights are "real rights" because, like "the ancient rights of Englishment," they are concretely grounded in and emerge from our history

This finally brings into focus the main object of my inquiry here. We can say that a critical part of what is at issue, when we examine American attitudes and policies with regard to international human rights, is a particular understanding of the relationship between fundamental rights, democracy and identity. American traditions of law and politics are more likely to regard "rights" as acquiring their significance (both in the sense of meaning and importance) in the crucible of the domestic legal and political sphere, than through supranational processes or transnational consensus. Accordingly, international or foreign understandings of rights are less likely to carry weight, especially any weight that rests on the authority

putatively derived from their "transnationality". Although one rarely sees it argued in a direct way, I think it is uncontroversial to note that for many players in the international milieu, and particularly among human rights activists and scholars (the distinction being less clear in the human rights arena than elsewhere), the exact opposite is true. That is, insofar as rights are drafted, determined, defined, and developed at a transnational level or through supranational institutions, they are by virtue of the fact of transnationality alone more authoritative, more legitimate and less likely to be contested. How, and why, does this difference represent distinct ways of conceptualizing the relationship between human rights, democracy and identity?

In addressing that question, I will argue in the rest of this essay that the predominant ways of framing the relationship between democracy and human rights in contemporary legal discourse undervalue some of the important truths that underlie the American preference for the local over the transnational in the determination of rights. Before jumping straight into that question, however, in light of the highly polemical way in which some of these matters sometimes get treated in both political and scholarly discussion, let me first make clear one thing that I am *not* seeking to do, or to claim, in the course of this inquiry. By focusing on and retrieving the value of a distinctively American expression of this problem, I do not intend to present American views and practices on democracy and rights in their totality as superior to others, or without serious flaws. On the contrary, I find much to criticize in them. But that does not prevent us also from discerning something valuable in them for our thinking about global human rights and the future of democracy; my purpose is only that, and not an *apologia* for an Americanist ideology in international law.

II. *Comparative gastronomy and human rights: a Tocquevillian starting point*

The attitude about democracy and human rights that I would like to tease out of the knot of the American tradition of law and politics goes back to the earliest days of the republic, and so it is not surprising Alexis de Tocqueville should have perceived it with his unparalleled acuity of observation about democracy in America. Tocqueville was rather clear about the centrality of an idea of rights to the fledgling American nation, and its connection to democracy. "No man can be great without virtue, nor any nation great without respect for rights," he wrote. In a democracy, the virtue of the individual and respect for rights go together, because "Democratic government makes the idea of political rights penetrate right down to the least of citizens." There is nothing remarkable about these affirmations, especially given Tocqueville's preoccupation with the passage from aristocracy to democracy and his attentiveness for those qualities that keep the vices of democracy in check. More interesting, however, are two other little nuggets that Tocqueville drops into his narrative almost casually.

First, Tocqueville uses an evocative phrase in describing the Americans' commitment to rights: he remarks that "The American destiny is unusual" insofar as it has succeeded in maintaining both "the idea of individual rights and a *taste for local freedom.*" The latter, the "taste" – the word itself is redolent with a particular sort of pleasure, very human, very elemental, and highly variable among persons and cultures – for local freedom, indicates Tocqueville's fascination and praise for the decentralization of social ordering in the young American democracy, which is indeed one of the most central themes of his entire study. The American constitutional scholar John McGinnis has synthesized the basic outlines of this Tocquevillian perspective very well:

> In contrast to the centralization of France's ancient regime and the French Revolution's democratic centralism, Tocqueville observed that the vibrancy, innovation, and beneficence of American society did not come from its rulers but bubbled up from below. The secular associations of public-spirited citizens and churches and synagogues of spiritually oriented citizens were the underlying reason for the self-regulating order of our society. Tocqueville believed that while political factions try to use government coercion for their own ends, civil associations organize to meet the common goals of their members. Civil associations promote reciprocity among their members and create social norms from which other individuals can voluntarily choose. In this way they generate what modern sociologists would call social capital: the glue that binds society together through a group of interlocking networks. These civil associations have influence at the local level, making local government more responsive and contributory to a more public-spirited citizenry. Local governments also compete and thus are, in this sense, more similar to voluntary associations than the national government. Thus, in Tocqueville's conception, localism and mediating institutions are related social goods, because mediating institutions improve local government and local government has some of the virtues of mediating institutions.

Tocqueville's phrase cited earlier connotes a tension between this love of local freedom, this spontaneous social ordering from below, and the idea of individual rights. The idea is not developed in Tocqueville, but the outlines of the problem are not hard to identify: rights suggest fixity against the instabilities and dynamism of the love of local freedom; they are points of ordering not subject to the vagaries and vicissitudes of norms that "bubble up from below". In the tension between rights and self-government we face the paradox of ordered liberty.

