# *Conference Report* – Widening the Scope: Reflections on the Human Rights Law Session of the XV$^{th}$ Academy of European Law

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## A. Introduction

The Human Rights Law Session of the XV$^{th}$ Academy of European Law at the European University Institute in Florence (21 June – 2 July 2004, Villa Schifanoia)[1] focused on two prominent contemporary subjects: In the general course, entitled *Human Rights Obligations of Non-state Actors: Time for a Radical Rethink,* Andrew Clapham presented his advanced ideas on the horizontal application of human rights law and in a total of five specialized courses, Michel Rosenfeld, Eva Brems, Jiri Priban, Wojciech Sadurski, Colin Warbrick and Victor Ferreres Comella elaborated different aspects concerning *Political Rights under Stress in 21$^{st}$-century Europe*. Finally, in a distinguished lecture, Andrew Drzemczewski outlined the effectiveness of the Council of Europe monitoring mechanisms.

## B. The Status Quo of Human Rights Obligations of Non-state Actors

### I. General Concept

As the title of his general course implies at first glance Andrew Clapham (Graduate Institute of International Studies, Geneva) challenges the traditional presumption that – apart from a few exceptions – human rights may only be applied in the sphere between States and individuals. Clapham, who in 1991 successfully de-

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[1] The lectures delivered during both the Human Rights Law and European Law sessions of the XVth Academy of European Law will be published in the series The Collected Courses of the Academy of European Law at Oxford University Press.

fended his Ph. D. thesis on this subject at the European University Institute,[2] has in the meantime broadened his perspective in two ways: firstly, with the evolvement and increasing importance of numerous non-state actors in international relations in the course of the 1990s Clapham now deals with an enlarged series of possible subjects of human rights obligations. Secondly, while ten years ago he had predominantly focused on the European Convention on Human Rights, in this year's general course at the Academy, he presented a general picture of how he views the various sources of international law that deal with human rights obligations of non-state actors. Currently he is framing this picture into a book entitled *The Human Rights Obligations of Non-state Actors* to be published by Oxford University Press.

Undoubtedly, in the era of globalization with the enduring growth of transnational corporations into entities much more powerful than many small States, resting with the old approach that holds only States accountable for human rights violations appears more and more to be unsatisfactory. At the same time, the withdrawal of the (Western) State from areas historically regarded to be within its exclusive domain following the concept of privatization shifts human rights-sensitive areas into the ambit of private entities; as a consequence thereof the threat that human rights violators may, under certain circumstances, go unpunished is omnipresent.

The question as to whether non-state actors may be held accountable for human rights violations is inseparable from the general concept of human rights. Do we still consider them to be protective only against excessive State power or to be rights which every person enjoys by virtue of being human, without any supplementary condition being required? Clapham unsurprisingly follows the prevailing second approach which is, *inter alia,* reflected in the Universal Declaration of Human Rights[3] and countless other human rights instruments as well as national constitutions. If we thus accept that human rights are inherent in every individual, it is legitimate to ask why infringements should (still) be confined only to State entities and violations by non-state organs should be excluded.

## II. Legal Foundations

Clapham began from a South African perspective with an excerpt from J. M. Coetzee's *Disgrace*, in which the laureate of the 2003 Nobel Prize for Literature illustrates accusations of serious violations of human rights against a university professor for

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[2] A. CLAPHAM, HUMAN RIGHTS IN THE PRIVATE SPHERE (1993).

[3] The first sentence of Art. 1 of the Universal Declaration of Human Rights, GA-Res. 217(III), 19 December 1948, 3 UN-GAOR 71, UN-Doc. A/810 (1948) stipulates: "All human beings are born free and equal in dignity and rights".

his sexual involvement with a female student. The country at the Cape of Good Hope was the perfect starting point as it represents one of the societies most willing to apply a wide concept of human rights obligations. This is reflected by both the country's historic concern to deal with alleged human rights violations of black opposition groups (primarily the ANC) during the apartheid regime as well as the contemporary, liberal practice of its constitutional court favoring horizontal application of human rights.[4] In other countries, courts have been much more reluctant to apply human rights *inter privatos*. This is true, for example, with regard to jurisprudence in the United Kingdom concerning accountability under the British Human Rights Act. Only acts of public authorities fall within the scope of the act, public authority being defined as "any person certain of whose functions are functions of a public nature".[5] The crucial question as to what shall be deemed to be functions of a public nature has been assessed by the House of Lords differently in distinct cases: restrictive in *Poplar*[6] and in *Leonard Cheshire*[7], more broadly in *Aston Cantlow*[8].

