European Master's Degree in Human Rights and Democratisation 2003

Human Rights: Political Empowerment or Impoverishment?

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Abstract:

Far from constituting a coherent, monolithic whole, human rights is better seen as a diffuse concept replete with internal contradictions and paradoxes which may yield simultaneously positive and negative results for the exercise of participative democratic politics. While certain rights are necessary to enable democratic politics in the first instance, it can be argued that their apparent proliferation reveals a desire on the part of some proponents to either facilitate or compensate for the demise of traditional forms of antagonistic politics. The quest for progressive rights institutionalisation must be questioned in the light of criticism that the proposed 'constitutional minimum' would seem to entail according maximum power to legal institutions and to provoke a somewhat restrictive juridification of political life. These development are seen as being inimical to effective and sustainable rights fulfillment, given that human rights must first and foremost enjoy 'grass roots' dissemination, activation and ownership, and that the most immediate threat to their current and future realisation is arguably to be found in the demise of participatory democratic politics, the death of Aristotle's *zoon politikon*, and the rise of atomised societies composed of privatised individuals.

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1. Introduction

Having become, in the words of Boutros Boutros-Ghali, a 'common language of humanity', the concept of human rights is by now inextricable from the panoply of activities we describe as politics. With the last century having been justifiably dubbed 'The Age of Rights'[1], and with no visible sign of an abatement to the production and proliferation of rights at both national and international levels[2], there is every reason to believe that rights will continue to be situated at the very epicentre of political life well into the future.[3] However, if relentless efforts towards the realisation of 'all human rights for all' could be universally welcomed as part of the future (at least from behind Rawls' 'veil of ignorance'), the precise modality of such efforts should be considered cautiously in light of the often extensive opportunity that exists, as I will argue, for human rights to frustrate rather than honour the emancipatory spirit that informs their letter.

Below I seek to treat the question as to whether the concept of human rights and its associated practices and discourses can be seen to effect an overall *empowerment* or *impoverishment* of politics. What do I mean when I invoke this somewhat nebulous and often subjective term, 'politics'? While the term's employment may modulate to some degree over the course of the discussion, I use it primarily to mean three things: first, the practical processes by which collective life is organised by recourse to participatory deliberation and decision-making in conformity with the fundamental democratic principles of political equality and popular control. Such a process is necessarily based upon maximised human agency; popular engagement and access; minimised institutional opacity; and, above all, on a stable but responsive institutional design which ensures repetition *ad infinitum* of the cycle – non violent conflict, negotiation, reasoned

[1] Nicolas Bobbio gave his 1996 publication this title. See N. Bobbio, *The Age of Rights*, Oxford, Oxford University Press, 1996.
[2] Jan Klabbers, amongst others, insists that the concept of human rights is "bursting at seams". See J. Klabbers, *Glorified Esperanto? Rethinking Human Rights*, in *The 13th Finnish Yearbook of International Law*, Helsinki, 2002.
[3] As Upendra Baxi notes, "[n]o preceding century in human history has been privileged to witness such a profusion of human rights enunciations on a global scale". See U. Baxi, *The Future of Human Rights*, London, Oxford University Press, 2002, p. 1.

consensus – without which social change cannot easily be fathomed. In short, I refer to democracy. Second, I refer to the related concept of power – that which it is the tacit function of democracy to harness and which is responsible for the casting of groups or individuals in positions of subordination, domination or relative equality (the ambivalence and tension that exists between the interdependent concepts of democracy and power will form a leitmotif of the discussion). Third, and last, I refer to political culture or the social dynamics that underpin human constellations, giving them greater or lesser degrees of cohesion or unity and providing the necessary languages of negotiation and compromise.

In simplified form, the notion which I aim to present and explore here is that the protean and flexible concept of human rights has potential *both* to empower and impoverish politics and may do so in different degrees, in different ways, at different stages, depending on the precise nature and setting of their deployment.[4] A recurring criticism will be that a vision of human rights which places exclusive or even primary emphasis on positivist and judicialised manifestations of rights can be deeply problematic, for reasons which will be examined at length. While for many, not least those subscribing to the more traditional views of the political left, it is perhaps self-evident that human rights can be employed to regressive ends and may ultimately yield undesirable (or merely insignificant) results, there is a recognisable need for a more popularised critical evaluation of where the current human rights trajectory may be leading established or modern democracies in terms of political practice and culture. There is, as I aim to illustrate, a certain ambivalence between human rights and democracy understood in the terms described (and between human rights and power). This is due, in part, to the major reconstitutive effect that the former has had and continues to exert on the nature and execution of politics in Western democracies, and, perhaps even more importantly for the future, to a particularly restrictive conception of human rights which appears to continue

[4] I rely here in part on the work of Neil Stammers. See N. Stammers, *Social Movements and the Social Construction of Human Rights*, in <<Human Rights Quarterly>>, vol. 21, 1999, pp. 996-998, and also, *A Ctritique of Social Approaches to Human Rights*, in <<Human Rights Quarterly>>, vol. 17, 1995, pp. 480-508 by the same author.

to gain dominance over other more liberating versions. This precise nature of this relationship will form an important part of the analysis.

Many critics maintain that it is impossible to say anything generic about the political value of rights as a consequence of their fundamentally indeterminate and contingent nature, and that it makes little sense to argue for or against them in isolation from an analysis of the historical conditions, social powers, and political discourses with which they converge.[5] Yet, notwithstanding the probable contextual discontinuity between any two instances of rights, it would indeed seem possible to identify certain distinct patterns and features in current rights discourse and practice in Western democracies and to hold these up to critical scrutiny. While I do not aim necessarily to engage in an argument for or against rights as such, precisely because such argument does tend to ignore the crucial significance of historical timing, social power and political cultural context, I do wish to draw attention to the many paradoxes and paradoxical outcomes which may emanate from practices relating to rights as part of an effort to gain a better understanding of their true value and, crucially, as a means to identifying the most expeditious route to their effective realisation.

If the analysis presented here appears to devote more space to views which are skeptical and critical towards human rights than to arguments which emphasise their progressive value, this is in part because I believe that addressing such views is imperative to the successful and satisfactory realisation of those objectives enshrined in the various UN conventions and declarations at the local level. It is perhaps also called for given the abundance of literature which neglects the arguably existing 'dark side' of rights. It is my view that definitional closure is the worst fate that the discourse of human rights could suffer, short of outright extinction, and if disputing certain aspects or dynamics of the contemporary human rights 'project' is tantamount to being "against motherhood"[6], as a

[5] W. Brown, *States of Injury: Power and Freedom in Late Modernity*, New Jersey, Princeton University Press, 1995, p. 97 at footnote 3.
[6] Russian Diplomat and former advisor to Mihail Gorbachev, Georgi Arbator, quoted in T. Risse, S.C. Ropp, K. Sikkink, *The Power of Human Rights: International Norms and Domestic Change*, Cambridge, Cambridge University Press, 1999, p. 229. In full, the quote reads, "How can one be against human rights these days? It is the same to be against motherhood".

prominent Russian political figure put it, and potential critics fear that "it is difficult to argue with or about human rights without either being labeled or feeling obnoxious or reactionary"[7], then such closure must be seen as a real and perhaps imminent prospect. Moreover, if the myriad, often antithetical, practices and processes related to human rights are viewed as inextricable parts of a monolithic whole over which people feel little sense of ownership or control, then there is genuine reason to fear that this venture will ultimately precipitate its own demise.

A certain eagerness to criticise is also due in some measure to the fact that the formative roots of this work lie in an educational environment which tended to promote an exaggeratedly optimistic view of positive law's putative capacity to construct a better world all by itself. The dynamic of collective human action and the role of social movements as the *sine-qua-non* for social change (and indeed for the socio-historical construction and realisation of human rights themselves) seemed to somehow drop off the academic horizon as the impression that justice could somehow be litigated into existence was fostered.[8] This arguably widespread conception of human rights, which effectively serves to relegate the person from their initial position as agent to the position of subject, or from participant to passive entity on which rights are conferred by state authority, is one which is difficult to reconcile with the professed objective of rights to constitute the "foundation of freedom, justice and peace in the world".[9] Assessing criticism of this nature will form an integral part of this discussion.

To briefly outline the form that the discussion will take: the chapter that immediately follows (chapter 2), entitled 'Visions of Human Rights and the Paradox of Institutionalisation', will attempt to distil the discourse of human rights into a number of different conceptions: human rights as "ethical imperatives", as "politics and ideology", as "metaphysical abstraction", as "judicial production and positive law", and as

[7] J. Klabbers, *Doing the Rights Thing? Foreign Tort Law and Human Rights*, in Scott, C., (ed.), *Torture as Tort*, Oxford, Hart, 2001, p. 554.
[8] It is interesting to note in this regard that just one out of c.85 students on the master's degree programme for which this dissertation is being presented made the two-hour journey from Venice to Florence in order to attend the multiple seminars, workshops and demonstrations organised as part of the European Social Forum in December 2002 (unfortunately, it was not this student).
[9] See the first preambular paragraph of the Universal Declaration of Human Rights.

"governance". The overall qualities and behaviour of each will be described in order to approximate an initial evaluation of their apparent propensity to empower or impoverish politics. It will be argued that institutionalisation marks a crucial turning point in terms of facilitating a transition or shift between what can be called 'politics *for* human rights' to 'politics *of* human rights' since, once institutionalised, human rights can and often do play an ambivalent role in relation to power structures and the generation of social justice.

Next, departing from the notion that the ideal society for many is a society in which politics has been abandoned, chapter 3, 'The Human Rights Objective – Towards a Superfluous Politics?', will question the underlying motivations, circumstances and implications of rights proliferation and the tendency to view human rights in terms analogous to contractual law. The role of the postulated 'death of history' and the generalised loss of faith in political democracy in promoting the transformation of the instrumental function of the law into a political end will be examined at length as part of an effort to assess the ostensible desire on the part of some rights advocates to dispense with antagonistic politics in favour of proceeding to an expansive vision of the rule of law.

Chapter 4, 'Constitutional Rights, Courts and Politics', will seek to make a detailed examination of the radical transformative effect that the emergence and development of 'higher law constitutionalism' has had in so far as politics and the traditionally apolitical process of the law have been driven towards and into one another with profound reconstitutive implications for the nature and exercise of governance. The assessment of this apparent 'judicialisation of politics' will be accompanied by analyses of the professed apolitical nature of human rights, the role of courts in the securing of human rights in practice and the question of public interest litigation.

Chapter 5, "Human Rights and Political Empowerment", will seek to assess how in certain dynamic and holistic conceptions human rights may constitute an integral part of any struggle for the generation of more just, equitable and reflexive societies through

serving as normative mobilisers for popular political engagement. It will be argued that human rights can play a pivotal role by providing impetus, form and cohesion to social movements; by providing a normative structure or foundation for local and global cultures of solidarity; and by reviving and invigorating both citizenship and politics.

As will be made clear, it is my contention that a more lasting, liberating and participatory logic of rights would, rather than seeking to drive politics towards redundancy or extinction, recognise the indispensable role of politics and welcome non-violent antagonism as a fundamental component of collective existence. As a corollary to this, it would greet the increasingly automated implication of courts in the deliberation of politics with certain reservation (at least seeking to avoid any further entrenchment of its role), while resisting the predominant tendency of this and other factors to bureaucratise or technocratise questions which are elementary to politics. I will also seek to stress the conviction that rights must be defended not only from the radical attack on the very notion of rights that comes from either end of the political spectrum, but also from what one might call the expanding human rights 'establishment' which serves in some measure to undermine the necessary public ownership of rights discourse through the promotion of a rigidly legalistic and truncated conception of rights under the exclusive tutelage of professional 'gatekeepers'.[10] In short, I aim to critically assess some of the current practices relating to rights in an effort to identify the different ends, not necessarily emancipatory, which rights can serve and the different outcomes, not necessarily desirable, which can result from an insistence upon them.

[10] This term is used by Charlotte Bunch. See C. Bunch, *Feminist Visions of Human Rights in the Twenty First Century*, in Mahoney, K. E., Mahoney, P., (eds.), *Human Rights in the 21st Century: a Global Challenge*, Dordrecht, Kluwer, 1993, pp. 967-977.

2. Visions of Human Rights and The Paradox of Institutionalisation

2.1 Introduction

As Upendra Baxi reminds us, "there is not *one* world of human rights, but many conflicting worlds".[11] A necessary first step on the way to gaining an understanding of the dual capacity of human rights to empower and impoverish politics is to identify the salient features of the dominant conceptions or visions of rights which constitute these conflicting worlds and to assess subjectively some of their strengths and weaknesses in light of what has been said in the introduction. In doing so I will adumbrate several of the arguments which will be taken up over the course of the overall discussion, most notably that a singular emphasis on human rights as a legal concept is inadequate both in terms of what it can achieve vis a vis rights fulfillment and what influence it ultimately brings to bear on the political process.

2.2 Visions of human rights

a) Human rights as ethical imperatives

Some speak of human rights in terms of ethical values that ought to inform collective and individual action and desire. This conception sees rights as providing an ethical standpoint from which power formations can be subjected to constant interrogation and opposition. Rather than being seen as necessarily restricted to the operational level of the law and conforming with its frequent structural contradictions and ambivalences, human rights become a moral-ethical discourse capable of supplying "standards of critical morality for the evaluation of any state of affairs" (not least the functioning of the law and justice itself).[12] The objective is no less than to construct a new social morality, or

[11] U. Baxi, *op cit*, p. 5.
[12] *Ibidem*, p. 7.

what feminists Carol Gilligan and Joan Tronto call an "ethic of care", which may be capable of generating consciousness of the "constitutive interconnection of self and other" and a sense of solidarity which is seen to be sorely lacking in contemporary society.[13] The strengths of such a vision are clear. Rather than a vertical system of legal norms moderating the individual's exclusive relationship with the state in terms of entitlements and obligations, human rights become a means of focusing in a more horizontal way on the inviolable integrity of the human being, regardless of from where and in what form threats to such integrity may come. Power is thus held accountable in all of its many guises and diffuse manifestations. While it is contentious whether human rights as a concept could come to generate such allegiance on a global scale (is it complex or comprehensive enough in comparison to the complexity of human socio-political relations?) and whether this would necessarily produce truly positive outcomes in every instance (an issue for later discussion in relation to the somewhat disfigured vision of rights that predominates in the USA[14]), in an age where traditional sources of morality meet with increasing societal indifference and an ethical vacuum is seen to emerge, the development of such a universal moral vision could feasibly be of immense value.

b) Human rights as politics and ideology

Described by some as a 'critical modernist perspective', this vision rejects the positivist and essentialist tendencies which are frequently found in human rights discourse in favour of conceiving human rights as an open-ended, revisable and omnivalent "ideological discursive practice".[15] In many ways similar to the ethical-moral view in its propensity to push the traditionally state-centric and vertical boundaries of human rights in order to enable their response to the inequitable distribution and exercise of power in society in all of its manifestations, this conception remains valid far beyond the

[13] Quoted in C. A. MacKinnon, *On Torture: A Feminist Perspective on Human Rights*, in Mahoney, K. E., Mahoney, P., (eds.), *Human Rights in the 21st Century: a Global Challenge*, Dordrecht, Kluwer, 1993, p. 27.
[14] See M. A. Glendon, *Rights Talk: The Impoverishment of Political Discourse*, New York, The Free Press, 1991.
[15] R. Devlin, *Solidarity or Solipsistic Tunnel Vision*, in Mahoney, K. E., Mahoney, P., (eds.), *Human Rights in the 21st Century: a Global Challenge*, Dordrecht, Kluwer, 1993, p. 993.

conventional reaches of the law – it looks as much to solve problems related to *structures* as to *actors*, maintaining that duties should be ascribed in the first instance to those parties which are seen to violate a given right. In this way a conscious effort is made to shift the frame of analysis or focus from victims of abuse (seen to be the traditional emphasis in many human rights discourses) to the agency which is responsible for such abuse. Drawing on feminist criticism, it also takes issue with the pervasive influence of the public/private dichotomy, arguing that such a division is artificial and wrongly presupposes that there are certain spheres which are by nature 'unchangeable' or 'beyond the mandate'. In so far as it aims to constitute "a way of thinking, talking and knowing that facilitates, structures and underpins the ways and means of social interaction", the expansive and holistic nature of this vision is clear.[16]

Central to this idea of rights (and indeed to the overall discussion regarding empowerment versus impoverishment) is the conviction that, rather than being somehow necessarily above or extraneous to politics and public deliberation (by virtue of being somehow pre-political or necessarily abstract concepts), human rights are themselves a *key element* of politics. This is so by virtue of the fact that they are seen to constitute a "contestable terrain of political struggle" where crucial questions regarding definition, interpretation and realisation are decided. Instances where such contestation is not done in the most public and participatory way are seen to betray the professed goal of human rights to bestow freedom and self-determination upon each and every individual. This conception also stresses that the primary vehicles for the realisation of social change, and indeed the very construction of human rights in the first instance, are the myriad and multifaceted struggles and movements throughout the world which fight concentrations of political, social and economic power in order to generate more equitable and just societies.[17] For this reason it remains deeply skeptical of those institutions, national or international, which would seek to somehow control (or 'appropriate') human rights in a manner which can work against their 'grass-roots' reflexivity and emancipatory potential, or serve to generate dynamics which precipitate the definitional closure of the discourse

[16] *Ibidem*, p. 994.
[17] See N. Stammers, *Social Movements and the Social Construction of Human Rights*, in <<Human Rights Quarterly>>, vol. 21, 1999, pp. 980-1008.

(i.e. by authoritatively defining the precise content or nature of a specific right). Optimism for the future of human rights is, proponents argue, not so much to be found in related conventions, institutions, decisions etc., but rather in the social movements that respond to real instances of subordination and domination. Therefore, human rights must primarily be fought for from the 'bottom up', while ownership or sovereignty over the concept of rights is necessarily to be found in people rather than procedure.

c) Human rights as metaphysical abstraction

This foundational conception of human rights has its roots in the abstract notion of natural law and, in a word, presents human rights as *truth*, both timeless and universal. As illustrated in Alan Gewirth's 'The Community of Rights' (1996) (which provides perhaps one of the most comprehensive accounts of the moral foundations for universal human rights), central to this vision is a reliance upon higher or meta-justification which draws upon the power of ethical theory and moral reason. However, rather than go deeper or embark on an evaluation of such theory in light of pragmatic or anti-foundationalist criticism such as that coming from authors like Richard Rorty and Eduardo Rabossi[18], I wish to register this conception of human rights for the reason important to the discussion that, while persuasive and of certain value for grounding rights in philosophical terms (primarily on the prerequisites of *human agency*), this view of rights nonetheless tends to obscure the historical social construction of human rights and their role in social and political struggles, past and present. It loses sight of the exercise of power and hegemony within human relations and the emergence of human rights over time primarily as a result of the movements that sought to respond to these forces.[19] If we accept that, in order to be more effective, the discourse of human rights must transform those "mendaciously idyllic" aspects of its character into a resolutely more contextualist practice which is capable of coming to terms with the "messiness, specificities and complexity of the

[18] See, for example, Richard Rorty's *Human Rights, Rationality, and Sentimentality*, in Schute, S., Hurley, S., (eds.), *On Human Rights: Oxford Amnesty Lectures*, London, Oxford University Press, 1993.
[19] See N. Stammers, *Social Movements and the Social Construction of Human Rights*, in <<Human Rights Quarterly>>, vol. 21, 1999, pp. 980-1008.

multiplicity of realities" that exist, then the acontextual and generic nature of this metaphysical conception would appear to render it somewhat pragmatically anaemic.[20]

d) Human rights as judicial production and positive law

In contrast to the conceptions previously described, this version of human rights inhabits and devotes almost exclusive attention to the supposedly neutral and apolitical realm of law, concerning itself primarily with the establishment, implementation and enforcement of human rights as international public law and as national law (the latter being increasingly derivative of the former). The primary actors which it implicates can be said to include constitutional and ordinary courts; the lawyers and jurists that keep these functioning; the litigants that activate them (reluctantly or not), including NGOs and other social actors; the bureaucracies that implement resulting decisions; and the academics who comment related activities and judgments. Collectively, these constitute an epistemic community with its own distinct form of reasoning and language which is often substantively alien to ordinary forms of political discourse (despite its ever closer implication in the ultimate outcome of any political process).