How then is that internal tension of ordered liberty maintained? Tocqueville's whole work is largely an extended examination of that question. Here we can introduce one small part of it, through a second suggestive term that Tocqueville uses. His general discussion of rights is situated in the context of an overall examination of the question of "how, then, do the American republics maintain themselves"? The maintenance and success of democracy, its viability over time and the tempering of its vices, is in Tocqueville's vision not a science or a technique but an "art." It is not a "science", as in something that can be intellectually systematized or reduced to a set

of abstractions through speculative rationality; nor is it a “technique”, as in a mechanical exercise that can be implemented without the need for creativity and distinctiveness, through merely an instrumental sort of rationality (*techne*). As an “art” it is a matter also of the particularities of preference and, one might even say again, *taste*.

So, democracy in this vision is the practical art of mediating between the social freedom of the local and the order of rights, between concrete particularity and abstract universals.

What might this mean in the context of the contemporary law and practice of human rights? I do not propose to apply Tocqueville’s thought to the problem in a systematic analytical form, but simply to use these ideas as starting points for reflection, as inspiration and provocation. With a Tocquevillian frame of mind, I want to suggest that the discourse and practice of fundamental rights law, particularly at the supranational level, has tended away from an adequate appreciation of the value and necessity of local freedom, and away from the artistry of maintaining the tension between the stable ordering of rights and the spontaneous ordering of social life. To indulge with just one more serving of the metaphor, international human rights has eschewed the delights and dangers of comparative gastronomy in favor of the reliable and global (but more bland) fast-food chain.

If that is true, then it is also reasonable to conclude that the role of fundamental rights in the democracies of the 21st century – and most notably in the future of Europe – depends on a recovery of appreciation for the relationship between universal rights and local freedom; between practical reason, self-governance, and the common good; between the specificity of belonging and unbounded openness to the good of others.

III. *Of self-government and an objective order of values*

What one determines to be the meaning and purposes of rights in a democratic polity depends in large degree on certain antecedent premises. These are all contestable and contested in the multitude of theories of democracy. It is not the purpose of this essay to dive into those foundational questions of political philosophy. I offer merely a few affirmations which form part of the necessary substratum of the argument in this paper, unargued and instead only posited in very general ways as the boundaries within which the subsequent discussion is situated:

1. democracy is not an end in itself, but is a means to facilitate the flourishing of human persons by making them participants in self-government and thus in the realization of their own and one another's good;
2. democracy is not self-legitimating, but instead is justified (following the previous premise) insofar as it is in fact oriented toward the common good (understood in turn as the good of all of the members of that community); and
3. thus, the legitimacy of democracy is conditional both upon its realization of the value of self-government and upon its orientation toward certain fundamental principles of justice as part of the common good.

Fundamental rights, in this understanding of democracy, serve two distinct purposes. On the one hand, they are substantive principles specifying (partially, at least) the content of basic requirements of justice and the common good. In this sense they serve as restraints on the exercise of the authority of the majority, without which democracy can become majoritarian tyranny. On the other hand, rights serve as mechanisms to protect the capacity of the people to govern themselves; they enhance self-government through the protection of liberties necessary to genuine representation and participation in the determination of the good of the community.

The first purpose leads to a conception of rights that is more substantive, thicker, and more expressive of basic and objective values. They get held out as the principles defining the identity and the *telos* of the community, and are often said to be "dignitarian" in orientation. The second tend to be more process-oriented, thinner in their expression of basic human goods, but constitutive of the participatory and deliberative aspects of democracy. They guarantee freedom and the rule of law, and are commonly thought of as more "libertarian" in orientation.

It is apparent that these two purposes of rights in a democracy – ensuring self-government and providing the objective value orientations (and thus a thicker expression of identity) of the body politic – can sometimes be in tension with one another as well. Where rights are used to define the boundaries of legitimate choices, by definition they constitute a certain limitation on the freedom of self-government (of the majority, to be sure) – they are "trumps" against societal choices that don't accord adequate respect for the moral worth of every individual. There is nothing particularly new or insightful in making such an observation, but it is interesting to note how this countermajoritarian thrust of appeals to fundamental rights is not just anti-*democratic* – after all, that is exactly what fundamental rights are supposed to be, in recognition of the need for democracy to be oriented in substance toward basic principles of justice and the common good – but in some degree it is even anti-*political.* It is premised on the perceived need to remove the basic values represented by rights from the sphere of politics altogether. The protection of human rights, in other words, entails the withdrawal certain basic questions of social life from the potential dilution and corruption of values by political actors, including but not limited to legislative majorities. This is the principal driving force behind the judicialization of fundamental

rights: the removal of those areas of common life staked out by those rights to the (supposedly) apolitical, principled institution of the courts of law.