While highlighting such examples from national jurisdictions, Clapham focused, however, predominantly on supplying evidence for *de lege lata* human rights obligations of non-state actors at an international level. Thus the former representative of Amnesty International at the United Nations in New York took in all various sources of international law and based his enquiry primarily on the following pillars: human rights treaties, international organizations, corporations and non-state actors in armed conflicts. Of key significance, according to Clapham, is the wording of the Universal Declaration of Human Rights:[9] Clapham stresses the fact that their drafters deliberately refrained from references to States – pursuant to him, they did only do so as an exception to the rule in Articles 16 § 3, 22 and 30. Thus, in the absence of any other restrictions, human rights might in general be applied horizontally.

Under Human Rights Treaties, Clapham refers to numerous international and regional human rights instruments. He addresses General Comment 31 on Art. 2 of

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[4] *See Fred Khumalo, Skhumbuzo Miya, Fidel Mbhele, Times Media Limited, New Africa Publications Limited v. Bantubonke Harrington Holomisa*, Constitutional Court of South Africa, Case CCT 53/01.

[5] Section 6 § 3 (b) of the Human Rights Act 1998. *See* House of Lords, House of Commons, Joint Committee on Human Rights,The Meaning of Public Authority under the Human Rights Act, Seventh Report of session 2003-4.

[6] *Poplar Housing and Regeneration Community Association v Donoghue* EWCA Civ 595, 2001..

[7] *Callin, Heather and Ward v Leonard Cheshire Foundation* EWCA Civ 366, (2002).

[8] Aston Cantlow, Appellate Committee of the House of Lords UKHL 37 (2003).

[9] *Supra* at note 3.

the International Covenant on Civil and Political Rights[10] as well as General Comment 14 on Art. 12 of the International Covenant on Economic, Social and Cultural Rights[11], the former declining whereas the latter welcomes responsibilities for individual bodies. In the context of the International Convention on the Elimination of All Forms of Racial Discrimination,[12] Clapham also included the EU anti-discrimination directives[13] in his survey – these directives being one of the most significant tools providing for horizontal application of human rights, would have benefited from greater discussion. Instead, the case-law of the European Court of Human Rights on the European Convention on Human Rights[14] was (mis)used to support the concept of human rights obligations for non-state actors. In general, it is extremely questionable whether the Strasbourg Court's cases do in fact support a concept of direct accountability of individuals for human rights violations: in all its cases, the European Court of Human Rights in all its cases solely examines the responsibility of State Parties to the European Convention on Human Rights – what is at stake with respect to relations *inter privatos* are therefore exclusively positive obligations of States under the Convention, their implementation remaining within the margin of appreciation of State Parties. Regardless of this, Clapham outlined several cases in greater detail. The case of *Appleby and Others v. The United Kingdom* represents a setback for his approach as the Court found the prohibition of locating a petition campaign in a (private) shopping mall neither to constitute a violation of Art. 10 nor Art. 11 ECHR.[15] In contrast, in the case of *VGT Verein gegen Tierfabriken v. Switzerland*, the Court found a violation of Art. 10 ECHR in the refusal of the

[10] General Comment No. 31 of the Human Rights Committee (21 April 2004) on Art. 2 of the International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171, *available at* http://www.unhchr.ch/tbs/doc.nsf/.

[11] General Comment No. 14 of the Committee on Economic, Social and Cultural Rights (11 August 2000) on Art. 12 of the International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 UNTS 3, *available at* http://www.unhchr.ch/tbs/doc.nsf/.

[12] International Convention on the Elimination of all Forms of Racial Discrimination, 7 March 1966, 660 UNTS 221.

[13] *See* Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, 2000 O.J. (L 180) 22ss, and Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, 2000 O.J. (L 303) 16ss.

[14] European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 UNTS 221.

[15] *Appleby and Others v. The United Kingdom*, Eur.Ct.HR (Judgement of 6 May 2003), *available at* http://www.echr.coe.int/Eng/Judgments.htm. However, in his partly dissenting opinion Judge Maruste found a violation of Arts. 10 and 11 ECHR and argued that it could not be the case that through privatization public authorities divest themselves of any responsibility to protect rights and freedoms other than property rights.

Commercial Television Company to broadcast a controversial "eat less meat" commercial during a program of the Swiss Radio and Television Company.[16] With reference to refugee law, Clapham relied on the Case of *H.L.R. v. France*[17], where the Court held that protection under Art. 3 ECHR forbids expulsion also in situations where persecution results from private but not from State organs. However, this case seems inappropriate to give evidence for horizontal application of human rights as it merely contemplates the notion of persecution triggering the application of Art. 3 ECHR.