This conception is distinct to the first two described by virtue of being more opaque and inaccessible to the public and also by virtue of being necessarily more painstakingly incremental and technocratic in its deliberations. This is due, respectively, to the inevitably exclusionary nature of legal institutions as a consequence of their convoluted process and language and as a result of constitutional law's express objective to protract and complicate the process of political change as a safeguard against 'heat of the moment' decisions which may threaten the legitimate interests or needs of certain groups or individuals. According to classical legal theory it is also necessarily in conflict with those conceptions which regard human rights as being central to politics because of the division that has traditionally been maintained between legal and political realms, with the rights included in the former being deployed in order to limit the unbridled passions of the latter. As one author puts it, the institution of law is driven by the Enlightenment's

[20] N. Devlin, *op cit*, p. 1000.

reasoned conviction that "the best means of preserving politics [i.e. maintaining stability] is through a conscientious objection to the political [i.e. radicalism or radical change]".[21] With human rights being seen to refer to a series of issues which are somehow 'pre' or 'supra' political, their interpretation and application is therefore perceived to be a legal matter. However, to foreshadow the argument I will pursue below to the effect that the legal can be seen to be gaining an inappropriate ascendancy over the political, such a separation between law and politics is in effect a feature of a bygone era, given the radical transformative impact that constitutionalised rights have had on the relationship between law and politics.

The case need hardly be made for the ubiquity or necessity of the law. Its coherent function is both foundational and indispensable to any given society, constituting as it does a set of necessary guarantees against anarchy. However, there would, in my view, appear to be no shortage of deficiencies to human rights as they manifest themselves in this conception. Frequently it would seem that there are no easily discernible limits to the optimism which circulates within the ranks of those subscribing to a singularly legalistic view of human rights vis a vis the law's potential to generate more egalitarian societies. Holding to what one might call 'blind faith' in the law's role in the promotion and defense of social justice, this conception perhaps fails to recognise the at least co-importance of broad-based initiatives to this end[22] and, moreover, to remain oblivious to criticism to the effect that legal systems are frequently themselves often complicit, willingly or otherwise, in legitimating societal structures which promote injustice – as one Council of Europe Human Rights Director put it, "jurists are often accomplices or prisoners of the established system[.]"[23] While it is true that the longevity of democracies depend in no small part upon the effective rule of law and that anyone who has had their

[21] M. Koskenniemi, *The Effect of Rights on Political Culture*, in Alston, P., (ed.), *The EU and Human Rights*, London, Oxford University Press, 1999, p. 101.
[22] N. Stammers, *Social Movements and the Social Construction of Human Rights*, in <<Human Rights Quarterly>>, vol. 21, 1999, p. 991.
[23] P. Leuprecht, *Conflict Prevention and Alternative Forms of Dispute Resolution*, in Mahoney, K. E., Mahoney, P., (eds.), Human Rights in the 21st Century: a Global Challenge, Dordrecht, Kluwer, 1993, p. 962.

rights violated will attest to the ubiquity of effective legal redress[24], there are substantive reasons to be wary of this conception of human rights when it is seen to be accumulating excessive prominence in relation to (and at the expense of) other conceptions, namely those described under 'a' and 'b' above. There is perhaps real reason to fear that, distanced from the influence of those who it purports to protect, this narrowly legalistic vision can compel human rights to become, as Richard Devlin puts it, "mired in a legalised proceduaralism which is blinkered from the necessity for more substantive transformation".[25]

Of perhaps equally negative import is the contention that those who devote their talents to systematising human rights law and practice typically create norms which are almost equally available to forces which work against, rather than for, the realisation of social equality. This is primarily the result of the often highly indeterminate formulation of human rights which entails a pivotal role being played by interpretation, prioritisation, and balancing in any rights adjudication. While a complex and disputed array of factors contribute to how any given rights dispute is handled and ultimately determined, a crucial role is invariably played by those functions and commitments, implicit or explicit, on which the adjudicatory body itself depends for its own legitimacy – i.e. the boundaries within which its judgments are expected to remain restricted.[26] Furthermore, likely patterns of comparative advantage in the court-room setting should be considered in terms of access to resources and other factors. These questions have important repercussions, as we will see, for the expectations that one can reasonably hold of social transformation emanating from the deliberations of such a body.

As a final point in relation to this conception of human rights, it is important to realise that it is not necessarily the legal establishment itself which has sought to create the impression of wielding the necessary power and wisdom to perform societal

[24] Patricia Williams makes an impassioned defense of rights in this regard in her *Race and the Alchemy of Rights*, Harvard University Press, 1992 (2nd Edition).
[25] N. Devlin, *op cit*, p. 995.
[26] Shapiro notes how judicial (rights) activism is only possible on the basis of a "stored legitimacy" which is built up over prolonged periods of "service" to free trade and corporate growth. See M. Shapiro, A. Stone Sweet, *On Law, Politics, and Judicialization*, London, Oxford University Press, 2002, pp.158-160.

transformation through its judgments and pronouncements, despite whether it may be found today to be at least partially complicit in failing to openly dismiss such a notion of its capabilities. As a respected judge warned upon the eve of the American 'rights revolution', "I often wonder do we not rest our hopes too much on constitutions, upon laws and upon courts. These are false hopes…Liberty lies in the hearts of men and women…when it dies there, no constitution, no law, no court can save it[.]"[27] It is probable that such modesty, insight and realism is commonplace amongst contemporary jurists. However a similar appreciation of the inherent limitations of the law would seem to be significantly lacking amongst those many human rights activists who are less shy or skeptical of the law's instrumental capabilities and litigation in the context of the European 'rights revolution'. It would perhaps even be appropriate to describe another dominant conception of human rights under the title, 'human rights as *romantic absolutism*', in order to describe the views of those activists which in no small part fuel or drive the conception of rights under consideration here. The motivations and import of their quest for human rights justiciability and the activation of the courts in seeking successful enforcement will be considered further below.

e) Human rights as governance

While human rights seek to address the problem of meeting a wide range of human needs, they also address the problem of legitimacy to rule – public decision-making power is in a sense 'purchased' at the price of according a series of guarantees and entitlements to those who are to be subject to that power. Therefore, in this conception, human rights come to constitute the basis of the relationship between the state (or statal structure) and the individual. However, as was suggested above, even as these provide obstacles to free play of power, rights standards also invariably provide opportunities for it. Since the structures and processes of the law shape, and usually determine, the form and content of human rights, these can be all too easily instrumentalised for extraneous or antithetical ends.

[27] Learned Hand, "The Spirit of Liberty", in The Spirit of Liberty, ed. Irving Dillard (New York: Alfred A. Knopf, 1960), 189-90, quoted in M. A. Glendon, *op cit*, p. 143.

As will be discussed further, this is a problem which surfaces not only in the national setting but also, for example, in the increasingly important context of the 'ever closer union' of the European Communities, where rights can be seen to have been systematically employed for the purpose of promoting ECJ jurisdictional primacy and (with the European Charter of Fundamental Rights) to accord legitimacy to a process which has arguably already taken place.[28] The extent to which this setting tends to expropriate rights in the pursuit of governmental interests remains subject to vigorous debate. However, I will argue that while human rights are indeed important in this conception, their importance is often relative or subordinate to other priorities which can serve to legitimate the influence of the few.

2.3 Which Vision?

Notwithstanding having excluded from discussion the traditional Marxist conception of rights (which essentially dismisses the concept as nothing more than a 'ruse of governance' or 'smoke and mirrors' born of supposedly worthless bourgeois ideology), what evaluation can be made at this juncture of the value or capacity of any of these conceptions to empower or impoverish politics beyond what has already been said of them?

If we accept that "the right to interpret rights is itself a basic human right" and consider this question from the perspective of *rightful ownership* of rights, then we are likely to get one answer.[29] Indeed, the first two conceptions described would appeal at first blush for a practice of human rights which is public, reflexive, vigorous, participatory, inclusive, engaged and intent on securing maximum human agency, freedom and self-determination on a sustainable basis. While recognising the role that the law and institutionalisation of human rights must play in some instances of rights practice and

[28] On the first point see J. Coppell, A. O'Neill, *The European Court of Justice: Taking Rights Seriously?*, in <<Common Market Law Review>>, vol. 29, 1992.
[29] U. Baxi, *op cit*, p. 43.

enjoyment, it would dispute the centrality of their contribution to human rights fulfillment. If on the other hand we think of rights more in terms of authority and control, or their forming the basis for *power over* (rather than *power to*), we are likely to get another answer.[30] The last two conceptions in turn would seem to gravitate more towards a practice of rights which is based in varying degrees upon maintenance of the status-quo and stability, instrumentalisation, cautiously incremental evolution and application, restricted access and public passivity, authoritative interpretation, and the necessary concealment of its clearly political nature behind a veil of technocratic and supposedly neutral legal machinations.[31]

By invoking such qualifying adjectives I do not aim to create such a one-sided picture as it may seem. Indeed, it would be wrong to suggest that any one of the conceptions described is likely or able to generate *only* empowerment or impoverishment. While the descriptions given here would reflexively favour the more putatively liberating and '*lex-phobic*' conceptions described (i.e. 'a' and 'b'), this does not mean it would ignore the fact that these too have their dangerous pitfalls and deficiencies, not least in being clearly more subject to passionate and unpredictable proclivities which have clearly been responsible for much suffering in the history of mankind. Thus, rather than being a question of *which* unique conception of human rights to endorse or champion, the issue becomes one of striking an appropriate *balance* between these various essentially symbiotic conceptions. If legal and governmental conceptions of rights provide necessary security and stability (and facilitate the ultimate attainment of consensus by some systematic means) and more fluid conceptions provide the dynamism or impetus to allow such stability to progressively evolve in desired directions, then it is perhaps conceivable that an effective overall discourse and practice of rights can be enjoyed.

However, such a necessary balance between factors *sustaining* authoritative interpretations of human rights and factors directly *challenging* and debating such

[30] Ursula Franklin makes this distinction. See N. Devlin, *op cit*, p. 993.
[31] See, generally, M. Shapiro, A. Stone Sweet, *On Law, Politics, and Judicialization*, London, Oxford University Press, 2002, and A. Stone Sweet, *Governing with Judges: Constitutional Politics in Europe*, London, Oxford University Press, 2000.

interpretations is both extremely delicate and, in my view, frequently lacking. While the somewhat restricted circulation of human rights as a concept within the public realm could be pointed to as one of the determining factors, a dynamic of perhaps greater long-term importance (which may serve to prohibit any such balance being reached at all) is the fact that as rights expand to cover more social ground, their necessary adjudication in the legal realm (if they are to be justiciable as is insisted) would logically entail the not necessarily liberating progressive entrenchment of the law in social relations. This is a development which arguably generates a number of problems for politics, both in terms of popular participation and legitimacy. If the law is the ultimate authority in society, and interpretation of expanding rights provisions becomes the means of exercising such authority, then political discourse is necessarily driven towards and into the traditionally apolitical process of the law with profound reconstitutive implications for the nature of governance and the exercise of politics. This encapsulates at least part of the overall problem I wish to get at here in relation to rights and their effect on politics, i.e. by insisting on justiciability, is the whole discourse of human rights driving politics into the restrictive realm of law? If so, why? In tandem with the stagnation of traditional forms of politics, is this in turn causing a frustrating displacement of political discourse into other areas of social life where it is perhaps more difficult to control and more likely to become dangerous or violent? Through insisting on enforceable human rights do we hope to somehow save ourselves from our own passions or to eliminate the kind of political conflict which we no longer have time for and which no longer commands our interests? These questions will be looked at in the chapter that follows.

This said, it would nevertheless seem possible to arrive at an overall judgment of the tendencies or proclivities of these conceptions of rights when based on the reasoning described and on the useful distinction which Baxi makes between 'politics *for* human rights' and 'politics *of* human rights', the former being of inherently greater emancipatory and participatory value than the latter. We could say that 'politics *for* human rights' is about seeking fulfillment and realisation of the terms of human rights themselves while 'politics *of* human rights' is more concerned with questions relating to jurisdiction, controlling interpretations, and instrumentalisation. Understanding the pivotal importance

in practice of this seemingly subtle shift in phrasal nuance allows us to apprehend at least some of the paradoxes which can emanate from rights practices as they can be seen to make a critical *transition* from being a vector of liberation and common empowerment to one which has an increased tendency to facilitate control and the concentration of power.

2.4 Empowerment and Impoverishment: Human Rights and the Paradox of Institutionalisation

When and how does this transition or shift take place? If we accept the argument that "human rights are above all the result of historical political struggles"[32], necessarily directed towards structures upholding the form of authority and power that is actively opposed, then it would seem that once this struggle has achieved its aim and passed into a position of authority itself that its participative dynamism is lost and 'politics *for* human rights' is more likely or amenable to be turned into 'politics *of* human rights'. In other words, it is when rights come to be successfully institutionalized that they are more likely to play an ambivalent role regarding the equitable distribution of power (i.e. 'power to' is easily reconstituted to form or enable 'power over'). Indeed, despite the long-standing universality of its language and the employment of the blindfold to symbolise its impartiality, it is not difficult to argue convincingly that, historically, in the ultimate instance, the universal language of the courts and the law have in practice tended to support and serve the structural interests of the powerful while political organisation and activism have traditionally been viewed as the surest means to defending and promoting the interests of the powerless (a view which I argue has come to be inverted in the eyes of many a human rights advocate). This is not to maintain, as some would, that once this transition has taken place that human rights serve *only* to underpin power and authority[33], but to emphasise the points that human rights can, rather than doing only one or the other,

[32] W. Dieter Narr, A. Belden Fields, *Human Rights as a Holistic Concept*, in <<Human Rights Quarterly>>, vol. 14, 1992, p. 18.
[33] For similar criticism, see for example M. Sandel, *The Procedural Republic and the Unencumbered Self*, in <<Political Theory>>, vol. 12, 1984, and, to a lesser extent, W. Brown, *op cit*.

serve *both* to empower and impoverish politics, and that the objective of human rights fulfillment is not necessarily secured once they achieve legal status.[34]

Such a proposition should not be particularly controversial or surprising given that the disciplines of politics and sociology abound with theories outlining the nature and effects of institutionalisation on a whole variety of actors in public life, each noting the propensity of this process to transform 'opposition' into 'support', and struggle for 'change' into struggle for 'order'. Indeed, Jack Donnelly, one of the most prominent proponents of human rights, notes that the idea of natural rights ceased to be an instrument for political change and came rather to be used "to impede further change" when "the original and largely bourgeois proponents of natural rights gradually moved out of political opposition and into control".[35] Similarly supportive of this notion is Nicolas Blomley's argument that, while "in certain community-based settings, rights claims can be powerful and progressive weapons, both as critique and mobiliser[,]"[36] (an observation which I will discuss in greater detail in chapter 5), "it is the circulation of rights within the juridical domain that ensures that their meaning is often counter-progressive".[37]

While further concrete evidence of this contention regarding the potential shift or transition in the effects of rights practice's impact will emerge over the course of the discussion below, as immediate supporting examples we need only mention the recognition of corporations as being entitled to equal rights and protection as natural persons under the US constitution[38]; the US Supreme Courts definition of money as a form of free speech (a decision which plays no insignificant role in the functioning of electoral campaigning and the ubiquitous role of big business in politics)[39]; the ECJ's

[34] N. Stammers, *Social Movements and the Social Construction of Human Rights*, in <<Human Rights Quarterly>>, vol. 21, 1999, p. 996.
[35] J. Donnelly, *Universal Human Rights in Theory and Practice*, New York, Cornell University Press, 1989, p. 29.
[36] N. Blomley, *Mobility, Empowerment and the Rights Revolution*, in <<Political Geography>>, vol. 13, 1994, p. 413.
[37] *Ibidem*. p. 412.
[38] N. Chomsky, *Rogue States: The Rule of Force in World Affairs*, London, Pluto Press, 2000, p. 117.
[39] *Ibidem*. p. 119.

placement of a "fundamental right" to life under the Irish constitution on the same normative level as the right to provide services freely throughout the Community in *Grogan* and its use of human rights as "no more than a vehicle for the Court to extend the scope and impact of European law"[40]; or the Canadian constitutional court's interpretation of the right to mobility in the Canadian Charter of Rights and Freedoms in rigid and exclusive conformity with "elite social interests", as described by Blomley.[41] Each of these instances in turn support the notion that, once in the institutional realm, rights *can* be deployed, interpreted, or prioritised in such a way as to fundamentally compromise the spirit of their origins; that passage from 'politics *for* human rights' to 'politics *of* human rights' is indeed feasible and something which should be both recognised and minimised. Sadly, all signs would appear to illustrate that such necessity has so far been ignored or overlooked by many influential rights proponents as they continue the struggle for maximum available enforceability for all human rights, frequently at the expense of realising other potentially more progressive modes of conceiving their deployment.

Recognition of the dual potential in rights has two important consequences. First, the Marxist and structuralist critique which rejects rights outright (and to some extent political liberation itself) is immediately called into question because of its failure to consider rights in anything other than their institutionalised form.[42] If it is indeed the case that it is in their institutionalised or legal form that ideas and practices in respect of human rights are most likely to sustain relations and structures of power, it could very well be (as we shall see more closely in chapter 5) that in their pre-institutionalised or nonlegal form claims for human rights can serve to effectively empower opposition to such relations and structures (c.f. the conceptions of rights described above under 'a' and 'b'). Second, if the potential of rights to empower is missed by the Marxist critique, then in a similar fashion their potential to impoverish is something which the epistemic human rights "community" (comprised of lawyers, jurists, bureaucrats, activists etc.) has often

[40] J. Coppell, A. O'Neill, *op cit*, p. 686 and p. 692.
[41] See N. Blomley, *op cit*, p. 418.
[42] Alan Hunt makes this point (see his *Rights and Social Movements: Counter-Hegemonic Strategies*, in <<Journal of Law and Society>>, vol. 17, no. 3, 1990), while Dieter Narr and Belden Fields point to Marx's failure to grasp the importance of political liberation.

insisted on remaining blinkered to in its frequently exaggerated rights optimism. As Stammers argues, this entails a failure to recognise that "institutional structures are not likely to be a fertile soil through which….power can be effectively challenged unless those institutions are themselves being forced to adapt and change as a consequence of further challenges from outside those institutions" – in other words, we cannot rely on the process of law alone (nor on initiatives, however well-intentioned, coming from therein) for the realisation or maintenance of social justice.[43] Important aspects of the relationship between the law (and particularly the constitutional court as the principal guardian of rights) and those forces which seek to challenge and shape its interpretation and application through public interest litigation and other means will be considered in chapter 4. However, I wish to turn now to consider some of the actual and potential impacts on political life of the confluence of those less favoured conceptions of human rights and their numerous tributaries, such as that which construes rights with a sense of 'romantic absolutism', forming as they do the major or principal current in the discourse of human rights in the West today.

[43] N. Stammers, *Social Movements and the Social Construction of Human Rights*, in <<Human Rights Quarterly>>, vol. 21, 1999, p. 998.

3. The Human Rights Objective – Towards a Superfluous Politics?

3.1 Introduction

Participative deliberation and decision making regarding the collective future, political debate and democracy, are all inconceivable without legal enforcement of certain human rights. This much is beyond question. However, the paradox I wish to explore here is whether the current desire and propensity to make all human rights justiciable and the enthusiasm with which rights proliferation is greeted are somehow symptomatic of a increasingly generalised loss of faith in democratic political processes and an ascendant notion that society can be more effectively and justly regulated by courts enforcing expansive series of rights and obligations. Could it be that there is an implicit desire or belief in the possibility of making traditional notions and processes inherent in politics redundant in certain discourses and conceptions of human rights? Is it the ironic truth that while human rights enable politics in the first place, their increased production serves to diminish it?