One problem with that view, however, is that it ignores certain ways in which the two dimensions of rights in modern democracy are not entirely distinct and separable. First, political participation is not separate from the substantive, dignity-oriented human goods; on the contrary, an integral part of the substance of a flourishing human life is to participate in the determination of one's own and the community's basic decisions about the goods of their lives, both as individuals and as members of the community – practical reasonableness as itself a basic good, to use John Finnis' formulation; or more recognizably in the rhetoric of liberal revolutionary politics, the right to the "pursuit of happiness". The two are also connected in the way clearly illustrated by Amartya Sen in the context of his discussion of the relationship between political rights and economic needs: "our conceptualization of economic needs [and, one could add, other requirements of human dignity] depends on open public debates and discussions, and the guaranteeing of those debates and those discussions requires insistence on political rights." Conversely, how one exercises one's rights to self-government will be shaped in significant degree by the recognition and acceptance of other substantive, dignity-rights. Finally, and relevant to our later discussion, at least in the context of the founding of the United States, rights protecting and enhancing self-government were deemed indispensable because the "rights of the people" were considered (in Lockean fashion) to be prepolitical, grounded in the traditions and material social life of the community; in other words, rights that served to guarantee self-government are necessary means to ensure the protection of the full range of substantive rights of the people that existed outside of, and prior to, the Constitution.

In these multiple connections between the two dimensions of rights, we can hear again the echo of Tocqueville, emphasizing that the rich social life that he observed at local levels generates those habits, commitments and mores that sustain democracy. In the art of democracy the political and the social are as deeply intertwined as the idea of individual rights and the taste for local freedom. The idea of "self-government" as related to rights, therefore, is not merely the affirmation of a substantively empty, or purely procedural, political autonomy. It represents the respect and protection of what we can call the *jurisgenerative communities* which give life to the values that sustain liberty, equality, the rule of law and democracy.

IV. *Two constitutionalisms?*

Given these multifaceted relationships between democracy and fundamental rights, it is to be expected that specific constitutional systems can take quite divergent form in seeking to realize both. Inspired by the nineteenth century French encounter with the United States elaborated in *Democracy in America*, we can usefully enter into a twenty-first century comparison between America and Europe.

Yale law professor Jed Rubenfeld has written of "two world orders" or "two constitutionalisms", which he dubs "international constitutionalism" and "democratic national constitutionalism", arguing that the former characterizes European approaches while the latter is typical of American understandings. I disagree with much of Rubenfeld's description and conclusions, and I share Professor Armin von Bogdandy's skepticism regarding Rubenfeld's reductive dismissal of European politics and democracy and his correlative romanticism regarding the U.S. constitutional order. Nevertheless, at one level Rubenfeld's basic intuition contains an important truth, when he perceives that predominant ways of thinking about the relationship between constitutions and rights, especially international human rights, are different

on the two shores of the Atlantic. Rather than stating the matter, as he does, tendentiously in terms of "democratic" constitutionalism versus "international" (and by implication anti-democratic) constitutionalism, I would say as I did in the beginning of this essay that in the United States one is more likely to find attitudes toward the constitution and international human rights shaped by a Tocquevillian "taste for local freedom" and by its implicit emphasis on self-government and locally-generated principles of common life, rather than on human rights as expressing a universal objective order of values abstracted from politics and local culture. Also in contrast to Rubenfeld, I do not minimize the complexity and pluralism of either American or European attitudes and ideas regarding constitutionalism and international human rights. I would not want to state the differences too categorically or starkly; one finds competing conceptions of rights and constitutions on both sides of the ocean. Still, there *are* differences in emphasis and weight worth identifying, and we can draw out from the fabric of the legal and political life on both sides of the Atlantic a few discrete strands of thought. (This is not an exercise in essentializing The American Position or The European Position or reducing them to a simplistic dualism. Nevertheless, for heuristic purposes it may be necessary at times to present those lines of thinking as more monolithic than in fact they are in the messiness and variety of human experience – among other complexities that will be set aside are the internal divergences among European constitutional systems. I refer in this section to constitutionalism generically in the style of Western European countries belonging to the Romano-Germanic legal tradition.)

The differences that I would like to highlight fall into three categories. The first can be traced back to differences in the founding ideas of constitutionalism and rights in the 18th Century. Obviously much has changed since then in constitutional

thought, especially in Europe but even in the United States where we have our 1789 constitutional text still in place. Yet, it is still possible to see the lingering imprints of two different influences, two different genetic antecedents to current thought. In Europe, especially seen from an American outsider's perspective, the influence of Rousseau is still palpable. The function of the social contract in a Rousseauian world is to bring isolated individuals out of their otherwise primitive state of nature. Man attains greater liberty and equality, and the possibility of culture and civilization, through this "constitution" of the body politic. It "silences the passions" of the individual and makes one freer through subjection to the general will. Exactly what that *volonté générale* entails is something that has vexed political theorists ever since, but for my limited purpose here it is safe to say that for Rousseau it is by incorporation into the *volonté générale* that a man acquires and secures the rights that were not only insecure but even impossible without the social contract, prior to the constitution. One of the consequences of this vision is that it gives the constitution, and the general will as embodied in the Legislator, an exalted status as the origin and source not only of rights but of culture and civilization. While such a view may not adequately describe the current conceptions of constitutions in Europe, the not infrequent pretensions of European law to constitute and embody the basic civilizational values of the society are, for an American, still striking.

Striking, because our own genetic line still carries forward the very different traits of Lockean and Madisonian constitutionalism, along with distinct traces of Antifederalist thought and politics. In contrast to Rousseauian understanding of primitive prepolitical life transformed and civilized by constitutionalization, Locke's vision is of a thicker prepolitical civil society, with natural rights arising and existing prior to any constitution or social contract, and of a correspondingly more limited role

for constitutional government. To use the words of the American Declaration of Independence so familiar to us Americans (for instance, I and 80,000 other spectators hear them read aloud as part of the opening ceremonies every time we go to watch a football game in the stadium at my university): "to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed". To put it another way, it is not the case that constitutionalization generates the possibility of fundamental rights that otherwise could not exist except through the establishment of law, but rather the opposite. The legacy of the Antifederalists reinforced that Lockean idea of rights as arising out of the prepolitical civil society. In their thought, the Bill of Rights was necessary only in order to avoid losing the liberty and the rights of the people that preexisted the new constitution; it was a moral and civic reminder of the principles by which government is limited so that the people's rights can be preserved. Madison provided the third leg of the stool, envisioning a constitution that primarily offered a guarantee of the exercise of popular sovereignty, by providing a framework in which citizens remain free to discuss, debate and decide how they are to live their common life.

A second, and related, category of difference has to do with the traditional conceptions of the roles of judges. Historically in Europe there has been a strict conceptual and institutional separation of adjudication from politics, and formally that remains so even today (even though functionally the reality of the "official version" of judicial roles has changed significantly). Career judges are firmly instilled with an ideal of abstaining from lawmaking, from intrusion into the proper and exclusive realm of the political, legislating bodies. This tradition was part of the reason for Europe's difficulty in accepting the idea of constitutional judicial review initially, and factored importantly into the model of judicial review that eventually developed here

(i.e., a centralized and specialized tribunal, often not part of the ordinary judiciary). When in the mid-20th century constitutional rights became entrenched and subject to judicial protection, I believe that this conception of the proper roles of judges contributed to a greater tendency in Europe than in the U.S. to understand the judicialization of constitutional rights as their transfer out of the precarious and partisan realm of politics, and into categorically separate and theoretically apolitical judicial world of principle and law. It is a hallmark of achievement and continued progress of the constitutional rule of law, in this view, to place an expanding realm of individual rights within the judicial sphere and beyond the dilution or damage of politics.

To many Americans, this way of seeing the roles of judges in constitutional rights adjudication shows comparatively little sensitivity to legal realist insights into the indeterminacy and the politics of adjudication. It is uncontroversial to observe that American judges at all levels tend to be much more openly politically engaged and popularly involved than European ones. This has do to not only with the fact of diffuse judicial review in the United States as opposed to the centralized European model, but it can also can be seen in the methods of judges' selection and appointment and advancement, in their background and training, in the way that they write judicial opinions (often clearly externalizing their arguments in order to appeal to a wider audience), and in the intense public dialogue and debate that often surrounds their actions and decisions – one can simply observe the difference in political attention paid to the justices of the U.S. Supreme Court, compared to those of the Italian Constitutional Court. This is a natural corollary of the more flexible American understanding of separation of powers between legislature and judiciary (in both directions). As a result, it is not as frequently the case that the transfer of rights to

the province of judges is exclusive and definitive, removing those questions from robust public debate and deliberation. It is in part for this reason that the countermajoritarian difficulty in judicial review remains perennially a much more intensely debated topic in the United States than in Europe, and that court decisions on fundamental rights that serve to restrict or remove popular political engagement over rights debates gets severely criticized from both the political left and the right. Tocqueville observed that it is rarely the case that a serious political question in America does not eventually become a judicial one; he could have added equally well that when a serious political question becomes a judicial question it rarely ceases to remain an intensely political one at the same time – even (or perhaps especially) on matters of fundamental constitutional rigths. This web of connectedness of the judiciary to politics, in the Madisonian constitutional model, enhances popular sovereignty and self-government. As one scholar has put it, "to the extent that the American constitutional experiment can be said to have succeeded, it has not done so because judges have stood outside and above politics, defending rights against the machinations of self-interested majorities, but rather because they have been intimately enmeshed in the democratic political process."