3.2 The human rights objective – towards a superfluous politics?

There seems to be no doubt on the part of the human rights 'establishment' described as to the most desirable status of a human right within the national context or otherwise, nor in certain instances would there seem to be any apparent limits to the faith which can be placed in their capacity to 'trouble-shoot'. The direct incorporation of the Bill of Rights into the constitutional framework of crisis-ridden post-Dayton Bosnia-Herzegovina would serve as an illustration in this regard. As the argument goes, all human rights must be made justiciable and, while it is accepted that the means of incorporation of international law into domestic law is a matter for the individual state concerned (provided it is capable of successfully producing the desired results), it is generally

considered that the 'higher the law the better' – indeed how else could all human rights be treated "on the same footing and with equal emphasis".[44]

As Donnelly observes, notwithstanding the fact that human rights are fundamentally distinct from legal rights (in so far as they are "essentially extralegal"), it remains the case that giving "effective legal force to their content is the *ultimate aim* of *the* struggle for human rights" (emphasis added).[45] If it is a fairly self-evident and uncontentious point that he goes on to make regarding the purpose or aim of human rights being to "challenge or change existing institutions, practices, or norms", there would seem to be certain problems inherent in the automatic assumption that the only real means by which this can be achieved is through the production of more (albeit improved) law.[46] While it would seem unlikely that, as a political scientist, Donnelly would fail to neglect 'the political' or to notice any potentially diminishing effects that rights could exact through their impact on the organisation and functioning of a political community, his welcoming recognition that "our list of human rights has evolved and expanded, and will continue to do so…" is one which has perhaps rightly made other observers uneasy when it is juxtaposed to the professed judicialising tendency just described.[47]

One of the most critical yet cogent expressions of this uneasiness has come from Jan Klabbers, who argues convincing that "…the ideal society for many is a society in which politics has been abandoned"[48], linking this development to the assertion that the current concept of human rights is "bursting at the seams."[49] Noticing that the deep historical connection that has always existed between human rights and politics (c.f. those points

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[44] See United Nations Economic and Social Council, The Domestic Application of the Covenant:. 03/12/98. E/C. 12/1998/24, CESCR General Comment No. 9, Substantive Issues Arising in the Implementation of The International Covenant on Economic, Social and Cultural Rights; The Vienna Declaration and Programme of Action 1993 notes with regard to the issue of rights indivisibility that all human rights must be treated "on the same footing and with equal emphasis". See Vienna Declaration and Programme of Action 1993, Paragraph 5.
[45] J. Donnelly, *op cit*, p. 14.
[46] *Ibidem*, p. 14
[47] *Ibidem*, p. 26
[48] J. Klabbers, review of T. M. Franck's, *The Empowered Self: Law and Society in the Age of Individualism*, Oxford, Oxford University Press, 1999, in <<International Journal on Minority and Group Rights>>, vol. 7, 2000, p. 412.
[49] J. Klabbers, *Glorified Esperanto? Rethinking Human Rights*, in *The 13th Finnish Yearbook of International Law*, Helsinki, (forthcoming), p. 3.

made above regarding the historical construction of human rights through the activities of socio-political movements) has been lost sight of in recent decades, leading us to think of human rights as being somehow isolated (and necessarily insulated) from the political process, he takes issue with two prevalent intuitions – that human rights can be thought of as legal rights of a similar kind to contractual or intellectual rights; and that these can be unproblematically enforced by courts.

The point of departure Klabbers takes for such criticism is the work of the often controversial political theorist, Hannah Arendt, who stresses in her book, "The Origins of Totalitarianism", that there is one human right which is the most fundamental of them all: the right to have rights.[50] Extrapolating from the argument which follows from this that rights are virtually meaningless unless one is embedded in a political community and that politics itself is the main safeguard we have against evil, Klabbers presents the idea that human rights are first and foremost required in order to lay the foundations for meaningful politics. The inference here is that the use of rights for other means should be carefully, if not extremely cautiously, considered in so far as it has potential to encroach upon the exercise of politics and the vitality of the political community through endeavouring to 'resolve' or remove from contention certain questions which arguably constitute the very essence of politics by spiriting them away into the more rigid and technocratic process and language of the law. While such a vision of rights as primarily serving to guarantee politics would be likely to be dismissed immediately by many critics as both reductively instrumentalist and incapable of accommodating the many questions which are currently recognised as human rights in the international instruments (since not all of these would easily pass the litmus test of being necessary or foundational to politics), it would seem however to be a position which is vindicated somewhat by the subtle maintenance of two discrete categories within academic literature and the rights instruments themselves – i.e. between those rights which are 'fundamental', 'basic', 'essential', 'non-derogable' or 'core' and those which are not. As Klabbers argues, "it is no coincidence that the rights usually claimed [as] basic…are typically the sort of things

[50] Hannah Arendt quoted in J. Klabbers, *Doing the Rights Thing? Foreign Tort Law and Human Rights*, in Scott, C., (ed.), *Torture as Tort*, Oxford, Hart, 2001, p. 558.

which we would need in order to create some of the right circumstances for political debate."[51]

The problem he wishes to identify would seem to reside in at least two factors whose combined force can be perceived as constituting a genuine threat to the maintenance of a vital politics. The first is the arguably increasing tendency for *desires* (as distinct to *needs* fundamental to human agency or freedom) to be translated into the language of human rights and the rights proliferation this can bring about. As Milan Kundera writes in *Immortality*:

"The world has become man's right and everything has to become a right: the desire for love the right to love; the desire for rest the right to rest; the desire for friendship the right to friendship; the desire to exceed the speed limit the right to exceed the speed limit; the desire for happiness the right to happiness; the desire to publish a book the right to publish a book; the desire to shout in the street in the middle of the night a right to shout in the middle of the night."[52]

While literary flourish may come here at the expense of according due importance to the genuine need for certain rights, it does serve to capture the tendency of rights language to become scattered throughout contemporary popular and political discourse and to hint at the prevailing sense which critics have identified in certain contexts that one's claims must increasingly be made in terms of rights in order to be taken seriously.[53] Such a limitless approach to rights can have a quite devastating effect on political culture when it takes on a particularly individualistic and absolutist idiom and enters into cycle of mutual contamination with the law, as we see clearly from Mary Ann Glendon's account of the distinctly atomising effect that one form of rights culture has had in the USA.

The second is the tendency already referred to of human rights being conceived of almost exclusively in legal terms, meaning that their more holistic, normative or ideological

[51] *Ibidem*, p. 561
[52] Milan Kundera, *Immortality*, Harper Collins, 1991, p153
[53] See M.A. Glendon, *op cit*.

aspect is neglected in favour of an insistence on their being enforced by domestic courts in much the same way as other rights, e.g. contractual rights. This argument, championed by prominent rights proponents such as Harold Hongju Koh,[54] pays little heed to the implications of seeing human rights as thus enforceable in terms of causing a perhaps unsettling and illegitimate empowerment of the role of courts in politics and a general migration of politics into the language and practice of law. While it should not be particularly surprising that international public lawyers take such a stance vis a vis justiciability, there does appear to be a problem when this approach is accompanied both by the dynamic described above of translating desires into rights and by a putatively representative and increasingly powerful portion of civil society (mainly constituted by Non-Governmental Organisations) which demands a kind of 'rights absolutism' policed by activist courts directing (and 'correcting') the political process. In this vein, it is instructive to note the rigidity of those comments, seemingly representative, made by the Director of the Human Rights Institute, Central American University, San Salvador to the effect that "*all* human rights" should be seen as "…fundamental, essential, non-negotiable and enforceable terms" or as "essentials" forming a "…legal and constitutional minimum".[55] Such an approach to rights would appear to provide certain impetus to the juridical conception of human rights and to differ substantially from those conceptions favoured by virtue of its reliance on the law as the primary tool of liberation. Given the sheer number, breadth, and frequent vagueness of human rights and their very real potential to conflict with one another, how it is possible to hold such a view of human rights without recognising that such a 'minimum' entails according maximum power to legal institutions, arguably at the expense of participatory politics, is not easily understood.[56] This question of the courts increasing implication in the political will be discussed in the chapter that follows.

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[54] Harold Hogju Koh, US Assistant Secretary of State for Democracy, Human Rights, and Labor; Speech given to United States Institute of Peace, see: http://www.usip.org/events/pre2002/kohspeech_hri.html

[55] M. Czerny S.J, *Liberation Theology and Human Rights*, in Mahoney, K. E., Mahoney, P., (eds.), *Human Rights in the 21st Century: a Global Challenge*, Dordrecht, Kluwer, 1993, p. 36.

[56] Having cited the words of a human rights advocate from a highly unstable nation in Central America as an example of the potentially damaging rights 'absolutism' which can emerge, it would be wrong to consider such a stance to be of the same nature and import across different historical contexts. To return to the point made earlier regarding rights and the impact of the transition or switching between pre-institutionalised/nonlegal forms and institutionalised/legal forms in relation to structures of power and domination, it is important to realise that the experience rendered by such an insistence on non-

If it can be agreed that categories of rights have "mushroomed"[57], it must provoke the question as to whether the discourse of rights can sustain the weight it accumulates in light of the accompanying insistence upon justiciability without coming up against problems or contradictions of a foundational nature. Some of the rights proposed since the first UN formulations of human rights have been both outlandish and cynical – one could point, for instance, to Johan Galtung's insistence on the necessity of endorsing the 'right to defecate'[58] or the lobbying that took place at the UN at the behest of a coalition of airline companies for the formulation of a 'right to tourism'.[59] While it is indeed a testimony to the resilience of international human rights law that neither of these attempts were successful, it is perhaps more vulnerable to infiltration by other 'rights' which are less obviously prone to devalue the currency in question. As an example at the regional level, even the Council of Europe, ordinarily a strong proponent of justiciable rights and not squeamish about the role of law in society, saw fit to caution against "rights proliferation" in its submission to the Praesidium of the 'Convention on the Future of the European Union' regarding the Charter of Fundamental Rights of the European Union, asking whether "certain rights, such as the right of access to free placement services and to services of general economic interest…are really so fundamental that they should stand side by side with such…human rights as the right to be protected from torture and the freedom of expression and assembly, [thus] implying their equal weight and importance".[60] Indeed there would seem to be a valid point to be made here; the statement could have gone further to point to the dubious inclusion of "academic

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negotiability and constitutionalisation is radically different when cast as an aspiration rather than being actually achieved. Thus the perspective on rights in relation to power is likely to be quite different as seen from Central America rather than from the European Union, given their distinct histories and relative (in)stability. The fact that the freedoms and entitlements entailed in human rights are more safely and consistently guaranteed in the latter region necessarily sets its experience of rights apart from that of the former. It is arguably the case that rights in many European contexts have made the transition or shift from being motors of popular struggle and subject to public ownership to constituting the justificatory basis for what was described as 'power over'.

[57] J. Klabbers, *Glorified Esperanto? Rethinking Human Rights*, in *The 13th Finnish Yearbook of International Law*, Helsinki, (forthcoming), p 15.

[58] Johan Galtung, Lecture given at European Masters in Human Rights and Democratisation, San Nicolo Monastary, il Lido, Venice, 10 December 2002.

[59] See U. Baxi, *op cit*, p. 67.

[60] See the Council of Europe's submission to the Praesidium at http://db.consilium.eu.int/df/default.asp?lang=en p. 9.

freedom" as a fundamental right under the Charter's provisions. Similar arguments could be made of numerous rights recognised under international law which clamour for their promised status in the domestic sphere and which are invoked and promoted by human rights advocates in their quest for social justice. For example, despite the categorical desirability of such circumstances in practice, one is compelled to question the inclusion in The Convention on the Rights of the Child of "*appropriate* information" (article 13) or "a *loving* and a *caring* family" (article 20) as rights (emphasis added). How is it conceivable that such essentially subjective notions could aspire to the status of law without radically redefining the nature and role that it plays in politics?

Returning to the contention that "the ideal society for many is a society in which politics has been abandoned", it would indeed seem to be within reason to suggest, as Martii Koskenniemi does, that the more positivist or legally orientated elements of the human rights discourse carry a promise which is arguably implicit in all great ideologies – that of an end to politics. This is so since it is evident that, in these conceptions, human rights are supposed not only to be made immune from politics and to provide protection against politics gone wild, but also to somehow point the way to a space which exists beyond politics.[61] However, as the same author emphasises, there is and can be no space beyond politics which is not essentially authoritarian, or in the very least undemocratic. It is, he argues, illusory to desire the law to take the place of politics, as some would, if only because the law itself (and human rights law especially) is itself intensely political.[62] All that such desire can really achieve is the displacement of politics from the public agora into the arguably opaque and distant machinations of the law. While the issue of the amalgamation of politics and law via constitutionalised human rights is one which will be dealt with in the following chapter, I wish now to delve deeper into the circumstances of this apparent gravitation towards the 'end of politics' by considering the issue under two appropriate headings: 'The death of history and social antagonism', and "political democracy in crisis'.

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[61] J. Klabbers, *Doing the Rights Thing? Foreign Tort Law and Human Rights*, in Scott, C., (ed.), *Torture as Tort*, Oxford, Hart, 2001, pp. 564-565.
[62] M. Koskenniemmi, *The Effect of Rights on Political Culture*, in Alston, P., (ed.), *The EU and Human Rights*, London, Oxford University Press, 1999, p. 99.

3.3 The death of history and social antagonism

Not long ago, with the almost worldwide collapse of communism, we were told with great fanfare that liberal democracy had won the 'last battle' and that history (or History, as understood in the Hegelian sense of irresistible progress or futurity) had ended. Authors such as Francis Fukuyama identified the final demise of one of the two major competing ideologies as marking the definitive point beyond which antagonism would begin to make its exit as a distinctive feature of politics as future conflict would come to be centered around alternative and less immediately dangerous poles. Since fascism had failed long ago, Communism had fallen, and military rule had been proven to be incapable of effective government, the historical alternatives had effectively disappeared, bar one – liberal democracy, coupled to capitalism in the economic sphere. If, however, it is a welcome observation that Fukuyama's makes regarding this development taking place as a result of "a growing belief that democracy was the only legitimate source of authority in the modern world"[63], there is a certain short-sightedness in his apparent conviction that difficulties for democracy will be encountered only somewhere in the distant future, once it has come to triumph more absolutely and completely throughout the planet. This is because it is quite clear to see that liberal democracy is, as Anthony Giddens reminds us, "in trouble almost everywhere [as it exists] here and now."[64]

While I will discuss some of the reasons why this is the case under the heading that immediately follows, what is interesting here for the purpose of approximating an understanding of the postulated will to dispense with politics and proceed to the rule of law is the implicit notion in Fukuyama's thesis that conflict, antagonism or disagreement are en route to extinction in view of the perceived truth that ideology is no more. Although ideology is an unwieldy term which can be employed with multiple and contradictory meanings (and certainly beyond exclusive reference to Cold War enmity), I would contend that one of its most basic constitutive parts is the notion of contention and disagreement. If we accept this as correct, and it is this foundational aspect of human

[63] Francis Fukuyama quoted in A. Giddens, *Between Left and Right: the Future of Radical Politics*, Oxford, Polity Press, 1994, p. 107.
[64] *Ibidem*. p. 109.

existence which the current political trajectory inspired by human rights is set upon eliminating, then there is, I would argue, reason to fear for its long term stability and the future of the human rights project. Perhaps even more than ever, in the context of communities increasingly characterised by plurality and diversity, it would seem that politics, in the sense of meaningful and unrestrained debate about out common future, should be seen as the indispensable life-blood of the community and not something amenable to conclusive resolution or deportation to the more restrictive realm of the law.

Stressing that "a healthy democratic process calls for a vibrant clash of political positions and an open conflict of interests", and that the conception of politics informing a great deal of democratic thinking today paradoxically works towards an "evasion of the political", the argument developed by Chantal Mouffe in her work, *The Return of The Political*, would support this view. She argues that current political thought "cannot perceive the constitutive role of antagonism in social life" and that, ultimately, this could serve to "jeopardise the hard-won conquests of the democratic revolution".[65] Far from being victoriously entrenched, as Fukuyama might have us believe, democracy is perhaps rightly considered by Mouffe to be something both highly uncertain and improbable which must never be taken for granted. In other words, rather than celebrating having somehow passed the threshold beyond which democracy's existence is guaranteed, it must be accepted that democracy is "an always fragile conquest that needs to be constantly defended as well as deepened[.]", primarily by the maintenance of a vigorous pubic participation in its exercise.[66]

Where do human rights fit into this picture? Touching momentarily on the communitarian versus liberal individualism debate, I would contend that, for some, rights hold a welcome or necessary promise of providing the means by which to proceed to the exercise of a politics which functions on a kind of institutional autopilot, i.e. no longer requiring the active engagement and participation of citizens. This is clear from the fact that some conceptions of rights tend to view rights practice as a finite endeavour rather

[65] C. Mouffe, *The Return of the Political*, London, Verso, 1993, p. 2.
[66] *Ibidem*, p. 6.

than the necessarily perpetual and all-interrogating process which it invariably must be in order to be of sustainable value and effect. In other words, rather than being seen as a continual *means* to the deliberation of politics as an inherently antagonistic but ultimately consensual process (or to inform or construct a radical political agenda), human rights are too often seen as *ends* in themselves or once-off struggles which lead society towards the joyful elimination of antagonism and, ultimately, universal agreement or harmony. Such an approach to rights tends to harbour the notion that once agreement or momentary consensus has been reached and a struggle appears to have achieved its objective (by passing into the realm of legal enforceability), it can effectively be abandoned or dissolved, leaving citizens free to retreat once again into the increasingly preferred private realm. The words of a recent popular culture pamphlet seem to capture this sense of desired detachment succinctly, as it proclaims that "…the right to party is in force. You don't have to fight for it anymore."[67] Evidently, it is presumed that from the desired point of 'victory' (or institutionalisation) onwards the legal and legislative establishment can be left in splendid isolation to deal professionally (although perhaps not legitimately in all instances for the former) with germane matters without the involvement of those ultimately affected.

And, true enough, it would seem that some rights can in fact be enjoyed unproblematically in this 'autopilot' fashion by virtue of being so established and infrequently subject to attack or violation. However, this is clearly not the case for the majority of human rights whose fulfillment or 'victory' can never be insured or guaranteed by any institution on a perpetual basis by virtue of their being a constant source of political contention (economic, social and cultural rights and those civil and political rights containing 'positive' elements would seem most at issue here). It would seem that the realisation of human rights cannot be truly effective, or is rendered somehow self defeating, when its purpose is to facilitate political disengagement or passivity (or exercise of the 'right to party' *ad infinitum*), following harmonious arrival at a rights-based consensus, and leaving deliberation over the precise content and prioritisation of those many rights to an elite process which is, I would argue, driven

[67] Promotional literature for 'Spring Three, festival for electronic art and music', Graz, Austria, 2003.

frequently by vested interests.[68] As Thomas Jefferson told us, the price of democracy is constant vigilance. If we accept, as I argue, that the primary genesis of politics *for* human rights is to be found in social movements and other forms of engaged mobilisation, then we must agree that there is no autopilot which can guide us to social justice. While attainment of certain entitlements or freedoms at issue in the bitter and protracted struggles of yesterday have been in some instances successfully transformed into the unquestionable 'common sense' of today, and therefore remain largely effective and unproblematic from the view-point of their translation into enforceable law in the context of flagging participation (we may think of universal suffrage in established democracies as an example), such felicitous self-realisation cannot reasonably ever be anticipated but for the most uncontested and undemanding of rights. Given the necessarily contentious and contingent nature of many recognised rights (not least those with resource implications), it is questionable whether these can attain the status of law and be thus isolated from the democratic political process without creating difficulties in terms of legitimacy and effectiveness in similar circumstances of declining public participation. However, this would seem to be the implicit aim of some strands of the human rights discourse as it seeks to translate international human rights law into directly enforceable domestic law as the best hope for human rights fulfillment, in the process neglecting all arguably valid concerns, as it does, "…about the transformation of the instrumental function of the law into a political end and [the] bartering [of] political freedom for legal protection", and the missing aspect of broad participation in any such scenario.[69]

3.4 Political democracy in crisis

If the implicit or explicit desire on the part of some proponents of human rights to drive public deliberation towards extinction through increasing judicialisation and enforcement

[68] As Peter Leuprecht of the Council of Europe puts it, "jurists are often accomplices or prisoners of the established system[.]" See P. Leuprecht, *op cit*, p. 962. Legal theorists argue endlessly on the topic of whether the application of the law is determined by the personal policy preferences of the judge or other criteria. It would indeed seem that there is at least ample room for discretion which does not always favour the weaker party. This issue will be taken up in the following chapter.
[69] W. Brown, *op cit*, p. 28.

of all human rights was not enough to threaten participative democracy and to precipitate the 'end of politics' described by Koskenniemi, Klabbers and others, then it would seem that cotemporary politics is already half way down the road to its own constructive demise in any case. As noted above, Anthony Giddens stresses the belief that contemporary liberal democracy, far from being in a state of jubilant exuberance as Fukuyama would have it, is in a state of sclerotic disarray. However, rather than draw a causal connection between the gravitation towards liberal rights and the crisis of contemporary democracy, as some anti-rights communitarians would do, it could reasonably be argued that rights are, conversely or in equal measure, a seemingly necessary *response* to this situation. Deployed via the legal realm by well-intentioned social actors, such actions can be seen as an attempt to compensate for a mass 'secession' from the public realm and as a step towards securing the guarantees that an increasingly unresponsive and unrepresentative politics would deny.[70] Thus, if I earlier contend that, for some, rights hold a welcome or necessary promise of providing the means by which to 'transcend' to a politics which functions on a kind of 'autopilot' no longer requiring the active engagement and participation of citizens, it could feasibly be that, for as many, human rights are in fact a last-ditch reaction to the emergence of such a condition of popular detachment. While the progressive erosion of democratic politics through an untempered insistence on judicialised rights would continue apace regardless of the veracity of this assertion, I wish now to turn to examine the current political panorama in search of an answer as to why it currently fails to command the allegiance or interests of citizens and is in turn neglected by human rights proponents in favour of legal strategies.