The third category of difference is the 20th century history of the two regions. In Europe, the strong turn toward both constitutional protection of fundamental rights backed by judicial review and the supranational supervision of human rights after mid-century was irrevocably tied to the experience of the failure of democracy and the rise of genocidal totalitarian regimes. At a general level, that has bred a wariness or lack of confidence in national democratic institutions. More specifically, as the political scientist Andrew Moravcek has demonstrated, in Europe there was a very strong correlation in the latter half of the 20th century between a country's experience

of the weakness of democratic governance at home, and its willingness to cede authority to supranational supervision. According to Moravcek, commitments to international human rights and supranationalism generally served as a way to "lock in" and consolidate democratic institutions which had undergone crisis and collapse, paving the way for illiberal elements to take hold. The international commitment reinforced democracy against possibility of future reversion toward authoritarian rule. This contributed vitally to the contemporary European openness to international human rights, exactly as a *protection* and *consolidation* of democracy. Thus it is not really adequate to say that it is an "anti-democratic" attitude (*pace*, Rubenfeld). However, it certainly does present acutely the paradox of restricting democratic self-governance in favor of the maintenance of objective values necessary for democratic legitimacy – it is "militant democracy" writ large.

If there is an American parallel to be drawn to this dynamic, it is perhaps in the history of the Civil War and the Reconstruction Amendments, which arguably shifted our constitutional order in fundamental ways toward a "trans-state" understanding of fundamental rights and the police power. But such a role for *international* law and institutions has not fit within the U.S. historical experience. Even the most grave 20th century crisis of human rights in the United States, the struggle against racial segregation, was not resolved through international intervention nor resulted in a collapse of democratic self-governance. In fact, arguably it resulted in a strengthening of domestic political and legal institutions (at least on the federal level), not their delegitimation. Thus, history does not incline Americans to see supranationalism as necessary; and indeed any strong form of international supervision could be perceived as unnecessary or worse, because of its expressly embedded intention to enforce limits on the exercise of popular self-governance. (It will remain to be seen whether the test

that the struggle against terrorists represents for human rights will be resolved through such self-governance-reinforcing paths as well.)

There are certainly other differences as well that we could invoke to reinforce the hypothesis of two constitutionalisms, some going much deeper than constitutional law to the roots of civil law and common law *mentalités*. (The former is more concerned with abstract and systematic thinking and "legal science"; the latter is more rooted to history, pragmatism and the concrete case; etc.) But even these few factors are sufficient to see how the overall constitutionalism of the American tradition, when compared to European ones, is much less likely to be oriented toward understandings of rights as constituting an objective order of values expressing the fundamental substantive commitments of the democratic polity, and more toward understandings of rights as arising out of the social and political life of the people, and their constitutionalization as a reinforcement of self-governance and local freedom. Moreover, that orientation is not just a fading vestige of another era; if anything, it has been revived in recent years. An intellectual tour through the last ten years of legal scholarship in American public law suggests a renewed attentiveness to the structures of self-government in, for example, the renewed appreciation of the values and virtues of federalism, the exploration of how legal norms are generated and sustained through social norms at local levels, or the study of how rights like freedom of religion, freedom of speech, and the guarantee of the jury trial and other aspects of criminal process, and indeed the Bill of Rights as a whole, are "designed to protect structures of self-governance".

While Americans have been turning to such questions, in Europe probably the most significant event regarding fundamental rights in the last ten years has been the advent of the Charter of Fundamental Rights of the European Union – a massively

broad and centralized, one could even say "imperial" (in the high Bonaparte-Giscard style), enumeration of rights. Generated from on high, and designed as a way to instruct and educate the citizens of the EU and to constitute the expression of values of the new constitutional order, it is a paradigmatic exemplar of the detachment of rights from their social and political foundations, a Rousseauian effort to create and impose the rights of the people through the civilizing effect of the *volonté générale* acting through the Legislator. The contrast is stark.

The greater emphasis on objective values at the expense of self-government poses the risk of a number of potentially negative consequences. Turning for a moment from the comparative constitutional context to that of the international law of human rights will help reveal them.

V. *Subsidiarity vs. dis-integration of the idea of human rights*

I have argued at length elsewhere that the principle of subsidiarity should be understood to be a structural principle of contemporary international law of human rights. It is deeply consonant with the idea of human rights represented by the Universal Declaration of Human Rights and other foundational instruments, and corresponds well with the understanding of the requirements of dignity, justice and freedom of socially-situated human beings that those documents express. Subsidiarity also describes remarkably well many of the structural and doctrinal features of human rights law and institutions, providing a helpful analytical tool to understand why it bears some of the peculiar features that characterize it, and how it works in practice. Most importantly, however, I argued that subsidiarity should be preferred as an evaluative principle of the human rights system (and especially as an alternative to the concept of sovereignty), in particular because of the way that it unites a concern for the universal common good with a profound attention to the

freedom of local communities to determine and realize their ends for themselves. As I previously put it, "The principal advantage of subsidiarity as a structural principle of international human rights law is that it integrates international, domestic, and subnational levels of social order on the basis of a substantive vision of human dignity and freedom, while encouraging and protecting pluralism among them."

I will not rehearse again the arguments behind those conclusions. Here, I wish only to point out that to the extent that such a reading and analysis of the relationship between the principle of subsidiarity and human rights is correct, a subsidiarity-oriented approach to human rights law will seek to integrate both dimensions of rights that we have been exploring: the guarantee of structures of self-governance and the protection of objective values of justice and human dignity.

In fact, however, many of the predominant ways of thinking about international human rights and putting them into practice do not reflect that balance well, and instead undervalue the self-governance aspects of human rights. That is not to say that the idea of self-governance is absent from international human rights law. On the contrary, it is present in a number of important ways. Generally, structural doctrines such as the requirement of exhaustion of local remedies and the margin of appreciation (in Europe) are good examples of self-government-reinforcing features of the international human rights system. Similarly, institutional relationships limiting international tribunals' direct control over domestic legislation and judicial decisions, or requiring domestic actors to incorporate and execute the international norms and decisions, also can strengthen self-governance. Moreover, important parts of the substantive law of human rights do affirm the importance of democracy, which may be understood at least in some cases as reinforcing self-governance (although arguably

the Strasbourg Court's endorsement of "militant democracy", especially in the case of *Refah Partisi*, is really a decision applying objective values limiting self-governance).

Still, the appreciation for self-governance has never been the stronger partner in the development of human rights ideas, probably in significant part because the international system of protection was born out of the original sin of failed and criminal domestic political institutions. What tenuous interest there has been in the ideal of self-governance has weakened even further with the passing of time. For instance, the doctrine of the margin of appreciation – never accepted outside of Europe in any event – has been in substantial decline at least since the great expansion of the Council of Europe to Eastern and Central Europe. The supranational human rights courts in the Americas and in Europe have been experimenting more and more with remedies and forms of supervision that exercise much stronger internal control over domestic politics and institutions. Even the substantive law has tended to diminish the importance of the value of self-government. For instance, international human rights law is essentially incapable of distinguishing between the illegitimacy of a military regime's self-amnesty for grave violations of human rights and a negotiated, democratically accepted amnesty which in some cases allows societies to move away from conflict and toward reconciliation. This shift is supported very strongly by the dominant mentality of activists and institutional actors (this I can say purely from my personal experience in the field as a member of the Inter-American Commission on Human Rights), who often seem untroubled by the systematic transfer of domestic politics and law to international levels. And finally, much of the most influential scholarly work on international human rights has set aside any real interest in or engagement with the value of self-governance. Even those theories that have been on their surface oriented toward the strengthening of domestic democracy seem in the

end to focus more either on the thick normative content of that democratic order (for instance, Carlos Nino's deeply influential and important *Constitution of Deliberative Democracy*) or on a systematic effort to enhance domestic institutions' capacity to do what international law mandates that they do (for instance, Anne-Marie Slaughter's proposals for adopting what she revealingly calls "The European Way of Law"). They are hardly concerned with structures of self-government that begin in the capillaries of society, the starting points for Tocqueville's appreciation of democracy.

VI. *The problems of an objective order of values without objectivity*

The consequence of an atrophied attention to structures of self-government is a correspondingly stronger focus only on the objective order of values that human rights norms represent. In the international sphere, above all, this can have some highly problematic consequences in the long run.