Former director of the OCSE's Office for Democratic Institutions and Human Rights, Gerard Stoudmann, described the greatest disappointment of his professional career as "seeing the gap growing between the political class, or should we say ruling elite, and ordinary citizens throughout the OSCE area and sensing the mounting frustration with

[70] 'Secession' is the term used by Alan Gewirth to refer to the exodus of society's more affluent from the public realm in favour of private environs with a consequent shedding of all concern and responsibility for what occurs there, and to whom. See, A. Gewirth, *The Community of Rights*, Chicago, University of Chicago Press, 1996, p. 334.

governments".[71] Indeed, while the reasons for this development are contentious, there would seem to be broad agreement on the assessment that "we no longer believe in the politicians or political systems that govern us".[72] A number of political commentators in the 1960's tended to view the emerging gap between legislative representatives and the people who elect them as in some measure a reflection of how a professionalised politics and a Schumpeterian view of democracy (as control) had been proven successful.[73] However, it is increasingly clear to us today that nonparticipation is far from a reflection of consent and contentment as was often claimed, but rather a worrying reflection of the distance created by the separation of people from the actual content of politics. Indeed, the past decades have seen endless theoretical treatments of the transformation of Aristotle's *zoon politikon* (political animal) into a "*homo oeconomicus*" [74], or the demise of citizens into "passive consumers of symbolic political communication"[75], each in turn pointing to the emergence or creation of increasingly privatised and autonomous individuals which are "stripped of political substance".

While it would seem that the prevailing cultural shifts in the West tend ever more towards the creation of 'apolitical market-humans', the frustration felt by those actively resisting such acculturation is exacerbated by the apparent futility of a momentary popular conversion from this state of inertia to one of engagement within the current political context. Such dormant activism as exists and its capacity to radically and rapidly evolve was recently quite clearly seen in the context of the Second Gulf War, where several European states saw anti-war mobilisation of an unprecedented scale and nature. However, rather than offering a sign of hope, the experience perhaps more served to illustrate the extent of how far removed from popular control the political process has

[71] Gerard Stoudmann, Former Director ODIHR, OSCE, quoted in OSCE Newsletter, Vol. 9, No. 10, Oct/Nov 2002 p. 31.
[72] Financial Times, Thursday May 1 2003, Ben Rogers, 'How the Think Tank Took the Place of Politics', p. 13.
[73] Joseph Schumpeter propounded a view of democracy in which the common individual (which is construed to be innately dangerous and pathologically self-interested) must be pacified into playing a minimised and passive role, given that only the elite can overcome their own natures sufficiently to be entrusted with political power. In other words, the 'masses' are to be distrusted at the best of times. Such a view is, as I wish to argue, both incompatible with human rights principles and an obstacle to their effective realisation. See W. Dieter Narr, A. Belden Fields, *op cit*, pp. 15-16.
[74] P. Leuprecht, *op cit*, p. 961.
[75] Jean Baudrillard, *Simulacres et Simulation*, Paris, Galilee, 1981, p. 57.

become – it may suffice to note in this regard that at least 74% of the Spanish population expressed their opposition to the country's involvement in military operations, to no effect.[76] It would not seem at all inappropriate to recall those comments made by Hermann Goering in 1946 as he described the machinations of one version of 'democracy' and its modus operandi in the quest to secure the policy priorities of an elite:

"Why of course the people don't want war. Why should some poor slob on a farm want to risk his life in a war when the best he can get out of it is to come back to his farm in one piece? Naturally the common people don't want war neither in Russia, nor in England, nor for that matter in Germany. That is understood. But, after all, it is the leaders of the country who determine the policy and it is always a simple matter to drag the people along, whether it is a democracy, or a fascist dictatorship, or a parliament, or a communist dictatorship. Voice or no voice, the people can always be brought to the bidding of the leaders. That is easy…It works the same in any country."[77]

Admittedly, in this instance few if any Spanish 'slobs' were sent off to die[78], yet neither were the people ultimately "brought to the bidding of the leaders", thus rendering the experience all the more illustrative of the chronic extent of the existing disjuncture between elite policy and popular preference. Even where, rather than mobilising themselves, the people must be consulted as a matter of law for their opinion on certain issues, results would all too often seem to be subject to easy revision and regeneration in order to secure the desired or 'correct' result, as the recent Irish experience with the Nice treaty referendum demonstrated convincingly.[79] The clear lesson was again that popular

[76] A survey carried out by Gallup International on 3 March 2003 showed that Spain was the European State with the largest share of residents who were against war on Iraq. Exactly, the survey said that 74 per cent were against attack Iraq under any circumstances, while a further 13 per cent would only agree if the action is sanctioned by the United Nations. The people who supported an attack of United States and its allies was only 4 per cent. Source: http://www.arabia.com/pina/article/english/0,14183,375855,00.html

[77] Quoted at http://www.snopes2.com/quotes/goering.htm , source: Gustave Gilbert, 'Nuremburg Diary, Farrar, Straus & Co, 1947.

[78] In any case, the Spanish army has been professionalised since 1998.

[79] The first Nice Treaty referendum, held on 7 June 2001, enjoyed a voter turn-out of only 33% and returned a 'no' result by a margin of 54 to 3%. While unsurprised (and seemingly unphased) at the low levels of participation, the government was taken unawares by the failure to win a 'yes' vote. However, it was deemed satisfactory and acceptable to launch a 'post-electoral' promotional campaign (including a peripatetic discussion forum on the issue of Ireland's future role and involvement in the European Union)

disengagement from political affairs is to be welcomed as a convenience; that is, unless it fails to rubber-stamp the prior decisions of the governing elite.

Further contributing to the demise of democratic politics is the circumstance of the blurring of the traditional distinction between left and right. As the traditionally 'radical' left endeavours to reconstitute itself in order to mount a defense of the (welfare) state, and the traditionally 'conservative' right embraces a radical neo-liberalism which seeks to strip the state of its substantive and regulatory powers, a confusing switching of roles has taken place, arguably impeding the citizen's formulation of a distinct political identity.[80] It could be argued that this upheaval, combined with the loss of the traditional landmarks of politics following the fall of communism, is at least partially responsible for the prevailing disaffection towards political parties and the political process. Mouffe argues convincingly that it is this alienation from politics (so tangible in many Western democracies) which in turn promotes the construction of collective identities around religious, nationalist or ethnic forms of identification. In this way, rather than enjoying the release and diffusion which is made possible by a functioning liberal democracy with an 'antagonistic' and broadly incorporative parliamentary system, grievances are instead pushed into other realms where they are more likely to provoke or degenerate into uncontrollable violent conflict. As she writes, "…parties can play an important role in giving expression to social division and the conflict of wills. But if they fail in their job, conflicts will assume other guises and it will be more difficult to control them democratically."[81]

Supportive of this contention is the fact that critics frequently speak of the increasing "discursive displacement" of politics into other discourses which are incapable of accommodating or satisfying its grievances, not least into the world of literature and other forms artistic creation.[82] As a popular publication recently put it, "Art has become one of

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and to re-stage the referendum on 19 October 2002 when the desired result was duly attained by a margin of 63 to 37% with a participation rate of 48%. Source: http://europa.eu.int/comm/index_en.htm.

[80] See A. Giddens, *op cit*, for an account of this paradoxical shift in the historical orientations of the political left and right in relation to the state.

[81] C. Mouffe, *op cit*, p. 5.

[82] See T. Eagleton, *The Crisis of Contemporary Culture*, Oxford, Oxford University Press, 1993.

the last refuges of socio-political experiments and strategies of change".[83] While it is perhaps welcome that art recovers from its avant-garde disengagement to become more discursively implicated in socio-political issues, the sad truth remains that it cannot provide society with a meaningful strategy for substantive change, just as the direction of consciously political criticism to places other than or outside the political process itself is more likely to meet with frustration than the desired remedy or reform. More serious again is the well-founded fear that the absence of political frontiers may be central to such developments as the growth of the extreme right in several European countries. Thus, far from a mark or sign of political maturity, the decline in representative politics should be viewed as a symptom of a void which can serve to gravely endanger the longevity of democracy.

3.5 Conclusion

As democracy fails, the suffering of the many 'have-nots' continues unabated. Given that the throngs of techno-informed and organised groups offering critical engagement remain, at least currently, resolutely peripheral to formal political structures and are kept behind rolls of barbed wire outside the various gatherings of the WTO, G8 etc., and given such circumstances where existing politics appears an indifferent and self-serving professionalised activity which knows no authority or direction outside the law (bar the next election), it is little wonder that many activists look increasingly to the courts, law and constitutions in search of immediate guarantees and solutions to immediate and pressing problems of a socio-political nature. However, as will be examined in the following chapter, this is not necessarily a strategy without costs.

[83] Citation from promotional material for cultural project 'Senseless' ('Sinnlos'), Graz, Austria, 2003.

4. Constitutional Rights, Courts and Politics

4.1 Introduction

The assertions made so far regarding the transformative effect that an insistence on legally enforceable human rights has on the nature and function of the relationship between politics and the law have been varied and numerous. To recall, we have noted that there has and continues to take place a perhaps illegitimate and ill-conceived empowerment of the role of the court in the political process with a consequent migration of more traditional forms of political participation into the largely 'techno-bureaucratic' legal realm. It was stated that if the law, and particularly constitutional law, is to be regarded as the ultimate authority in society, and the interpretation and balancing of expanding lists of largely indeterminate and potentially conflicting rights contained therein becomes the means of exercising such authority, then politics and the traditionally apolitical process of the law are necessarily driven towards and into one another with profound reconstitutive implications for the nature and exercise of 'governance'.

Competing theories were presented for the propensity of many activists to adopt a legalistic approach to human rights through seeking institutionalisation as its primary objective above or at the expense of recognising the value or necessity of other forms of deployment (disdain for politics and a desire to eliminate contention through arrival at an all-embracing 'lasting legal consensus' versus despair at the paralytic and redundant state of politics today?), while the seemingly ignored ambivalence or dual potential of the resulting picture vis a vis rights fulfillment was described in brief by noting criticism that, once in the institutional realm, rights can easily be deployed, interpreted, or prioritised in such a way as to fundamentally compromise the spirit of their origins (that 'politics *for* human rights' can all too quickly be translated into 'politics *of* human rights'). It was stated that while rights standards provide obstacles to free play of power, they also invariably provide opportunities for it – since the structures and processes of the law shape, and usually determine, the form and content of human rights, these can be all too

easily instrumentalised for extraneous or antithetical ends. It was, in addition, noted that the expectations harboured by public interest or social action litigants of 'human rights progressive' court judgments or adjudications should be tempered by an appreciation of the limits within which a given court's maneuverability is confined in order for it to retain it own legitimacy and by the reality that courts are often by necessity or inclination restricted to upholding or promoting the inequities of the status-quo rather than readily available to pushing vigorously for the realisation of social transformation through landmark judgments (we may recall those comments made earlier by Leuprecht to the effect that "jurists are often accomplices or prisoners of the established system[.]")[84]

These are the arguments and observations which, inter alia, I wish to take up once more and develop here in an effort to show how they apply in practice in the European and American contexts. However, such a task first calls for, and is facilitated by, deeper reflection on the comments made earlier to the effect that some of the questions which human rights seek to place *beyond* the reach of politics are in fact elementary to its function and constitutive of its substance. If, as we have noted, politics is inconceivable without certain rights, then what can be said of those which remain? Rights proponents would typically accept the observation that politics (as distinct from law) is very often all about human rights, yet it seems to be a highly contentious point to suggest that this runs both ways and that most recognised human rights are, once delivered from their abstract form and applied in legal practice, in fact themselves unavoidably all about politics. It is to this contention I will now turn.

4.2 The right versus the good

Such discussion or dispute as goes on regarding the political nature (or otherwise) of human rights is often framed within the terms of the debate regarding supremacy of the *right* over the *good*, the deontological requirements of the first habitually seen by rights proponents as necessarily 'trumping' the dangerous utilitarian or teleological whims of

[84] P. Leuprecht, *op cit*, p. 962.

the second.[85] A representative proponent of 'the right' can be found in the late John Rawls, whose theory of *justice as fairness* argues that morally derived, apolitical individual rights cannot be sacrificed for the general welfare and that these principles of justice impose restrictions on what are the permissible conceptions of the good which individuals are allowed to pursue – in other words, there must be consistent "priority of the right over the good".[86] Opposed to this view, the good is championed by those communitarian critics such as Michael Sandel who insist that such priority of the right over the good cannot itself exist since it is only through our participation in a community which defines the good in a certain way that we can acquire a sense of the right conception of justice in the first place – therefore, the good must be accorded priority.[87] It would seem that both of these approaches to rights are unacceptable in their absolute form, the first taking an inappropriately reductive view of politics and clinging hopelessly to the notion that rights and a conception of justice somehow existed prior to and independent of specific forms of political association, and the second being somewhat prone to validate John Stuart Mill's prognostications in *On Liberty* regarding the tyrannical potential of the unfettered majority.[88] To put it another way, the priority of the right can be seen to allow too little space for the political, while priority of the good can be seen to allow for too much.[89]

The history of liberalism could be read as an endeavour to negotiate a path between this Scylla and Chyrbdis, with rights theorists seeking to identify the organisational structures and circumstances conducive to an appropriate balance between the supposedly apolitical right and the good, or between law and politics. However, as the previous chapter has sought to indicate and this one will also, it can very reasonably be argued that such endeavours are destined to be unsuccessful in harmonising rights and community in practice due to, first, the propensity or inclination to define more and more essentially

[85] 'Trumps' here refers to Ronald Dworkin's famous thesis outlined in *Taking Rights Seriously* (1977).
[86] See J. Rawls, *A Theory of Justice*, 1973.
[87] See M. Sandel, *op cit*.
[88] M. A. Glendon, *op cit*, p. 52.
[89] See C. Mouffe, *op cit*, 46ff.

political questions in terms of rights and to seek their constitutionalisation[90] and, second, the accompanying steady decline which is taking place in popular political engagement. I will try to illustrate this claim by means of reference to the work of the prominent rights philosopher, Alan Gewirth.

Gewirth treats at length the question as to how a harmonious, effective and, above all, legitimate relationship between rights and democracy can be generated. In his lifetime work, *The Community of Rights*, he strives to dissuade of the apparent antagonism between the right and the good while dealing at length with the question as to whether (and which) rights should be subject to political democracy. The argument he develops begins with the resolute affirmation (supportive of Klabber's claims earlier outlined) that 'basic rights' (he does not specify which) and political rights are as a case of necessity to be immunised from the political process since they are not instrumental but constitutive of democracy. He points to the Weimar Republic's use of the democratic state to abolish democracy as a valid and sobering example of such a necessity. However, certain vacillation is duly expressed when it comes to considering the relationship between economic rights (including those 'positive' aspects of other rights) and democracy – to place such rights in the same basket as 'basic rights' would, he says, entail rendering "*political democracy…irrelevant to vitally important segments of human social life*" (emphasis added), while subjecting such rights to the "variable and shifting decisions of democratic majorities [would provide] no guarantee that the rights will be fulfilled."[91] Noting that there are "many disagreements over the question of whether…economic rights are indeed specifications of [the human rights] principle"; that "there are potential conflicts between the economic rights and the political rights of democracy" (he mentions, for example, between the right to property and other rights with resource

[90] This fact is particularly alarming when it is seen that questions of identity politics are increasingly being formulated in terms of rights and translated to the judicial sphere. Wendy Brown's, *States of Injury*, offers a detailed analysis of this phenomenon, arguing that "legal "protection" for a certain injury-forming identity discursively entrenches the injury-identity connection it denounces" and suggesting that contemporary campaigns by feminists, gay activists, indigenous peoples, and people of colour for emancipation through and for rather than in spite of their "difference" are more likely to obstruct than promote their aims of achieving conditions of equality and non-discrimination. See W. Brown, *op cit*, Chapter 5, " Rights and Losses", pp. 94-127

[91] A. Gewirth, *The Community of Rights*, Chicago, University of Chicago Press, 1996, p. 318.

implications); and that these factors in turn form "an important basis for appealing to democratic decision procedures"; the solution which Gewirth presents for this problem is constitutionalisation. Such a solution, he argues, places rights *between* politics and imperviousness while allegedly leaving ample room for "democratic deliberation."[92] According to his reasoning, since "*initially* set up by a democratic political process" (emphasis added), a constitution manages to give "fixed and firm status" to both political and economic rights while simultaneously doing justice to the conviction that "…social arrangements which affect a persons' most vital interests should be subject to their approval…".[93] Further on in the text, when noting the fear held by some to the effect that 'positive' constitutionalised rights will lead courts to "usurping that which is properly a task for legislatures elected by the people", Gewirth reiterates with far greater emphasis than earlier the contention that "…whether [rights] are put into a constitution and thus made potentially legally enforceable depends on their being first voted upon in a democratic political process."[94]

While I do not raise these points in order to somehow advocate Stephen Lukes' dystopic 'Libertaria', which would, after Nozick, construe freedom (and rights) in solely negative terms (as one critic contends, "it is not positive social rights which are really at issue but the judicial enforcement of those rights"[95]), there is, I would argue, a difficulty with Gewirth's answer to the negotiation between right and good which is perhaps pointed to by his protracted efforts to present the constitutional solution as having been given popular consent and thus enjoying full legitimacy.[96] This is the case, in my view, because if the expanding and internally conflicting list of human rights currently recognised is to achieve its professed aim of constitutionalisation (see previous chapter), it would seem that the once-off popular endorsement which Gewirth describes as providing the necessary legitimacy for channeling such large discretionary powers to the judiciary may start to look similarly deficient to the increasingly once-off nature of the ordinary

[92] *Ibidem*, p. 320.
[93] *Ibidem*, p. 326.
[94] *Ibidem*. p. 354.
[95] M. Shapiro, A. Stone Sweet, *op cit*, p. 181.
[96] See S. Lukes, *Five Fables about Human Rights*, in Schute, S., Hurley, S., (eds.), *On Human Rights: Oxford Amnesty Lectures*, London, Oxford University Press, 1993.

democratic political process, except in this instance with much more serious and lasting consequences. This is not to mention the fact that in order to live under, for example, the Irish constitution and to have participated or personally endorsed its contents would necessarily give you a current minimum age of 84. Of course, this is a somewhat superfluous point from the point of view that we are all born into circumstances beyond our influence which we must accept, the nature of the polity being no exception in this regard; yet the truth is that for all the careful deliberation on the need to reconcile democracy, consent and the discretion that rights accord to the judiciary, what Gewirth ultimately offers us, more than a balance, is a *choice* between the right and the good, his preference (and that of many contemporary human rights advocates) being for the former embellished with the feeble veneer of the latter. Since his work argues that all human rights rest on the prerequisites of "human action"[97] and the "secession" of major portions of the population from political life is presented as one of the greatest contemporary obstacles to the realisation of a just society, it is strange to observe that his solution arguably seems in no small measure to frustrate the first concern by situating more and more fundamental political questions inside the "exclusionary logic"[98] of the law and to facilitate the second factor by encouraging the court to 'step in' to fill the resulting societal gap and serve in lieu of the public as a kind of professional watchdog capable of monitoring an increasingly professionalised and distant politics.

However, the more elementary problem I wish to identify comes into focus when we consider Koskenniemi's reasoned argument that there is in *adjudicatory practice* no such thing as the right (in relation to the good) since such a distinction rests on the fundamentally mistaken notion that rights are capable of being enforced or implemented in a way which is somehow 'unpolitical' or free from political subjectivity (as simple 'trumps') and skillfully ignores the fact that, through the language of 'functions', 'objectives', 'general interest' and 'proportionality', a right in the legal sphere is often reduced to a policy which, as such, must be weighed against other policies (or rights).[99]

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[97] A. Gewirth, *op cit*, p. 16.
[98] J. M. Conley, W. M. O'Barr, *Just Words: Law, Language, and Power*, Chicago, University of Chicago Press, 1998, p. 14.
[99] M. Koskenniemi, *op cit*, 100ff.

As Sandel's criticism would maintain, this legal exercise itself is necessarily conducted by reference to the good – i.e. prevailing societal demands and priorities in terms of economics, politics, moral standards etc., but also, more fundamentally, by reference to the particular version of the good subscribed to by a minority elite and its peers – the legal establishment.[100] In other words, the right which Gewirth has opted for is quite arguably no more than a facility by which the particular version of the good held by the judiciary and those directly implicated in its daily function is exercised. Thus, in practical terms, notwithstanding the solid philosophical foundations which would seem to place it beyond the political, once described as a right and enshrined in a constitution, a given question does not somehow cease to be political as such but is merely transposed to a different, arguably more restricted, realm of political deliberation. As Koskenniemi writes in his discussion on the contribution of certain visions of rights to the construction of a "political culture of bad faith":

"*Everyone knows that…at issue [in a given judgment] are struggle and compromise, power and ideology, and not derivations from transparent and automatically knowable normative demands…Everyone knows that administration and adjudication have to do with discretion, and that, however much discretion is dressed in the technical language of rights and 'balancing', the outcomes reflect broad cultural and political preferences that have nothing inalienable about them*." [101]

We inevitably return here to some of the questions and concerns posed in the first place regarding the propensity to judicialise or constitutionalise rights. To describe the picture in somewhat cynical terms, it seems that if we can no longer tolerate the "contingencies of democratic consensual decisions" and the "inefficiencies of political control", we may apparently simply opt to remove those points of contention from the immediate political arena in order to provide the desired guarantees; if collision or tension is likely between certain rights or fundamental questions at issue in the delimitation of the boundaries and

[100] Literature abounds with discussion as to whether it is the personal policy preference held by a judge which ultimately determines the precise nature of an outcome of adjudication in the legal sphere. It would seem at least seem difficult to suggest that the judiciary's discretionary powers are anything less than substantial.
[101] M. Koskenniemi, *op cit*, p. 101.

requirements of juxtaposed rights, we can leave it to the courts (and its interlocutors) to strike an appropriate balance or prioritisation between those interests at play; if there is social disintegration and generalised political atrophy as citizens become ever more distanced from the institutions that represent them, then the "institutionalisation of love" (as Gewirth puts it) can somehow compensate for their disengagement and 'save us from ourselves'.[102] The end result is, however, that the locus of necessary political struggle and compromise (Cf those points made by Mouffe in the previous chapter) over questions of power and ideology is thereby shifted out of its traditionally more accessible, transparent and responsive place of residence in the public realm and into the somewhat obscure machinations of the law[103], where the dominating and determining forces are necessarily those cultural and political preferences of an epistemic elite enjoying progressively greater discretionary powers with each additional definition of a right. Each point in turn, I would argue, points the way to an increasingly impoverished and illegitimate politics of frustrated participation and popular passivity as "exit from the tragedy of incompatible and contested goods is bought at the expense of bureaucratising politics".[104]

This said, it is now appropriate to present a more descriptive framework within which to consider and further analyse the comments made above and at the opening of the chapter on the contemporary relationship between law and politics and the impact of rights on this relationship. How is it, we may ask, that "over the past half-century…the domain of the litigator and the judge has radically expanded" and what effects has this development had in practice for the exercise of democratic politics, particularly from the view point of public participation?[105]

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[102] A. Gewirth, *op cit*, p. 313.
[103] Ewick, P., Silbey, S., *The Common Place of Law: Stories from Everyday Life*, Chicago, University of Chicago Press, 1998, pp. 74-96.
[104] M. Koskenniemi, *op cit*, p. 114.
[105] M. Shapiro, A. Stone Sweet, *op cit,* p. 1.

4.3 The road to 'higher law constitutionalism'

In simple terms, in pre-World War II Europe, democratic constitutions could typically be revised at the discretion of the legislature; they prohibited review of the legality of statutes by the judiciary; and they did not contain substantive constraints, such as rights, on legislative authority. However, since the end of World War II, a 'new constitutionalism' has emerged and spread throughout the continent, bringing with it the incorporation of human rights into constitutional law and the establishment of constitutional courts to enforce the 'normative superiority' of the constitution. To note, such courts were established in Austria (1945), Italy (1948), The Federal Republic of Germany (1949), France (1958), Portugal (1976), Spain (1978), Belgium (1985) and, after 1989, in the post-Communist Czech Republic, Hungary, Poland, Romania, Russia, Slovakia, the Baltics, and in several states of the former Yugoslavia.[106] Prior to these sporadic seismic shifts between legislative supremacy and higher law constitutional models[107], an important and instructive European antecedent was provided by the legal scholar and jurist Hans Kelsen in his design of the constitutional court of the Austrian Second Republic (1920-1934). Since Kelsen foresaw nearly all of the existing variations upon the model now in place his writings still constitute the standard reference for debates about the legitimacy of European constitutional review.[108]

While Kelsen perceived the need for the integrity of the politico-legal system to be assured by the presence of some higher court-like body enforcing the superior status of constitutional law, he faced two hostile camps at the time of deliberating how to strike an appropriate balance between judicial and legislative forces in the political structure: one composed of politicians "suspicious of the judiciary and judicial power" in a generalised way, and the other composed of a "pan-European movement of prominent legal scholars who favoured installing American judicial review on the continent." His solution or compromise was to make a distinction between the work of legislators, which he

[106] A. Stone Sweet, *op cit*, p.31.
[107] Stone notes that some of these countries did have constitutional courts in the inter-war period, namely Austria, Germany, Spain and the Eastern Bloc countries, but these were largely ineffective.
[108] See A. Stone Sweet, *op cit*..

described as 'creative' and 'positive', and that of constitutional judges which should be conceived of as 'negative' (i.e. restricted to procedural and balance of powers questions and lacking authority to second-guess legislation). Such a distinction would, Kelsen believed, enable the benefits of review while at the same time allaying fears that such a system would quickly mutate into a "government of judges".[109] With the upheaval generated by World War II (and the presence of American authority on the European continent) the scene was ripe for the diffusion of the Kelsenian court and 'higher law constitutionalism' quickly became the "new orthodoxy". However, this was to be with one crucial modification to the original model conceived by Kelsen: his concept had relied on constitutional courts being denied jurisdiction over constitutional rights in order to ensure that judicial and legislative functions remain as separate as possible; yet at the same time as his design began to be popularised, Europe was to begin its experience of a "rights revolution" waged at the national and international levels. The burden of enforcing these rights has fallen on modern Kelsenian courts with radical consequences of the kind Kelsen sought to avoid.

Both Martin Shapiro (the original figure behind the concept of '*political jurisprudence*') and Alec Stone Sweet have written extensively on the reconstitutive effect that this pivotal modification has had on the nature and function of European politics as the role of the constitutional court was changed from one of policing the separation of powers into one performing review of legislation for conformity with constitutional rights provisions. Using the analytical methods of political science to focus on the role of the constitutional court in Italy, Germany, France and Spain, their work has shown conclusively how the distinction between the positive and negative legislator is no longer feasibly maintained and how the constitutional court has come to occupy a position of overwhelming dominance in the political process, both through its own dynamic institutional propensities of self-entrenchment and through being increasingly implicated in the political process via litigation instigated by elite actors.

[109] *Ibidem*, p. 35.

This research demonstrates clearly how legislators are gradually placed under the increasing tutelage of the constitutional court or, more precisely, the pedagogical authority of constitutional case-law; how the monopoly of the constitutional court on constitutional interpretation of statutes is broken down and the role of constitutional adjudication is diffused to the ordinary courts; and how abstract and concrete review mechanisms reveal themselves to be inextricable and mutually overlapping practices (especially where there exists an individual complaints mechanism such as in Spain and Germany), as the Kelsenian model is driven, feature by feature, into ever closer similarity to the American logic of judicial review. It has, they argue conclusively, become an impossible anachronism to maintain, as is still the insistence of so many European jurists, the existence of the classical distinction between law and politics. Separation of powers doctrine is, as Shapiro states, "increasingly insufficient, if not irrelevant" to the current practice whereby both politics and law-making are 'judicialised' through the implication of constitutional rights adjudication in the political process. As Stone writes, "…today judges legislate, parliaments adjudicate [by preempting and conforming to likely constitutional rulings], and the boundaries separating law and politics – the legislative and judicial functions – are little more than academic constructions."[110]

How do some of these developments just mentioned occur in practice? Although the means by which the legislature's subordination to the constitutional court and its case law is secured are complex and numerous, it can be seen most clearly when there is an immanent risk or threat of the parliamentary opposition instigating constitutional proceedings and deliberation on a given issue (abstract review). This is frequently the case since, arguably, most of the important ideological conflicts that divide parliaments can easily be expressed as conflicts about the nature and application of rights.[111] Faced with such a threat, before even being formally implicated, the court's perceived preferences and understanding in relation to a given issue are taken into account and integrated into any emerging compromise. In this way a situation is created whereby parliaments in effect behave as constitutional decision-making bodies of first instance,

[110] *Ibidem*, p. 130.
[111] M. Shapiro, A. Stone Sweet, *op cit*, p. 178.

over which the constitutional court exercises a kind of appellate control, as the business and language of politics is increasingly subjected to the logic of the law.[112] The role and function of the ordinary courts is also profoundly affected by the development of constitutional review in a process which some scholars describe as the 'constitutionalisation of the law' or legal order – i.e. the process whereby constitutional norms come to constitute a source of law capable of being invoked by litigators and applied by ordinary judges. As this process is continued the orthodox division between abstract review (supposedly carried out only by constitutional judges who do not involve themselves in the facts) and concrete review (supposedly carried out only by ordinary judges who do not concern themselves with constitutional questions) has been shattered, along with the myth of the ordinary judge being a 'slave to the code', prohibited from creative interpretation or rewriting laws. Stone explains that while it is difficult to generalise across cases, it can be gathered that as constitutionalisation deepens, ordinary judges necessarily begin to behave as constitutional judges (i.e. resolving disputes by applying constitutional norms), while constitutional judges gradually become more deeply involved in what is theoretically the exclusive purview of the judiciary (i.e. interpreting the facts of a given dispute and their relationship with the constitutional norms). As this occurs the 'codes' gradually loosen their grip on ordinary judges and are treated less as sacred commands issued from the sovereign and more as a system of rules that must be coordinated with other systems of rules in light of changing conditions.[113] The net effect is clearly one which sees greater discretionary powers conferred on the judiciary.

However, rather than recognise these realities and the arguable truth that "…European judiciaries engage in such extensive interpretation of the various legal codes that these statutes mean only what the courts say they mean", the fiction of classical doctrine is all the while vigorously maintained in legal practice and academia, as the following extract, from 1997 would indicate:

[112] A. Stone Sweet, *op cit*, p. 103.
[113] *Ibidem*, pp. 114-116.

"the focus of all law-making authority within the state is the sovereign legislature; law is a closed system of logically arranged and internally coherent rules; all legal disputes must be resolved by reference to such rules; courts of law, independent of the legislature, are the proper agencies for interpreting law; courts should interpret law literally and in strict accordance with the legislator's will; their function, therefore is to administer the law as written." [114]

While the supposedly rigorous dictates and requirements of precedent and common law doctrine of *stare decisis* are typically wheeled out as grounds for arguing that the judiciary does not enjoy such free reign as described to formulate policy, such arguments do not account for the paradox whereby judicial decision-making constantly succeeds in changing law while being simultaneously governed by pre-existing law.[115] Furthermore, as Stone argues, we know that constitutional courts often dictate statutory provisions that legislators ratify; that constitutional politics create gaping holes in the legislature's law, once presumed to be closed; and that ordinary judges increasingly behave as if they recognised a higher duty to interpret statutes as if it were in conformity with the constitution, thus participating directly in the legislative function.[116] In continuation to the comments made earlier by Koskenniemi, we also know that the structure of rights provisions delegate large discretionary authority to judges who are obliged to dissimulate the political nature of their deliberation behind 'reasonableness' and 'proportionality' tests. As Shapiro writes, "all rights provisions come down to reasonableness provisions; if we empower courts to enforce rights provisions, what we do is authorise them to decide the reasonableness of the acts of…the government."[117] These observations would seem to be clear and largely beyond dispute.

[114] B. Kommers (1997) quoted in A. Stone Sweet, *op cit*, p. 131.
[115] M. Shapiro, A. Stone Sweet, *op cit*, 90ff.
[116] A. Stone Sweet, *op cit*, p. 131.
[117] M. Shapiro, A. Stone Sweet, *op cit*, p. 179.

4.4 Legitimacy and popular participation

So why is it, we may ask, that the legal establishment is so eager to maintain the evidently defunct Kelsenian distinction between law and politics (or negative and positive legislators); to dissimulate the political nature of rights adjudication; and to underplay the primary role of the court in politics? What reason is there to deny or ignore the patent truth of politicised constitutional justice? The most immediately obvious motivation would necessarily derive from the fact that the state of affairs described is so clearly at variance with the established prerequisites of democratic legitimacy – what one author terms as the "mighty problem" in relation to the reconstruction of the political framework brought about by constitutional rights. Shapiro himself maintains that "the issue of whether such lawmaking [is] somehow anti-democratic or anti-majoritarian is uninteresting", thus adopting an acquiescent 'realist' stance which argues that if the polity desires enforceable rights it must simply come to accept the reformative impact that such desire will exert on the political process, 'warts and all'. This view is shared by Stone who argues consistently (like many jurists) that constitutional review will continue to acquire the necessary, but lacking, legitimacy as numbers of litigants gradually increase. Seeing the building of constitutional law as "a participatory process involving a wide range of actors", he views the resulting picture as one which has generated "an expansive (rather than simply narrow) and relatively participatory (rather than exclusively elite dominated) deliberative mode of governance."[118]

By way of response to such accepting realism, it may first be fitting to recall a scene from Kafka's *The Trial*:

"*Before the Law stands a doorkeeper on guard. To this doorkeeper there comes a man from the country who begs for admittance to the Law. But the doorkeeper says that he cannot admit the man at the moment. The man, on reflection, asks if he will be allowed, then, to enter later. "It is possible," answers the doorkeeper, "but not at this moment."*[119]

[118] A. Stone Sweet, *op cit*, p. 133.
[119] Franz Kafka, The Trial, London, Penguin, 2000, p219

The substantial body of sociological research which has grown up around varied investigations into the relationship between ordinary people and the law would serve to vindicate Kafka's dark image of arbitrary or consistent popular marginalisation and alienation from the law and its institutions.[120] The instances where the popularly perceived lack of connection between law and ordinary life is disrupted seem all too often to prove how a wide array of factors (from the socio-cultural, e.g. linguistic, to the economic or procedural) ensure that legal processes are biased against a widening selection of social groups – the poor, racial and ethnic minorities, women, gays, and lesbians, immigrants – in a widening array of institutional settings.[121] When we see Stone's desire to confer legitimacy on review via greater participation in litigation qualified with comments from members of the legal establishment to the effect that it would indeed be interested in "*permitting*" groups which are "*serious*"[122] to enjoy greater access to the authority of the law, and consider also his own reservations about the 'inappropriate' level of access to review that individual litigants have in Spain through the individual complaints procedure (or *amparo*), then we start to appreciate some of the problems which are likely to be encountered in attempting to accommodate political democracy in the legal realm in an inclusive and egalitarian fashion. This is not to mention the prohibitive expense which any such litigatory action is likely to entail – Blomley puts the minimum figure (for Canada) at around $200,000 in an article written in 1994.[123] All in all, there appear to be very sound reasons for concurring with Jurgen Habermas when he contends that the expansion of judicial authority and the attendant

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[120] See, for example, P. Ewick, S. Silbey, *The Common Place of Law: Stories from Everyday Life*, Chicago, University of Chicago Press, 1998; P. Ewick, R. A. Kagan, A. Sarat, (eds.), *Social Science, Social Policy, and the Law*, New York, Russel Sage Foundation, 1999; J. M. Conley, W. M. O'Barr, *Rules Versus Relationships*, Chicago, University of Chicago Press, 1990; J. M. Conley, W. M. O'Barr, *Just Words: Law, Language, and Power*, Chicago, University of Chicago Press, 1998.

[121] P. Ewick, R. A. Kagan, A. Sarat, (eds.), *Social Science, Social Policy, and the Law*, New York, Russel Sage Foundation, 1999, p.13. As a localised practical example, we may note the recent comments of two Irish justices to the effect that all Nigerians drive without insurance (Judge Kenny) and that "coloured" people were prone to shoplifting (Judge Neilan). Source: Irish Times, "Judges' apologies were unsatisfactory – centre", Nuala Haughey, Social and Racial Affairs Correspondent Thursday 6 March 2003, at http://www.ireland.com

[122] R. Singh, *The Future of Human Rights Law and Practice*, London, Oxford University Press, 1997, p. 114.

[123] There is an old cartoon which depicts two litigants who, in the dispute over the ownership of a cow, are pulling on each end of it, while in the middle is a lawyer milking it.

'juridification' of political life is an inherently oppressive phenomenon which in fact serves to stifle what is most badly needed – a liberating, deliberative democracy – by favoring the reproduction of the law's own internal logic and recasting social problems as legal ones.[124] Other critics such as Belden Fields and Wolf-Dieter Narr would agree, adding that the proliferation of laws and bureaucratic rules which has taken place since World War II has played no small part itself in creating a dramatic division between individualised, depoliticised citizens and the web of state mechanisms which regulate various aspects of their lives (which arguably end up functioning for the people rather than by the people).[125] Indeed it is frequently tempting to adopt a Weberian pessimism towards the growth of the kind of "legal-rational and bureaucratic authority" which sees citizenship reformulated to constitute no more than a "modulated form of subjugation".[126]

I will now look more closely at the picture of reconstructed governance described from two related perspectives: first, the varying approaches that can be adopted by a court towards human rights and their realisation in practice; and, second, the apparent reduction of democracy and political participation to court room litigation.

4.5 Courts and securing the realisation of human rights in practice

Can the court (constitutional or otherwise) be perceived as an ally of progressive social change in accordance with human rights principles or, alternatively, as its enemy? There can, naturally, be no single answer to this question since the given contexts are so numerous and varied, even when one is restricted to looking at Western democracies. However, I would posit that there are at least four possible approaches to rights which could feasibly be repeated across different contexts once extensive rights provisions form part of the institutional realm, each presenting different prospects for the realisation of

[124] J. Habermas, *Private and Public Autonomy, Human Rights and Popular Sovereignty*, in Savic, O., (ed.), The Politics of Human Rights, London, Verso Books, 1999, pp. 50-67.
[125] W. Dieter Narr, A. Belden Fields, *op cit*, p. 14.
[126] Foweraker, J., Landman, T., Citizenship Rights and Social Movements: A Comparative and Statistical Analysis, London, Oxford University Press, 1997, p. 37

human rights via legal strategies. In examining them we will be reminded of the initial contention that human rights, once institutionalised, can and often do play an ambivalent role in relation to power structures and the generation of social justice.

The first approach is one which is characterised by an apparent deference to the legislature and an extremely moderate or reserved interpretation of rights provisions. This approach can be seen even where the court enjoys vast powers, as for example in Hungary which has been described as having "the most powerful constitutional court in the world." Indeed, the Hungarian constitutional court has actively sought to limit its own jurisdiction, maintaining that it must never get involved in positive law making and at times refusing even to emit advisory opinions when requested to do so on the grounds that it would violate the principle of separation of powers.[127] Where a court of such reserved inclinations cannot avoid entering into deliberation on a politically sensitive issue (or indeed one which should arguably be decided upon elsewhere by other means), it is typical for its pronouncements to become more terse or syllogistic and its judgments to become as neutral as possible, seeking to accord 'victory' and 'defeat' in as equal measure possible to both sides.[128] Such a cautious approach can be attributed in large measure to the court's desire and necessity to build and retain its own legitimacy in the eyes of both legislature and litigants – an aim which requires certain predictability in its actions and the exercise of restraint. Certainly the young Hungarian court would be eager to avoid suffering a similar fate to the overly ambitious Russian constitutional court whose weak foundations and failure to prevent the constitution becoming an overt tool of partisan political struggle led to its speedy demise.[129] Human rights provisions are

[127] J. Elster, *Majority Rule and Individual Rights*, in Savic, O., (ed.), *The Politics of Human Rights*, London, Verso Books, 1999, p. 140.
[128] An example of this kind can be found in the Irish Supreme Court's dealings with the highly controversial issue of abortion in Ireland. Faced with governmental paralysis in front of such a contentious and divisive issue, the court has been forced to pronounce on the (un)constitutionality of abortion on a number of occasions. In each instance neither side of the debate has been left satisfied, while experts and the public at large have been barely able to understand what the emerging ruling actually amounts to in practice and whether this constitutes a victory for one side or the other. It would seem clear enough that the court has sought to extricate itself from an issue it has openly declared to be beyond its competence to decide or adjudicate.
[129] See E. Ametistov, *The Constitutional Crisis in Russia and the Role of the Constitutional Court*, in Mack, T., Hunter, K., *International Rights and Responsibilities for the Future*, Westport Connecticut, Praeger, 1996.

unlikely to be employed for progressive social ends to great effect by a court adopting this approach but are more likely to be deployed in such a way as to bolster and maintain the status-quo, which itself is invariably at odds with a number of human rights principles even at the best of times.