To understand why, we need to begin by restating two familiar premises of the international human rights project. First, at a conceptual level, "human rights" is not a single coherent idea, but represents the intersection of a variety of different traditions of thought, many of which in various degrees have mutually incompatible premises – especially premises about the nature of the human person and the source of his or her rights. This was recognized to be true from the first stirrings of the effort to articulate common standards of human rights at the international level. Second, in order to circumvent the obstacle of this theoretical pluralism, those who set out to forge the first global declaration of rights based their effort on a deliberate abstention from debate, let alone agreement, about the theoretical foundations of human rights. The focus of their agreement was on practical principles alone. To this day, it remains a pervasive and persistent characteristic of international human rights that its fundamental principles are based on a very thin, if any, consensus about where they

come from. These two premises together ensure that principles of fundamental rights in law are inherently underdetermined, and necessarily subject to further specification through interpretation and legislation.

To compensate for this precarious state, human rights lawyers and political actors have spent decades dedicating themselves to the building up of the positive law of international human rights – multiple treaties, institutions and processes designed to "translate" the soft underlying principles into hard norms of positive law with widespread global acceptance. Once "constitutionalized" in this way, the validity of the norms become separated from their social or philosophical basis, like Hart's rule of recognition or Kelsen's *grundnorm*, thus obviating the need (and perhaps even the possibility) to inquire into, or shore up, their originally multivalent ethical starting point.

I do not want in any way to minimize the value of the tremendous successes that this effort has achieved in the last 60 years. I would not be dedicating myself for four years to working within and seeking to strengthen one of the international institutions that this process has generated, if I did not believe that it was a noble and valuable labor on behalf of justice and the universal common good of the peoples of the world. Nevertheless, it would be unrealistic and disingenuous to ignore the limitations, and even dangers, of building the edifice of global human rights law merely on a positive law that has a very thin practical consensus beneath it.

Let me highlight four interrelated clusters of difficulties with such an arrangement. First, generally speaking there is often a widespread gap between international norms and instruments of human rights law and the local social, political and cultural contexts in which they are supposed to be operative in practice. Someone trained primarily as a comparatist like myself cannot help noticing the

structural similarity between this aspect of international human rights law and patterns of law in colonial societies or pluralistic legal systems. To put it another way, law that is constructed without attentiveness to the underlying cultural context tends toward abstraction that separates it from the society that it purports to regulate. It thus often becomes a bare and unobserved formality. Or, alternatively, the formal and abstract law is maintained through the use of considerable coercive force, which with respect to human rights law would indeed be an intolerable self-contradiction.

That the first problem is not very evident in the Western European constitutional space (although it certainly is even in some of the newer member states of the Council of Europe) is certainly not due to the "positivization" of the principles, but rather to the fact that the underlying commitments and values necessary to sustain the positive law are in fact present, unlike in many other regions of the world. But that observation actually leads us to the second problem area. The thinness of the cultural basis of human rights law becomes even more of a difficulty insofar as we recognize that law and rights do not by themselves *generate* the conditions and commitments necessary to sustain the prepolitical values needed to make the law effective. Even Jürgen Habermas – he of "constitutional patriotism" and the self-sufficiency of the liberal legal state – has come to acknowledge that "An abstract solidarity, mediated by the law, arises among citizens only when the principles of justice have penetrated more deeply into the complex of ethical orientations in a given culture." In short, the thin practical consensus of human rights alone is not self-sustaining; it depends on other extra-legal sources of value and commitment.

Without the nourishment of a genuine connection between the abstract human rights norms and the cultures that can sustain them and that are subject to them, a third set of problems arises. The mediation between the law and the social basis from

which it arises and toward which it is directed would, in the focal case of a law-governed community, normally occur through the political life of the community, by the practical "art" of reasoning together and persuading one another about the goods of the community and how to realize them. Instead, the vacuum existing between positive law and the meaning-bearing contexts in which people actually live their lives tends to get filled with an exaggerated role of bureaucratic institutions and political elites. As Philip Allot memorably put it, human rights in the international legal order have been "swept up into the maw of an international bureaucracy. The reality of human rights has been degraded. . . [T]hey were turned into bureaucratic small-change [and] became a plaything of governments and lawyers." Accompanying this reality is an emphasis on procedures; endless process is the fog that fills abyss of of substantive discord. In short, the risk is of a reduction of political life and its substitution by a weak legalism and formalism. It should be no wonder that most international adjudicative bodies in the human rights sector are notorious for their weak legal reasoning and loose conceptualization of the requirements of human rights in their jurisprudence.

Finally, the thinness of the foundations of human rights and the resultant bureaucratic proceduralism only masks the deeper differences among cultures that in fact persist. The arrangement merely defers disagreement on fundamental questions. Under the veneer of authoritative process, there continues to be controversy over the interpretation and application of even the most basic of rights, like life, and over the relationship between fundamental rights and the most elemental forms of social life, like the family. The divergent understandings are even more pronounced as one gets further away from the protection of the "hard" core of human rights like life and physical integrity, and more into the difficult weighing of competing goods

characteristic of constitutional claims generally. This will only be more true as we continue to see deeply contested moral questions all become processed as juridified human rights claims, and as the challenges of new technologies and new threats to human existence continue to make themselves felt.