The second approach is one which has been touched on previously in the context of describing the legalistically orientated, rights 'romantic absolutists' and the ambitions or optimism they can be seen to frequently hold for social justice being effected by landmark judgments pertaining to human rights law. The classic example or instance of such social progress being brought about via judicial proceedings (which has come to hold such a profound and lasting effect on the minds of lawyers and the nature of politics, not just in the United States but across the West and beyond) can be found in the 1950's-1960's era of the US Supreme Court under Justice Warren.[130] Disillusioned by encounters with corrupt and prejudiced officials on legislatures and local governments, the US civil rights movement placed increasing faith in the Supreme Court and its ability to interpret the constitution in such a way as to effectively "wipe out ancient wrongs with a stroke of the pen." [131] Indeed, as Mary Ann Glendon describes it, dramatic cases, such as that resulting in the celebrated 1954 desegregation decision in *Brown v. Board of Education*, "shone like beacons, lighting the way toward an America whose ideals of equal justice and opportunity for all would at last be realised", causing more and more hopeful men and women to believe that "…the high road to a better society would be paved with court decisions."[132] It is highly disputable whether such rulings can have a sustainable impact on societal conditions, most particularly in the absence of a strong civil society, while it could reasonably be argued that the American context has demonstrated that this kind of activism can ultimately do more harm than good for the function of politics and the creation of egalitarian societal conditions, in spite of the initial important gains. Clearly, the court does not present the silver bullet that some would believe. Notwithstanding, rights proponents frequently invoke contemporary instances of progressive judicial activism and its primary role in securing, for example,

[130] See M. A. Glendon, *op cit*, 5ff.
[131] *Ibidem*, p. 6.
[132] *Ibidem*, p. 6.

the justiciability of economic, social and cultural rights. Illustrative in his regard would be the internationally heralded judgment emerging from the South African constitutional court in *Grootboom v. The Government of South Africa* (2000) where, relying on constitutional human rights provisions and the International Bill of Rights and comments pertaining to, the government was ordered to redress the homelessness of the respondent and others, or the similarly lauded interpretation of the right to life under the Indian constitution as implying the right to a livelihood and thus not to be subject to eviction from the pavements or slums of Bombay in *Olga Tellis v. Bombay Municipal Corporation* (1986).[133]

The third approach I wish describe can see constitutional rights provisions deployed against legislature (or litigant) in such a way as to prohibit or block the realisation of human rights principles in a lasting fashion. Again the classic example is to be found in the American context, where the Lochner era (so called after *Lochner v. New York*, 1905, in which the Supreme Court struck down a regulation limiting the hours of labour in bakeries to ten per day)[134] saw progressive legislation "sacrificed on the altar of a broad notion of 'property'" for a period of almost twenty years (or up until the Warren Court era).[135] Such substitution by the court of its own regressive reading of rights, and its own policy goals, for those of the parliamentary majority are not, however, a thing of the past. Of the many examples available, an instructive one in relation to important human rights principles can be found in the process whereby affirmative action came to be prohibited under French constitutional law. To briefly recount the sequence of events occurring: during the 1981 elections the French Socialist Party promised it would promote gender equality by setting aside a minimum number of slots for female candidates on party lists; thus, upon election, legislation to this effect was duly drafted. Despite voting with the majority, however, the Right saw fit to refer the bill to the (constitutional) Council which in turn annulled the bill on the grounds of article 6 (1789) of the declaration of the rights of man which guarantees equality under the law. Thus, ignoring the 'constitutional

[133] See Constitutional Court of South Africa, *Grootboom v. The Government of South Africa*, Case CCT 11/00, decided 4 October 2000 and Supreme Court of India, *Olga Tellis v. Bombay Municipal Corporation*, Case AIR 1986.
[134] See R. Singh, *op cit*, p. 28.
[135] M. A. Glendon, *op cit*, p. 27.

command' contained in the 1946 principles (citied constantly by the left in the course of the legislative debate) which states that equal rights between men and women shall be guaranteed by statute, the council vetoed an important provision of the 1982 electoral law which is today read as prohibiting affirmative action in all matters of public policy. As Stone comments, "in this kind of case, it would be nonsense to suppose that the constitutional court has functioned as some kind of bulwark against the tyranny of the majority."[136] Furthermore, while the relationship that exists (if any) between human rights and privatisation or deregulation versus nationalisation is highly controversial, it is also instructive to note with regard to the impact of rights on politics that the Council vetoed the same government's bill to nationalise the most important French banks in 1982 on the basis of the provision in the declaration of the rights of man which guarantees the right to property and fair compensation (the proposed compensation was deemed to be insufficient).

Closely related to the third, the fourth and last approach I wish to describe entails a flagrant instrumentalisation of human rights – either for the purpose of jurisdictional empowerment or for the promotion of free trade and corporate growth (or both) – which, as stated earlier, can be aptly described as cynical 'politics *of* human rights'.[137] As was noted previously, examples of such deployment of rights by an institutional body in a manner inimical to rights principles (or the spirit of their letter) can be seen in recent US Supreme Court decisions holding corporations to be "persons" with constitutional speech rights and striking down state and federal efforts to restrain corporate influence in elections.[138] Accusations relating to rights instrumentalisation could be levied in varying degrees at several constitutional courts, not least as a consequence of their propensity to treat certain constitutional provisions as carte blanche to 'discover' or generate 'new', unenumerated rights.[139] However, the European Court of Justice would appear to be most

[136] A. Stone Sweet, *op cit*, p. 106.
[137] See U. Baxi, *op cit*.
[138] N. Chomsky, *op cit*, p. 88.
[139] The Spanish Court, for example, insists on the necessity of a systematic and teleological constitutional interpretation, rather than strictly 'literal', especially with reference to what it labels the 'finality' of article 1 which states that "Spain…considers liberty, justice, equality and political pluralism as the foremost values of its legal order". Thus, not only does the Spanish Constitutional Court possess the most extensive list of rights in Western Europe, but all other constitutional provisions are to be interpreted in light of the

worthy of criticism in this regard, given that, as Shapiro states, "it cannot be stressed enough that the EC legal system was constructed without the explicit consent of the member states."[140] To briefly describe the ongoing process of polity construction driven by this institution via rights, after an initial period of reluctance in applying human rights, the ECJ could be seen to change its attitude in response to the challenge presented by the German and Italian constitutional courts and to assert its jurisdiction to examine the compatibility of Community instruments with fundamental rights as inspired by Member States' constitutions (Cf *Stauder*, *Nold*, *Hauer*). Thereafter such power was extended to (some) Member State legislation in the field of community law (Cf *Rutili*, *Wachauf*, *Grogan*),[141] the net result being that the EC treaties have evolved from a set of legal arrangements binding upon sovereign states into a vertically integrated legal regime conferring judicially enforceable rights and obligations on all legal persons and entities, public and private, within EC territory. Referring explicitly to the treaties as a 'constitutional charter', the ECJ is in effect the supreme interpreter of this constitution and therefore, by its own appointment, the 'constitutional court of the community'.[142] This development has seen rights treated in a distinctly utilitarian fashion. As Koskenniemi writes, "as a result of the Court's wish to reassert its jurisdiction as against that of (some) Member States…'all sorts of things are bandied around as potential fundamental or human rights', including various political rights (freedom of information), administrative and procedural rights and rights in the area of social law."[143] As was mentioned previously, the court has also resorted to reconstituting the field of economic activity in terms of human rights: in the court's own words, "[i]t should be borne in mind that the principles of free movement of goods and freedom of competition, together with freedom of trade as a fundamental right, are general principles of Community law of

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extremely flexible notions of liberty, justice, and equality. Similarly, the French and German constitutional frameworks have extremely vague provisions which allow for many different varieties of invention – for example the former has seen fit to discover that the French bill of rights contains such rights as personal liberty and inviolability, the 'independence' of university professors etc., while the Italian Court has explicitly declared a number of constitutional provisions to be 'open norms' through which the court can recognise rights somehow 'forgotten' by the framers. See A. Stone Sweet, *op cit*, 98ff.

[140] M. Shapiro, A. Stone Sweet, *op cit*, p. 266.

[141] M. Koskenniemi, *op cit*, p. 106.

[142] M. Shapiro, A. Stone Sweet, *op cit*, p. 263.

[143] M. Koskenniemi, *op cit*, p. 106.

which the Court ensures observance."[144] Reinforcing some of the arguments made earlier regarding the far from apolitical nature of 'the right' in practice as a result of it being necessarily based in a particular version of 'the good', it is instructive to note that while the court has redescribed entitlement to property and land, as well as the confidentiality of business information, in fundamental rights language, no such language has been used to describe problems relative to immigration or asylum, racial discrimination, minorities or environmental protection. As Koskenniemi states, "such selectivity is of course not dictated by any 'essential' nature of those problems. It is a matter of (political) preference which interests, which visions of the good merit being characterised as 'rights' and thus afforded the corresponding level of protection" as a means to "ensure [its] jurisdiction and control".[145] This is perhaps as clear an example as one can find of rights being used to "seize the moral high ground" and lay the foundations for a narrow 'power over' (as against a diffuse and popularised 'power to'), as the rhetoric of human rights protection is seen as "no more than a vehicle for the court to extend the scope and impact of European law."[146]

Weighing these possible approaches against one another, one is driven to ask whether constitutionalised rights are capable of fulfilling the vast promise that they seem to hold for so many rights advocates (such as those described under section 'd' in the first chapter), notwithstanding sporadic claims to the effect that judicial activism is welcome because it may "boldly go where no politician has gone before".[147] If we accept that the first approach is not amenable to bringing about desired societal change in tune with human rights demands when such change has not first been initiated by the legislature (Stone writes that it is often the case that "the constitutional court rarely if ever protects rights that would otherwise be ignored by a parliament."[148]) but is, however, all too likely to act to obstruct seemingly 'radical' initiatives in the same manner described in the third approach when they conflict with vested economic interests; and if we similarly accept that the fourth approach is completely at odds with the original aim and purpose of

[144] See J. Coppell, A. O'Neill, *op cit*.
[145] M. Koskenniemi, *op cit*, pp. 106-107.
[146] See J. Coppell, A. O'Neill, *op cit*, p. 692.
[147] R. Singh, *op cit*, p. 50.
[148] A. Stone Sweet, *op cit*, p. 106.

human rights, then we are left with the singular hope that the court will adopt a magnanimous activism towards human rights, such as that described in the second approach. However, it is more realistic to imagine that a court would, rather than adopt any one of these approaches, assume varying combinations or degrees of all four approaches in different instances, depending on the particular issue at hand. This noted, let us for argument's sake imagine the best possible scenario whereby a given court adopts *only* a consistently 'benevolent' and accommodating activism in regard to human rights – even in this case can we really argue that it is human agency or democracy which has been empowered rather than the court itself? Is there not a certain antipathy between the exercise of a vigorous, participatory and effective politics and such activism and concentrated authority? Have we somehow lost sight of the fact that human rights successes which are formalised by landmark judgments are above all contingent upon a prior vigorous political activism, both for the judgment to take place and for it to be honoured in practice? These questions will be taken up in the course of the discussion below.

4.6 The reduction of democracy and political participation to court room litigation

The question of 'public interest' or 'social action' litigation has long been a controversial one. However, some time ago as part of a transformation already described in brief, the political left sought to shed its 'legal inhibitions' and embrace this practice in search of certain objectives. As Alan Hunt wrote in 1990, "the rights debate is dogged by an important misunderstanding. Those who are hostile to rights based strategies tend to conflate rights with litigation…[however,]…I view litigation as nothing more that *one of the tactics* to be deployed within a much broader conception of an essentially political, rather than legal, strategy."[149] If Hunt's well-balanced approach were shared by all rights proponents then there would perhaps be fewer problems of the kind I describe in relation to rights practice, yet it would seem that the properly political is increasingly being

[149] A. Hunt, *Rights and Social Movements: Counter-Hegemonic Strategies*, in <<Journal of Law and Society>>, vol. 17, no. 3, 1990, p. 317.

sacrificed and subordinated to the legal and that political strategies are being replaced by legal ones.

While prospective reasons for the ongoing demise or migration of the political have already been posited in the previous chapter, there is perhaps enough explanation for the propensity to litigate in the notion that actors seeking a particular objective will inevitably focus their efforts on the locus where these objectives can be most swiftly and economically realised. Since, as we have seen, the (constitutional) court is the ultimate authority without whose consent little can occur and by whose ruling much can be achieved, then it makes certain sense for parties to proceed directly to this source. However, this has extremely important consequences in so far as the 'test case' or landmark judgment comes to be regarded as preferable to ordinary politics, as was the case for the American public lawyers of the 1960's civil rights movement, holding as they did a "narrower and less organic view of law, government, and society" and seeing the judiciary as "the first line of defense against all injustice."[150] As Glendon maintains, as progress was made via the judgments of the Warren court, all the while "the time-honoured understanding that difficult and controversial issues should be decided by the people through their elected representatives…began to fray at the edges." She goes on to describe a process which would seem to be somewhat reflective of the contemporary European setting and the attitude adopted by some human rights proponents:

"*to many activists, it seemed more efficient, as well as rewarding, to devote one's time and efforts to litigation…than to put in long hours at political organising, where the most one can hope to gain is, typically, a compromise. As the party system gradually fell prey to large highly organised, and well-financed interest groups, regular politics came to seem futile as well as boring, socially unproductive as well as personally unfulfilling*."[151]

[150] M. A. Glendon, *op cit*, p. 5.
[151] *Ibidem*, p. 6.

Again we see here how politics can come to be conceived as a dispensable *end* rather than a necessarily perpetual *means* and feature of collective life which must enjoy broad participation in order for society to function justly, or even at all.

Were it not enough that, where provisions allow, rather than organise politically or lobby the government, private individuals and groups prefer to take their political agendas to court in search of the most expedient route to realisation, this trend is itself reflected within the representative assembly. As Stone points out, since the costs of referring a bill to the court are virtually zero (relatively) while the potential gains are enormous, political parties (when in opposition) routinely use vague rights provisions to turn a partisan struggle into a formal juridical conflict in order to potentially increase their influence via a sympathetic court. The longer-term costs of creating a "web of constitutional constraints" which may obstruct change in a given area for the foreseeable future (as we saw for example with the French Constitutional Council) or of progressively entrenching the role of the court in politics are ignored; until of course the opposition passes into government and the realities of judicial authority over the legislative process are decried as undemocratic and obstructive of the operation of an effective politics.[152] By then it is, naturally, too late to reverse the process.

As increasing numbers of political conflicts gravitate towards the judicial arena, there is also the problem to contend with that the logic, language and practice of litigation (or rights and law more generally) do not always prove amenable to expressing valid concerns to the extent necessary for their being accorded their due importance. A shocking example furnished by Glendon in this regard tells the story of "the most massive and rapid relocation of citizens for a private development project in US history", whereby an entire community of around 1600 homes, 16 churches etc. was razed in order to allow the General Motors Corporation to construct a new Cadillac assembly plant. In the process of litigation it became evident that the sense of roots, shared memory, solidarity, relationships, and place which were at risk (and ultimately perished) could not be felt once these concerns had been reductively translated into the only amenable rights

[152] A. Stone Sweet, *op cit*, p. 198.

language, i.e. the right to property. Thus, the arguments made ultimately failed to register in the justices' hierarchy of importance. In another context, Blomley notes how North American First Nations "find their concerns, drawing from a long history of cultural liberty and oppression, freedom and resistance, and articulated with a complex mix of humour, anger, passion, hope and despair, reduced to the arid legal plea for recognition of 'rights of ownership' over territory."[153] Glendon attributes these failings to deficiencies inherent in a legal system which has difficulty in dealing with long-term effects and with envisioning entities other than individuals, corporations, and the state.[154] Given the societally all-embracing nature of rights provisions and power that jurisdiction over them confers on the judiciary, it is cause for serious concern to note that a court can suffer such major perceptive deficiencies. Moreover, it is difficult to believe that a properly functioning political process based on political equality and popular control would have produced the same result.[155] This point gives rise to further concerns when one considers the propensity to formulate and constitutionalise increasing numbers of rights pertaining to what has been broadly termed 'identity politics' and 'politics of recognition' – i.e. relating to race, gender, sexuality etc.[156] Clearly the expertise of a court can only go so far, while certain questions evidently have no definitive answer or resolution which can be discovered in the realm of the law. However, the current faith in the possibility of exhaustively translating social morality into the language of the law would seem to resist such reasoning. It remains to be seen how such faith will continue to reconstitute politics and the court room in the future.

Further in regard to public interest litigation, I wish to take issue with the apparently unequivocally progressive nature of the second, 'benevolent' activism described, particularly with reference to *Grootboom* and *Tellis*, by suggesting that such action seems to somehow miss its necessary target or obscure a clear vision of the steps which are necessary in order to achieve the human rights objectives sought. While it may give cause for certain celebration that such judgments emerge in so far as, in Baxi's words, it can be

[153] N. Blomley, *op cit*, p. 409.
[154] M. A. Glendon, *op cit*, p. 30.
[155] This is David Beetham's definition of democracy. See D. Beetham, *Democracy and Human Rights*, Cambridge, Polity Press, 1999.
[156] See W. Brown, *op cit*.

seen to mark a further step on the way to successfully converting the courts from being "sites of ideological and repressive apparatuses of the state into an institutionalised movement for the protection and promotion of human rights", it is difficult not to feel that somehow the whole purpose of human rights to generate human agency, liberation and empowerment has been lost somewhere in the equation, or the ensuing celebration, as those suffering human rights violations are reduced to mere recipients of an isolated instance of justice whose function is beyond even their partial control (being channeled off to the various legal representatives and amici curiae.).[157] Taking first the case of those lower-caste persons of Bombay who constitute almost half of the city's population and are forced to live in a state of abject poverty on the pavement or in the slums where "…in the midst of filth and squalor which has to be seen to be believed, rabid dogs in search of stinking meat and cats in search of hungry rats keep them company,"[158] one cannot help feeling that energies are being channeled in the wrong direction or that there could be far more achieved than mere immunity from eviction from such intolerable conditions if such an enormous portion of the population was to organise politically and stake its demands for a more equitable distribution of income and wealth. Indeed, it would seem that this would be the only viable means by which their plight will be adequately addressed in practice, but also in a manner which accords these people their rightful dignity and self-determination. Yet, it would seem to be one which the human rights community somehow loses sight of in its frequent disenchantment with ordinary politics. Similarly, it must be wondered if the scale of the housing problem which exists in South Africa (as a direct result of the policies of the apartheid era) can be solved in a meaningful or lasting way by anything other than a political process which enjoys the determined participation of representatives of those suffering such degradation. Indeed, the indifference of the government towards the various progressive rulings of the court on the same issue in the lead-up to the final judgment in *Grootboom* would serve to indicate that where action was and is urgently required is at levels directly and effectively impacting on the legislative and executive arms of government, rather than via relatively

[157] U. Baxi, *op cit*, p. 127.
[158] Chandrachud, C., *Economic and Social Rights*, India, 1985, p.287, included in International Law Seminar work materials for European Master's Degree in Human Rights and Democratisation, Lido, Venice, 2003.

timid or cautious rulings from within the institutional realm. While circumstances in the developing world and in established democracies can frequently leave few apparent alternatives, sympathetic courtroom representation should, I contend, not be seen as an adequate compensation for or alternative to effective representation at the political level. While it is clear that a combination approach is necessary, there is perhaps a pressing need to examine how human rights can be more effectively harnessed to promote political strategies above ones which are singularly legal – how this may occur will be dealt with in the following chapter.

4.7 Conclusion

I would argue that the picture painted above points to a generally impoverished politics whereby the trend emerging since the 1950's of democratic processes being increasingly subject to the control and direction of 'experts' and epistemic communities is continued, in this instance via the letter of human rights. The policy-making of the courts is not only typically low-visibility and incremental, but is 'technical' in both language and substance and thus excludes by virtue of being not readily comprehensible to the public. Legal discourse is not widely accessible, despite the fact that the substance giving it content is almost certain to be of everyday import. While scholars argue endlessly about whether judges strive first to make principled decisions according to the law or whether judges decide on the basis of their own preferences and then use the law to justify these decision, there is substance in the contention that "in practice, the existence of a legal culture with shared norms of interpretation keeps courts from behaving in a totally arbitrary and unpredictable fashion."[159] However, departing from Edmund Burke's conviction that "the greater the power the more dangerous the abuse", it has reasonably been recognised that technocratic government by multiple communities of experts has come to be a threat to democracy.[160] Such departures from democratic politics have frequently been justified by arguments stating that party politics is not well equipped to deal with the challenges

[159] A. Stone Sweet, *op cit*, p.27; J. Elster, *op cit*, p. 130.
[160] M. Shapiro, A. Stone Sweet, *op cit*, 170ff.

presented by rapid technological developments, the underlying historically repetitious assumption being that 'people who know are superior governors to people who do not'. Yet, I would contend that this vision has an authoritarian potential. The more rights succeed in effectively insulating questions from democratic political process and the more such expert opinion will determine the nature of our societies, the closer we will be drawn to establishing what John Adams called "a government of laws and not of men".[161]

As a final point, I feel it is necessary to address potential objections to the juxtaposition and analogies made between the malfunctioning US rights panorama and the European context on the grounds that these polities are somehow distinct in terms of legal culture and practice. Beyond those reasons previously outlined which show the convergence of judicial review as is practiced in both continents, in the current political context of the European Union there is, in my view, good reason to see the European rights discourse as an effective continuation of its American predecessor which simply finds itself further along the 'rights road'. Indeed, the clear historical resonance of the name adopted for the body entrusted to formulate proposals for the European constitutional framework – The Convention on the Future of Europe – would serve to illustrate the ambitions that are at play in terms of polity-construction. If this were insufficient evidence or too subtle an illustration, we may look to those comments made recently by European Commission President, Romani Prodi, to the effect that one of the EU's chief goals is to create "a superpower on the European continent that stands to equal the United States".[162] Indeed, this would seem to be the common objective of several Member States.[163] Since relevant to the overall discussion, it should be said that an important step in this direction can be found in The European Charter of Fundamental Rights which, although not providing any additional legally enforceable rights[164], would appear to constitute an effort to lay the

[161] John Adams, "Novanglus" papers, Boston Gazette, 1977, Source: www.john-adams.org
[162] Romani Prodi, President of the European Commission, quoted in 'The Economist' April 26 2003 p. 25.
[163] As a BBC news report stated on 3 June 2003, 'German Chancellor Gerhard Schroeder said after talks with French President Jacques Chirac in Berlin on Tuesday that the two countries were determined to support the proposals of The Convention "without reservation".' Source: http://bbc.co.uk
[164] See K. Lenaerdts, E. E. De Smijter, *A "Bill of Rights" for the European Union*, in <<Common Market Law Review>>, 2001, p. 289: "…[I]t may be said that the Charter contains *rationae materiae* more fundamental rights than the Court of Justice has so far effectively guaranteed, but less than the Court could guarantee on the basis of Article 6(2) *juncto* Article 46(d) EU...The statement of rights that cannot be linked to such an exercise of [already existing] power mainly has a political function."

political foundations for "certain future developments with regard to the competences of the EC or the EU."[165] It may well be that such developments will make the European framework look less *sui generis* and more like its federal rival. It is also interesting to note the efforts to replicate at the EU level the successful infiltration of rights provisions by corporate interests in the United States, as illustrated in the submission of 'Eurochambres' to the Praesidium (following publication of the draft Charter) which calls for the recognition of 1300 Chambers of Commerce and 14 million businesses in Europe as "enterprise-citizens" with "the right to be represented and to hold a dialogue with the institutions of the European Union."[166] Only the submission from the Danish Centre for Human Rights expressed alarm at the lack of general debate which was accompanying the whole process, noting that broad awareness and support for the Charter was crucial for the future legitimacy of the European Union. However, since all of the powers entailed in the Charter had been previously assumed by the ECJ and other institutions, it would seem somewhat of a misnomer to term public acknowledgement of existing power structures as 'debate'.

As Shapiro writes, "…the move to judicialised governance will provoke and manage institutional change, reconstituting the world in ways that were both unintended and impossible to predict beforehand by those who created the system" [167] – we may recall that power of review did not exist in the United States until it was claimed in 1803 in the course of *Marbury v. Madison*.[168] Yet, in spite of such uncertainty, there would appear to be enough evidence to make it seem unlikely that the EU will not strike off down a similar 'rights path' to the US. It would appear that the ECJ's vision of the European Community as a constitutional polity, complete with recourse by which individual litigants can sue their own member states, would see it destined to become centered on the business of rights litigation and adjudication. Meanwhile, as rights and entitlements expand, politics is displaced from smaller forms of association and power shifts away from democratic institutions (such as legislatures and political parties) and towards

[165] *Ibidem*, p. 289.
[166] Statement of 'Eurochambres' to the Praesidium of the Convention on the Future of Europe. CHARTE 4366/00, 2000 p6. See http://db.consilium.eu.int/df/default.asp?lang=en
[167] M. Shapiro, A. Stone Sweet, *op cit*, p. 18.
[168] M. A. Glendon, *op cit*, p. 93.

institutions designed to be insulated from democratic pressures (like the judiciary and bureaucracy).[169]

[169] M. Sandel, *op cit*, p. 19.

5. Human Rights and Political Empowerment

5.1 Introduction

The proceeding chapters have argued that certain visions and practices of human rights can contribute to an impoverishment of politics in a number of different ways, primarily as a result of their being excessively legalistic or proceduralisitc in nature and due to their taking a reductive view of both politics and human rights as finite ends rather than as expansive processes which must necessarily be continued *ad infinitum* in the most public and participatory way. What can be said, however, of the capacity of human rights to empower politics when conceived of in more dynamic and holistic ways? In the first chapter we noted that, as all-embracing or horizontal 'ethical imperatives', human rights are seen by some to have the capacity to generate local and global solidarities and to provide the basis for a 'new social morality' which may fill the perceived modern 'ethical vacuum'. We also noted the existence of a vision of rights as 'politics and ideology', which sees human rights as constituting an 'ideological discursive practice' or 'a way of thinking, talking and knowing that facilitates, structures and underpins the ways and means of social interaction'. Crucially for both, but particularly the second view, is the notion that human rights constitute a key element of politics and that the primary vehicles for the realisation of social change, and indeed the very construction of human rights in the first instance, are the myriad and multifaceted struggles and social movements or associations throughout the world which fight concentrations of political, social and economic power in order to generate more equitable and just societies from the 'bottom up'. It is to these arguably more progressive, effective, participatory and sustainable visions of the diverse human rights discourse that I wish to now return in an effort to examine how rights may constitute an integral part of any struggle for the generation of more just, equitable and reflexive societies. With some qualification, I will suggest that human rights may play such a role in three mutually reinforcing, and perhaps mutually constitutive, ways: first, by providing impetus, form and cohesion to social movements;

second, by providing a normative structure or foundation for a culture of solidarity; and, third, by reviving and invigorating both citizenship and politics.

However, before proceeding to explore each of these points in turn, since so much of the preceding discussion has taken issue with the apparent will to truncate politics via judicialisation of human rights, it is perhaps first necessary to clarify the approach of such conceptions of human rights to the domestic institutionalisation of rights. While remaining cognizant of the dangers inherent in rights proliferation and the scope that 'transition' provides for an inimical 'politics *of* human rights', these conceptions do not necessarily maintain (in the traditional Marxist mode) that struggles for institutionalisation are simply futile, 'wrong', or that we would be unequivocally better off without them. Rather, most progressive thinking on rights has come to cautiously accept institutionalisation as an *auxiliary step* to rights fulfillment, provided that its importance is progressively eclipsed by other more dynamic forms of rights practice and deployment which serve to diffuse power instead of concentrating it in the manner described in the previous chapter.[170] In other words, while it is reluctantly agreed that to some extent, as Alan Hunt writes, "all struggles commence on old ground"[171] (and that the legal realm forms a substantial part of such ground), this is accompanied by a resolute insistence that, since "institutional structures are not likely to be a fertile soil through which….power can be effectively challenged unless those institutions are themselves being forced to adapt and change as a consequence of further challenges from outside"[172], a constant, vigorous and multifaceted 'politics *for* human rights' waged by civil society in all areas of social life is seen as the first prerequisite and most important vehicle to effective human rights fulfillment.

The highly contentious question as to what extent such conceptions of rights can remain external to or resist co-option into the legalising paradigm described in the previous

[170] On this point see A. Hunt, *op cit*; N. Devlin, *op cit*; N. Stammers, *Social Movements and the Social Construction of Human Rights*, in <<Human Rights Quarterly>>, vol. 21, 1999; N. Blomley, *op cit*; U. Baxi, *op cit*, chapter 11.
[171] A. Hunt, *op cit*, p. 324.
[172] N. Stammers, *Social Movements and the Social Construction of Human Rights*, in <<Human Rights Quarterly>>, vol. 21, 1999, p. 998.

chapters is a moot point. It is perhaps sufficient for the immediate purpose here of looking at the capacity of human rights to empower politics to note that, since these conceptions perceive that all too often rights languages ultimately succeed in enhancing the power of the state and that in the process "the bureaucratisation of human rights occurs in ways that are inimical to rights-attainment"[173], they actively seek to discover alternative modes of deploying rights which prevent them from merely implying or requiring the substitution of one form of power for another and which may allow them to have a more sustainable impact.[174] As grass-roots movements strip human rights principles of their 'statist assumptions'[175] and employ them to guide their "search for alternative forms of governance that are rooted in local tradition and allow for enhanced participation, democratic decentralisation, and accountability"[176], there is perhaps hope for the role that human rights can play in the creation of more just and equitable societies. In this respect these conceptions broadly share the premise developed in the course of this discussion that those human rights which do not constitute the essential basis to politics (see chapter 3) are often primed to have greater impact when effectively disseminated as *normative* vectors for societal mobilisation (or politics) rather than as justiciable law, and that, as a concept enjoying broad discursive circulation outside the institutional realm, human rights would be more likely to challenge systemic obstacles to the realisation of rights than to sustain them. Any such alternative modes of deployment or governance as may be found to exist for the purpose of securing sustainable impact must arguably depend upon the modes of human rights empowerment which I wish now to describe under the headings proposed.

5.2 Human rights and social movements

There is a theoretical critique which claims that "…even the best of all rights

[173] U. Baxi, *op cit*, p. 73.
[174] N. Stammers, *Social Movements and the Social Construction of Human Rights*, in <<Human Rights Quarterly>>, vol. 21, 1999, p. 1005.
[175] *Ibidem*, p. 505.
[176] N. Aziz, *The Human Rights Debate in an Era of Globalisation*, in P. Van Ness, (ed.), *Debating Human Rights. Critical Essays from the United States and Asia*, London, Routledge, 1999, p. 8.

performances typically professionalise, atomise, and de-collectivise energies for social resistance, civic empathy and political mobilisation."[177] However, despite the fact that rights languages may play a historically contingent, rather than foundational, role in any concerted struggle or instance of solidarity against domination, such a radical critique would seem to have been entirely discredited by research such as that conducted by Joe Foweraker and Todd Landman into the relationship between rights and social movements in the context of Latin America.[178] Through comprehensive comparative and statistical analysis they demonstrate conclusively that rights and social movements are in fact often symbiotic or mutually constitutive, the first providing the "associational idiom" or "synthesising force" that both stimulates activity and inspires it with a more proactive character, and the second performing the necessary contextual discovery, shaping and dissemination which successfully transforms rights from 'text' into action.[179] Furthermore, as they argue, the discourse of rights would appear to play a key role in translating the specific (communal, sectoral, or class) demands of particular movements into a common language, and in facilitating the necessary construction of political alliances and movement networks.[180]

Departing from Richard Falk's concept of 'globalisation-from-below', Nikhil Aziz supports this notion of an expansive mutuality between rights and social movements by pointing to the rise and spread of global political movements relying on human rights principles as their cohesive glue and the important "horizontal transnational solidarity linkages" that they form.[181] While he furnishes immediate examples in the form of foreign observer group presence in such troubled regions as Chiapas and Kashmir, he is eager to present this alliance between rights and movements as leading us towards a much farther reaching outcome, namely the "…creation of global perspectives and values in the depths of people's hearts and minds, and the development of a global civil

[177] U. Baxi, *op cit*, p. 75.
[178] See J. Foweraker, T. Landman, Citizenship Rights and Social Movements: A Comparative and Statistical Analysis, London, Oxford University Press, 1997.
[179] J. Foweraker, T. Landman, *op cit*, p. 34.
[180] *Ibidem*, p. 32.
[181] N. Aziz, *op cit*, p. 5.

society", a prospect I will look at under the heading that immediately follows.[182] In a similar vein, Blomley stresses the mobilising power of rights and the centrality of rights discourse to political struggles such as the US civil rights movement. Moreover, he makes the relevant observation that while the open texture or "semantic slipperiness" of rights can be detrimental in the legal setting (as we have seen at length), in the context of normative deployment by social movements this same characteristic provides rights with a "subversive and explosive quality" since they can be "radically extended so as to encompass progressive possibilities."[183] As a geographer, Blomley's provides an example in the contention that the right to mobility could be stretched to address important linkages between space, geography and state power, while a similar approach can be found in the work of feminist Catherine A. MacKinnon, who endeavors to see the right of freedom from torture extended to certain subjugations of women. In situating normative interpretation of rights in the public realm, this approach aims to see rights discourse pushed from its current relative stasis towards radical new horizons, much in the same way that the concept of rights was gradually expanded beyond the exclusionary logic of the French and American Declarations, but in a much more rapid way.

Anthony Giddens contends that it is wrong to give too much prominence to social movements or self-help groups as "carriers of radical programmes".[184] So why is it then, we may ask, that social movements are so important for human rights and vice-versa? The first reason is because, as Aziz, Landman and Foweraker argue, social movements are a pivotal means to "creating political space".[185] It would indeed seem that it is the combination of social movement and a discourse of rights, and their imbrication in communal 'demands for justice', that serves to ultimately vindicate and create an operative public domain.[186] The second reason, of equal or perhaps even greater importance, is that social movements also serve as 'schools of rights', providing the processes of organisation and mobilisation which create the means for a popular education in rights. As Landman and Foweraker argue, "an awareness of rights leads

[182] *Ibidem*, p. 6.
[183] N. Blomley, *op cit*, p. 408.
[184] A. Giddens, *op cit*, p. 250.
[185] N. Aziz, *op cit*, p. 7.
[186] J. Foweraker, T. Landman, *op cit*, p. 35.

directly to a struggle to vindicate these rights, and so operationalises the content of citizenship through public contestation and public demand for rights."[187]

Where there is a clear problem with social movements, however, is in their frequent tendency to dissolve themselves once the struggle for rights has moved to the constitutional sphere, thereby losing their pre-eminent role as defenders and promoters of rights. As one critic puts it, "successful social movements inevitably lose their reason for being."[188] This tendency, which is in no small way mirrored by political parties, has major repercussions for the continued vitality of politics. Taking the United States again as a prime example, Theda Skocpol has recently argued that the poor quality of democracy there is due, not to the decline in traditional communal ties as is usually assumed (e.g. by Robert Putnam), but to the demise of mass membership voluntary organisations, unions, and political parties in the 1960's and 70's (post civil rights movement) and the consequent loss of those structures which "bound Americans of very different backgrounds into a common structure, educated them into the art of political association and gave them a voice."[189] The net result has been that, "where American civic life was once dominated by popular federations that encouraged people to speak for themselves, it is now dominated by "advocacy" groups that claim to speak on their behalf."[190] Both the pivotal nature of social movements in terms of securing rights and the problems pertaining to this tendency towards self-extinction can be grasped from Robert Dahl's contention that "rights are better assured by associationalism than by legal guarantees, since it is only by forming and supporting active associations like political parties and trade unions that citizens can protect and extend their rights", or, equally, Durkheim's insistence that such associations are "essential if the state is not to oppress the individual."[191] As Giddens himself is eager to point out, rights have not just 'evolved' but are the result of active struggle and cannot be seen as 'once-and-for-all' achievements since "…how far they are real rather than formal rights and how they should be

[187] *Ibidem*, p. 227.
[188] T. Risse et al., *op cit*, p. 58.
[189] Ben Rogers, "How the Think Tank Took the Place of Politics", Financial Times, Thursday May 1 2003, p.13.
[190] *Ibidem*, p. 13.
[191] Quoted in J. Foweraker, T. Landman, *op cit*, p. 9.

interpreted are questions intrinsic to modern democratic politics[.]"[192] Social movements and the associationalism they facilitate would appear to be fundamental to such politics since there seems good reason to accept that the discourse of rights achieves its political impact through the social movements which articulate it. As Stammers would contend, if it is clear that human rights relied on such associationalism for their historic construction, then, quite arguably, the same must be true for their future, given that there will always be a gap between 'rights in principle' and 'rights in practice'.[193]

It would thus seem that rights can in effect serve as a valuable 'set of tools', a political resource or a banner for action which can be used to forge the unities required for social struggle and frame social movement activity.[194] Moreover, like a set of tools, rights discourse can be picked up and applied to new contexts without great difficulty since its core content has proven both easily assimilated and disseminated across widely different cultures – hence the contention that rights may form an important basis for the generation of simultaneously local and global solidarities. As Landman and Foweraker write, "in this sense [human rights are] the perfect example of a 'master frame' (Snow et al.1986) that gives political and ideological coherence to a broad range of (sometimes very specific) social struggles.[195]

5.3 Human rights and culture

Strands of research in the fields of anthropology, political science and law have for some time sought to investigate the validity of the ascendant notion of a 'culture of human rights'.[196] While Koskenniemi would maintain that "rights often remain insufficiently

[192] A. Giddens, *op cit*, p. 73.
[193] J. Foweraker, T. Landman, *op cit*, p. 227.
[194] *Ibidem*, p. 228.
[195] *Ibidem*, p. 13.
[196] See for example, J. K. Cowen, M. Dembour, R. A. Wilson, (eds.), *Culture and Rights: Anthropological Perspectives*, London, Cambridge University Press, 2001; H. Porsdam, *Rights Talk: The Case of the United States*, and K. Hastrup, *Accommodating Diversity in a Global Culture of Rights: An Introduction*, in *Legal Cultures and Human Rights: The Challenge of Diversity*, Kirsten Hastrup (ed.), The Hague, Kluwer, 2001.

normative to ground a sense of community"[197] and Klabbers derides as somewhat lacking the normative rush to human rights as "the last straw to clutch in a world otherwise filled with uncertainties and existential *Angst*"[198], others, such as former UN High Commissioner for Human Rights, Mary Robinson, have pointed to the progressive formation of a kind of beneficent global ethic or morality based on human rights principles and to the sense of solidarity and political empowerment which it brings in its wake.[199]

Given that, as Giddens reasonably argues, "…civil society depends on the sustaining of a 'common culture'" and that "to assume that we can rely purely on a regime of abstract rules is the merest folly"[200], it could well be of essential importance that such an ethic, morality or culture come to flourish in order to ground the concept of human rights in the everyday consciousness and daily exercise of collective life, where it is most meaningful. The perception of the necessity for more sublime modes of human rights dissemination, and the positive results this can generate over other forms, come further into focus when we consider Antonio Gramsci's contention that, more than anything else, domination and injustice depend on the fact that a prevailing *mode of thought* shields the existing social order by persuasively defining for the whole of society what is to be regarded as natural and normal.[201] According to this reasoning, the emergence of human rights as 'ideology' (with a small 'i', as against the deterministic Marxist notion of Ideology) or popular consciousness is a preliminary step or necessary condition for the realisation of human rights principles in practice.[202] It is, according to Gramsci, necessary to construct anew the polity's 'common sense', turning it into 'good sense'. The body of internationally endorsed human rights would appear to provide a template for such an endeavour.