Someone will undoubtedly object that I have overstated the vices of contemporary human rights here, so I will stress again that this is an isolated description of certain risks and tendencies, all of which I see present in various degrees in the reality of contemporary human rights practice, even if none of it describes the totality of the human rights field. As I already emphasized, the positive achievements have also been great. Fixing a Tocquevillian gaze for a few moments only on the potential problems, however, allows us to see why an attentiveness to the local communities in which human rights acquire meaning and have force, and the protection of structures of self-government which allow those communities to pursue their good, is so vital to fulfilling the promise of the human rights ideal.

VII. *Democracy as dialogue, mediating the universal and particular*

We can finally begin to pull together a few of the several threads of argument here. Along one track I have tried to demonstrate that one important factor in explaining the gap between international human rights law and United States law is due to the persistence in America of a Tocquevillian concern for the importance of self-government, for the art of democracy as a mediator between a commitment to individual rights and the taste for local freedom. These values are reinforced and carried forward by other characteristics of the American constitutional tradition which I have identified, especially as seen in contrast to certain aspects of Continental European constitutional traditions. Finally, the essay points a cautionary finger toward the international sphere of human rights to highlight the dangers of an

atrophied attentiveness to those same questions of local freedom and self-governance. Can we then draw some conclusions from the distinctive U.S. approach that may be useful for thinking about the sustainability of democracy in the 21st Century?

I do not suggest that we seek to replace the currently skewed way of thinking about and using rights in international and European constitutional systems with an equally reductive concern only for self-government and localism. Indeed, if this were a seminar and lecture about the limitations of the American constitutional disposition, I would be quite critical of the excessively exclusive emphasis there on self-governance with respect to fundamental rights and international law. Instead, therefore, it is necessary to seek means to bring the two forms together in a way that takes both seriously, that keeps them in dialectical tension without either destroying the other. The ways of doing so could include, for example, a more comprehensive application of the principle of subsidiarity to the fundamental rights law of the European Union, one that would open up a greater degree of pluralism in the definition and application of the rights while at the same time recognizing their regional status. An interesting analogous effort to bring the two together is the proposal of Grainne de Búrca, who has tried to articulate a view of the relationship between domestic law and international human rights law in adjudication as a practice of "mutual justification," by which each partner seeks to persuade the other through rational argument. In this way she seeks a "future of international law [that] is not only 'domestic' but also societal and normative."

These and other efforts to integrate commitments to universal rights with stronger orientations toward self-government and localism could help us to reach a more adequate equilibrium regarding fundamental rights and democracy both in international and in constitutional systems. Such an integration would, to begin with,

bring about a greater unity of the abstract idea of fundamental rights with concrete social life, a unity necessary if the common good is to be more a tangible reality than pious words. The vast and diffuse recent body of legal scholarship on social norms in a variety of areas from criminology to urban planning has shown us how vital that integration is to the realization of the humanistic ends of law. Greater integration of local freedom and individual rights can also lead to a richer form of democracy, because it fosters and supports the mediating institutions of civil society, those jurisgenerative communities (including religious ones) that are capable of giving rise to the democratic values and commitments to freedom necessary to justify and sustain pluralistic democracies. Democracy itself then becomes the vehicle for mediating between what the political philosopher Michael Walzer calls "thin" and "thick" moral arguments, between purely abstract expressions of universal values and the articulated, plural, substantive form that those values acquire through the strong forms of belonging that we experience. That vision of democracy creates a greater space for vibrant and pluralistic political life than can be realized in a constitutional order based exclusively on a conception of rights as expressing an objective order of values, because there is a continuous need to debate, discuss, and decide how to reconcile the diverse aspects of the good of the community. It therefore entails, ultimately, a broadening of the need to rely on reason in politics, on the prudence and persuasion that the "art" of democracy requires.

In sum, the resulting democracy does not aim to be a form of either "democratic nationalism" nor "internationalism" but rather conceives of democracy and fundamental rights as constituting a locus of dialogue. I do not mean "dialogue" in a weak sense, a merely procedural form of discourse and deliberation, but a *dia-logos*, a sharing of the fullness of reason with one another. Dialogue in that sense

consists of the conjunction of commitment to truth and to charity – that is, to a reasonable adherence to reality on the one hand, and an acceptance of the good of another as one's own, on the other. In the "art" of a democracy conceived as such a dialogue, the "taste for local freedom" and the idea of fundamental rights are not in contradiction, but become necessary complements of one another.