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[197] M. Koskenniemi, *op cit*, p. 100.
[198] J. Klabbers , *Doing the Rights Thing? Foreign Tort Law and Human Rights*, in Scott, C., (ed.), *Torture as Tort*, Oxford, Hart, 2001, p. 554.
[199] See, for example, Mary Robinson's speech to The Committee on the Administration of Justice on 2 December 1998. Source: http://www.caj.org.uk
[200] A. Giddens, *op cit*, p. 43.
[201] The Penguin Dictionary of Philosophy, Thomas Mautner (ed.), London, Penguin Books, 2000, p227
[202] A. Hunt, *op cit*, p. 310.

If we can, then, take a positive view of the dividends or potential resulting from the emergence in this way of a more holistic, omnivalent, and daily operative practice of rights through the development of a rights culture, how is it that such a culture is effectively fostered? While the mutually formative relationship between law and culture is immensely complex and perhaps necessarily polity-specific[203], there would increasingly seem to be good reason to broadly reject Martin Luther King's oft-cited assessment that "the habits, if not the hearts, of people have been and are being altered every day by legislative acts, judicial decisions, and executive orders"[204]. Although recent research in the United States has indicated that, for example, an awareness of a legal duty to rescue does affect the way people perceive the legitimacy of the behaviour in question (when asked to evaluate the morality of the conduct of an individual who saw another person drowning and did nothing to help, a group of subjects who were told there was a legal requirement of assistance in such situations judged the inaction more severely than the group that was told the opposite), it is highly doubtful whether such a 'top-down', legalistic approach to the generation of morality can go any further than merely laying negative normative markers based on fear of punitive sanction by the state – hardly proven to be the most effective or felicitous route to a society's conscience. Indeed it would seem that such a method is grounded in the bleak pessimism of a Hobbesian idea of 'law as command' and a vision of man in his natural state as driven by fear and desire, engaged in a perpetual state of war with others like himself and entering into society only for the sake of his own preservation.[205] All things considered (including those comments noted earlier to the effect that we "rest our hopes too much on constitutions, upon laws and upon courts"), there would seem to be greater reason to concur with Isaiah Berlin's more tempered and reserved opinion that, rather than constituting the sure means to shaping just societies and making good citizens of the individuals who compose it (as Rousseau would have it), at best, "law helps"[206].

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[203] See, for example, M. A. Glendon, *op cit*; P. Ewick, R. A. Kagan, A. Sarat, (eds.), *Social Science, Social Policy, and the Law*, New York, Russel Sage Foundation, 1999; J. M. Conley, W. M. O'Barr, *Just Words: Law, Language, and Power*, Chicago, University of Chicago Press, 1998; J. M. Conley, W. M. O'Barr, *Rules Versus Relationships*, Chicago, University of Chicago Press, 1990; P. Ewick, S. Silbey, *The Common Place of Law: Stories from Everyday Life*, Chicago, University of Chicago Press, 1998.
[204] Martin Luther King, quoted in M. A. Glendon, *op cit*, p. 105.
[205] M. A. Glendon, *op cit*, p. 68.
[206] Isaiah Berlin, Notes on Prejudice, The New York Review of Books, 2001

With the institution of law thus seen as a somewhat ineffective (and perhaps inappropriate) means to a progressive shaping of the public psyche, the most commonly entertained alternative is one which stresses the value and potential of human rights education. As William Warden writes, "*the* objective for the next twenty years should be to ensure that…virtually every individual on the planet will be fully aware in a practical and personal sense of the provisions of the Universal Declaration of Human Rights" (emphasis added). The professed aim of such an initiative is to broadly inculcate a consciousness which harbours the conviction that "'I" as an individual share the guilt of those who abuse others, as well as the pain of those who are abused", and thereby engender the kind of solidarity which is seen to be lacking.[207] Richard Rorty, as a pragmatic philosopher of rights, likewise argues at length that the truest means to rights fulfillment is the universalisation of a "sentimental education" based on rights principles.[208] While there exists valid criticism of the somewhat utilitarian or dogmatic nature of these approaches, to my mind the greatest deficiency with regard to the generation of a culture of human rights as it is envisaged by these authors is that they tend to overlook or downplay the importance of the associationalism described above. When Warden writes that "education will be *the* instrument for breeding and nourishing activism", he seems to have insulated such an initiative from any recognition of the pivotal issue of the context within which this will occur.

Returning once again to the United States in order to illustrate the problem, despite the rigorous dissemination within the educational system of the rights enumerated in the American Constitution, this has not prevented those rights being effectively translated in popular culture to mean the right for each and every individual to do '*whatever he or she wants*'.[209] In other words, and adopting some aspects of the communitarian critique of rights, mere knowledge of one's rights is insufficient to successfully create a culture which strives to respect the rights of all – these must be conceived and given shape within

[207] W. Warden, *From Analysis to Activism*, in Mahoney, K. E., Mahoney, P., (eds.), *Human Rights in the 21st Century: a Global Challenge*, Dordrecht, Kluwer, 1993, p. 989.
[208] R. Rorty, *op cit*, p. 122.
[209] M. A. Glendon, *op cit*, p. 98.

the collective setting in order to shed their atomistic or individualistic potential and become a genuinely empowering social and political tool. As Landman and Foweraker note, "it is the dissemination of a sense of rights through new forms of collective action that educates popular political actors and catalyses the creation of a new political culture, which is a rights culture."[210]

While it is perhaps excessive to suggest (as many would seem to do) that the concept of human rights in itself can come to constitute a normative global culture commanding holistic allegiance of the kind devoted to an established religious faith, there is thus certain scope for the generation of *cultures* which integrate and accord importance to human rights principles in their daily habits and practices, and that these will gradually come to constitute an ethic or modern morality. In this sense, human rights can be seen to provide a normative structure or foundation for the generation of a culture (or cultures) of solidarity in which understanding, ownership and observance of human rights is something which emanates from the individual self rather than the state apparatus.

5.4 Human rights, citizenship and politics

Contingent upon their success in providing impetus to social movements and in nurturing local and global cultures of solidarity in the ways described, it can be argued that, in contrast to previous arguments, certain expansive visions of human rights can empower by reviving and invigorating more participatory forms of both citizenship and politics. I will deal with each of these in turn in an effort to add to the comments already made in this respect.

Pointing at a possible means to striking an appropriate balance between the legal and normative aspects or personalities of human rights (which have been seen to be in dramatic tension throughout this discussion), Mouffe looks to a vision of rights which may somehow reconcile liberal and communitarian perceptions of citizenship. Echoing

[210] J. Foweraker, T. Landman, *op cit*, p. 232.

some aspects of the 'right versus good' debate, Mouffe contends that, while liberalism certainly contributed to the formation of a universal citizenship (based on the assertion that all individuals are equal and free), it also reduced citizenship to a mere legal status. As she writes of the liberal perception:

"The way rights are exercised is irrelevant as long as their holders do not break the law…Social cooperation aims only to enhance our productive capacities and facilitate the attainment of each person's individual prosperity. Ideas of public mindedness, civic activity and political participation in a community of equals are alien…"[211]

For its part, although arguably much richer in so far as it seeks to revive a civic republican idea of politics that puts a strong emphasis on political participation and political community, the communitarian conception of citizenship presents the danger of returning politics to an essentialist or premodern condition by virtue of being centered on a single substantive (and potentially authoritarian) idea of the common good. Drawing on the insight of theorists such as Quentin Skinner, who argues that there is "no fundamental incompatibility between the classical republican conception of citizenship and modern democracy", the task, Mouffe maintains, is not that of replacing one tradition with the other, but rather of drawing on both and trying to *combine* their insights in a "new conception of citizenship adequate to the project of *radical and plural democracy*."[212] Thus, latching on to the expansive potential of rights and their mobilising value, this criticism argues that liberal democracy should be extended and deepened to cover "ever wider social relations" and that an alternative model of the liberal citizen must be constructed, "premised not on possessive individualism but on participation and collective action."[213]

While Giddens contends that "[p]art of the strength of liberal democratic institutions is that they allow individuals and groups to free themselves from the political sphere…"[214],

[211] C. Mouffe, *op cit*, p. 62.
[212] *Ibidem*, p. 63.
[213] N. Blomley, *op cit*, p. 412.
[214] A. Giddens, *op cit*, p. 111.

we have seen at length how this process of detachment is in fact inimical to rights attainment. As Narr writes, "[i]f humans can truly be rendered apolitical, or even anti-political, privatised creatures, human rights will lose all meaning in the concrete world", since, quite clearly, political participation is precisely where human rights reside.[215] As has already been suggested, the rise of "*homo oeconomicus*", with his attendant characteristics of "selfishness and egocentrism, lust for possession, profit and power"[216], constitutes a primary threat to human rights realisation in postmodern societies and beyond. The potential of Mouffe's harmonised notion of citizenship to challenge such a development, by virtue of being driven both by a respect for liberal freedoms and by a conception of the good which is inspired by human rights principles (and the solidarities or ethics they have woven), is one which could be of immense value.

This leads us to the postulated invigoration of politics, since this notion seems to successfully negotiate the difficult, but pivotal, question of the relationship between morality and politics. While the separation between the realm of morality and the realm of politics has signified "an incontestable gain in freedom", responsible as it is for the emergence of the individual, the separation of Church and State, the principles of religious tolerance, and the development of civil society, it has, nonetheless, had very damaging consequences for politics.[217] This is primarily because all normative concerns have increasingly been relegated to the field of private morality and politics stripped of its ethical components. As Mouffe contends:

"liberalism's exclusive concern with individuals and their rights has not provided content and guidance for the exercise of those rights. This has led to the devaluation of civic action, of common concern, which has caused an increasing lack of social cohesion in democratic societies."[218]

[215] W. Dieter Narr, A. Belden Fields, *op cit*, p. 19 & p. 10.
[216] P. Leuprecht, *op cit,* p. 961.
[217] C. Mouffe, *op cit*, p. 33 & p. 65.
[218] *Ibidem*, p. 65.

Where the strength of human rights may lie in this context is in their capacity to rehabilitate a political vision of the good (via means described above) which is not totalistic, finite or conclusively defined (as was traditionally the case with the public common good), but open to constant revision and public deliberation. In this way, while subject to perpetual contestation (or politics) for precise definition, a public ethic is edified around human rights principles and the notion of 'civic virtue' restored. As Mouffe puts it, what is sought is the generation of an "*ethico-political bond* that creates a linkage among the participants in [an] association [which] allows us to speak of a political 'community', even if it is not in the strong sense" (emphasis added).[219]

Such optimism for the politically empowering potential of human rights is intensified when we consider Giddens' accordance of a primary role to their normativity in the development of "social reflexivity" or a "*generative life politics*" which (echoing earlier contentions) goes far beyond the traditional boundaries and practices of liberal democracy, being much more holistic and horizontal in nature. Based on the notion of human agency, such a generative politics "is a politics which seeks to allow individuals and groups to *make things happen*, rather than have things happen to them, in the context of overall social concerns and goals."[220] A similar source of rights optimism can be found in the fact that when seeking an answer as to what values, in an age of relativism, might provide the agenda for a modern 'radical politics', Giddens points to the emergence for the first time in history of truly universal values, of which human rights form an integral part. These values, he argues, are not negative values in the liberal tradition, but go much farther to imply and construct "ethics of individual and collective responsibility". Crucially, such *responsibility* is entirely distinct from *duty* in so far as it implies the spelling out of reasons and not blind allegiance. For this reason it has its own compelling power, since, supporting earlier criticism of the 'top-down' legalistic approach, "commitments freely undertaken often have greater binding force than those which are simply traditionally given."[221]

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[219] *Ibidem*, p. 66.
[220] A. Giddens, *op cit*, p. 15.
[221] *Ibidem*, p. 21.

5.5 Conclusion

Each of the discourses and practices in respect of human rights discussed here would aim towards the construction of radical democracies populated by citizens whose concerns for equality and liberty inform their actions in all areas of daily social life. Contrary to the visions of rights previously described, there is no will to drive contentious politics into extinction, nor any conviction that ideology can or should be dispensed with. Rather, these are viewed as necessarily permanent, indispensable societal features which must be reinvigorated with an expansive conception of human rights and harnessed as a means to their effective realisation. The notion of human rights as law providing an expedient alternative to the difficult task of mending our democracies, or as providing an ethical navigational system for a polity on institutional 'autopilot', is similarly rejected on foot of the conviction that the foremost threat to human rights is to be found in the death of Aristotle's *zoon politikon* and the rise of atomised societies composed of privatised, singularly self-interested individuals – a development that rights culture itself can help to precipitate, when abstracted from the associational context and in the absence of a strong civil society.

Statist, 'top-down', legalistic modes of conceiving rights are thus seen as largely ineffective and in many respects conflicting with the emancipatory aims inherent in human rights. Rather it is argued that human rights must, first and foremost, enjoy 'grass-root' dissemination, activation and ownership. It seems that Eleanor Roosevelt herself sought to make a similar point when she wrote:

"Where, after all, do universal human rights begin? In small places, close to home – so close and so small that they cannot be seen on any maps of the world. Yet they are the world of the individual person; the neighbourhood he lives in; the school or college he attends; the factory, farm, or office where he works. Such are the places where every man, woman, and child seeks equal justice, equal opportunity, equal dignity without discrimination. Unless these rights have meaning there, they have little meaning

anywhere. Without concerted citizen action to uphold them close to home, we shall look in vain for progress in the larger world."[222]

Human rights are thus perceived less as instruments of jurisdictional control or as legitimators of state power and more as normative mobilisers for popular political engagement. Instead of comprising a series of limitations to be imposed on man's passions, human rights are perceived as a means of inspiring those collective passions with the will to create more just societies. However, while it is in this way hoped that there will take place a development of what one might call social psychologies of human rights, this does not entail the utopic assumption that harmonious societies of cooperative satiation would result, or that this would even be desirable. Indeed, this would run against the presented notions of human rights as perpetual process and democratic politics as inherently and necessarily antagonistic. As Landman and Foweraker insist, dismissing the notion that "the better we behave, the more democracy we get":

"*…everything in the present study indicates…that the democratic qualities of civil society do not have to do with 'civicness' but with the associationalism which supports social mobilisation and political contestation; that democracy is not the comfortable result of righteous conduct but the result of prolonged struggle…*"[223]

While this view may miss the linkage between associationalism and certain concepts of citizenship, it would indeed seem that an empowering vision of human rights is one which lends itself to popular activism and critique, non-violent antagonism and, above all, to a participatory deliberative politics.

[222] Eleanor Roosevelt, quoted at http://www.udhr.org/history/biographies/bioer.htm
[223] J. Foweraker, T. Landman, *op cit*, p. 243.

6. Conclusion

It was stated at the outset of this discussion that, far from constituting a coherent, monolithic whole, human rights is a diffuse concept replete with internal contradictions and paradoxes. This much, at least, I hope to have successfully demonstrated. However, if the purpose was to gain a better appreciation of the progressive potential of human rights through an examination of the many discourses and practices that they inform, what is the final picture that would seem to emerge over the course of examining these contradictions and paradoxes?

We saw in the last chapter how human rights can serve to empower and invigorate a participatory politics, and how it is in their normative, pre-institutional form that rights can prove to be of greatest dynamic or transformative value.[224] Against this, we saw in chapters 3 and 4 how rights can also betray a tacit desire to radically diminish (or impoverish) such a participatory politics, and how institutionalisation can bring us closer to that result, at no necessary greater advantage to human rights objectives. Thus, although at first the protagonist of the political arena, it would appear that a switching of roles to that of antagonist would inevitably await any successful rights claim.

That is, unless, in this legalistic 'age of institutions', we can reverse the situation whereby we have "…given up on the capacity of human beings to do anything right and of human communities to solve any problem"[225], in order to find more participatory, alternative modes of deploying rights which prevent them from merely implying or requiring the substitution of one form of concentrated power for another. As was already noted, this will entail the "search for alternative forms of governance…[which]…allow for enhanced participation, democratic decentralisation, and accountability".[226] As Baxi rightly insists, "the future for human rights, if any, lies in *inventing forms of participatory governance*."[227] The innate irony of human rights is that it can both promote and inhibit

[224] See T. Risse et al., *op cit*.
[225] W. Brown, *op cit*, pp. 26-27.
[226] N. Aziz, *op cit*, p. 8.
[227] U. Baxi, *op cit*, p. 65.

this goal, that human rights can lead both to political empowerment and impoverishment, depending on how it is conceived and deployed.

Stone argues that the ascending dominance of the courts in political affairs and consequent problems in terms of legitimacy can be resolved by increasing participation in litigation and promoting popular access to legal institutions. Yet, even if this were desirable, logistically possible[228] or likely to better serve the aim of realising human rights, I believe the observations made here would indicate that such a transformation is somewhat problematic in so far as court room politics arguably leave little opportunity or necessity for deliberative, consensual, participatory democracy. While it may be true to some extent that "opening the doors to our legal system…will move us a little closer to the ideal of equal justice for all", rights advocates perhaps need to consider just how very distant such an ideal remains in practice and which methods may help close this distance with the urgency which is required.[229] My contention would be that the cautious incrementalism of the court room is not the most expeditious route to human rights fulfillment. Since we may note that despite the longstanding presence of the universal in the language of law universal justice is yet to be served, it may be reasonable to suggest that what is perhaps required is not necessarily more law or increased access to it, but new methods of promoting adherence. The overall point I seek to make here is that in order for human rights to be both effective and meaningful they must, above all, be struggled for and given voice 'from below', thereby enjoying a more dynamic and reflexive form. While related initiatives coming 'from above' can in instances be productive or of assistance, there must be a greater awareness, not just of the potential of institutionalised rights to ultimately function against (or to block) human rights objectives and channel power away from the demos, but, more importantly, of the relative ineffectuality of any such benevolent endeavours in the absence of a vigorous civil society broadly seeking the same objectives. As Stammers writes, "institutional structures are not likely to be a fertile soil through which….power can be effectively challenged unless those institutions are themselves being forced to adapt and change as a

[228] The current experience of the European Court of Human Rights at Strasbourg would serve to indicate how the courts are being massively overwhelmed by the numbers of petitions coming from the public.
[229] R. Singh, *op cit,* p. 119.

consequence of further challenges from outside those institutions."[230] Above any other human rights strategy must feature that which generates broad-based political mobilisation and accords greatest ownership over human rights to the people who need them most. As Baxi rightfully warns, if this is not the case and "the violated feel that like previous languages…human rights interpellate or insert them merely as discursive objects in the politics *of* rights, [then] the future of human rights must become radically insecure."[231]

At the close of this study, it is my contention that, excluding those core rights which are elementary to the function of democratic politics, the potency of rights lies less in their concreteness, and more in their idealism, in their ideal configuration of an egalitarian society, an ideal that is contradicted by substantive social inequalities which the courts themselves are neither inclined nor competent to resolve, but which can be adopted as a manifesto or mobilising vision by social forces which can and will engage in a constructive 'politics *for* human rights', which may enrich our moribund democracies.[232] To the extent that such a politics is finite rather than perpetual (with human rights seen as ends and not historical political instruments), displaying few misgivings about the antidemocratic nature of transferring ever greater areas of collective life from the relatively accessible sphere of popular contestation to the more restricted sphere of judicial authority, human rights is perhaps destined to exhaust itself and precipitate its own demise. An ideology which relegates the role of an antagonistic deliberative democratic politics based on the principles of political equality and popular control to second place, and sees the future in terms of expert and judicial administration is one which is, in my view, destined to fail, both in terms of its objectives and as a viable organisational system more generally. As was suggested earlier, "[f]or a radical and plural democracy, the belief that a final resolution of conflicts is eventually possible[,]…far from providing the necessary horizon of the democratic project, is

[230] N. Stammers, *Social Movements and the Social Construction of Human Rights*, in <<Human Rights Quarterly>>, vol. 21, 1999, p. 998.
[231] U. Baxi, *op cit*, p. 66.
[232] See W. Brown, *op cit*, p. 134.

something which puts it at risk.[233] If human rights are about liberation, emancipation, self-determination and empowerment, then there is something badly amiss when their result is one of bureaucratisation and a stifling judicialisation of political processes. As long as human rights are seen as the rightful property of institutions rather than people, then their progressive value will be obstructed, along with the "dream of democracy – that humans might govern themselves by governing together."[234]

[233] C. Mouffe, *op cit*, p. 8.
[234] W. Brown, *op cit*, p. 5.

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ANNEX: **Declaration of Authorship**

"I certify that the attached is all my own work. I understand that I may be penalised if I use the words of others without acknowledgement"

Signed: _____

David O'Connell