The second pillar, international organizations, leads Clapham to combating terrorism and the ongoing debate as to whether terrorist action constitutes a human rights violation or not.[18] One can argue, as Clapham does, that this is the case. Underpinning this position, he argues, is *inter alia* the UN Declaration on the Elimination of All Forms of Terrorism.[19] Furthermore, he analyses individual responsibility under the concept of "crimes against humanity" within international criminal law to reflect *de facto* systematic and widespread violations of human rights as referred to in the ILC's very early drafts on this subject;[20] as a corollary, crimes against humanity constitute more or less a synonym for an area where individuals do already have human rights obligations, even if they are only held accountable for certain gross violations of human rights. Undoubtedly, this line of reasoning seems to be one of the most convincing arguments favoring the horizontal application of human rights. The rise of international criminal law in the past decade and its blurry demarcation from international human rights law in particular in connection with the combat of terrorism, certainly appears to support this concept.

Clapham presented a broad picture, again involving and incurring benefit from recent developments in international law such as the establishment of the WTO and its delicate relationship with human rights law. He accentuated the role of World

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[16] *VGT Verein gegen Tierfabriken v. Switzerland,* Eur.Ct.HR RJD 2001-VI, 243. (Judgement of 28 June 2001),.

[17] *H.L.R. v. France.*, Eur.Ct.HR RJD 1997-III, 745 (Judgement of 29 April 1997).

[18] This may be seen as one aspect of the more general discussion whether international law is undergoing a more or less fundamental change in the wake of the terrorist activities in recent years. *See* W.H. Taft IV, J.J. Paust, R. Dolzer and K.M. Meesen, *Symposium: Current Pressures on International Humanitarian Law*, YALE J. OF INT'L LAW 2003 317,54.

[19] Annexed to GA-Res. 49/60, which states in its preamble: "[…] Concerned at the growing and dangerous links between terrorist groups and drug traffickers and their paramilitary gangs, which have resorted to all types of violence, thus endangering the constitutional order of States and violating basic human rights, […]" [emphasis added].

[20] *See* Art. 7 Rome Statute of the International Criminal Court, 17 July 1998, 2187 UNTS 3, 37 ILM 999 (1998).

Bank and other similar institutions granting financial support for foreign large-scale investments to transnational corporations contingent upon the positive outcome of Human Rights Impact Assessments assuring adherence to human rights. Dealing with the European Union provided inevitably the perfect precedent on how international organizations submit themselves as subjects to human rights obligations.[21] With the incorporation of the Human Rights Charter into the Draft Constitution of the European Union and the EU's envisaged accession to the European Convention on Human Rights, this process has been given new impetus;[22] within Clapham's opus it is just one, but a very glittering element. Recognizing the fact that the European Union has committed itself to a wide range of human rights obligations, Clapham drew support for his argument from recent judgments of the European Court of Justice; *in concreto* the *Angonese*[23] and *Schmidberger*[24] cases. However, this conclusion seems to be somehow oversimplified: whereas the former case established the free movement of workers to be applied on a horizontal level, in the second case, Austria was charged with a violation of the free movement of goods for not having banned a demonstration triggering the closure of an important motorway route. In its judgment in *Schmidberger*, the ECJ acquitted Austria as it found that the freedom of association prevailed over the free movement of goods. In any event, it remains doubtful why these cases strengthen the concept of human rights obligations of non-state actors as, similar to the European Court of Human Rights, they raise questions of a State's responsibility for omissions to intervene but none of individual responsibility.

A fundamental pillar of the approach towards human rights obligations of non-state actors constitutes the role of trans- and multinational corporations. From a political perspective, their accountability under international law would be highly desirable. From a legal point of view, it is controversial whether such corporations are deemed to have at least partial subjectivity under international law and whether they face certain human rights obligations or not.[25] In fact, this process is

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[21] *See* Treaty on the European Union, Art. 6, 2002 O.J. (C 325).

[22] *See* Draft Treaty establishing a Constitution for Europe, Art. I-7 § 2 and Part II The Charter of fundamental rights of the Union, 2003 O.J. (C 169) and the provisional consolidated version of the Draft Treaty establishing a constitution for Europe, Doc. CIG 87/04, available at http://europa.eu.int/futurum/eu_constitution_en.htm.

[23] Case C-281/98, Angonese, Eur.Ct.J. (Judgement of 6 June 2000), *available at* http://curia.eu.int.

[24] Case C-112/00, Schmidberger, Eur.Ct.J. (Judgement of 12 June 2003), *available at* http://curia.eu.int.

[25] M. N. SHAW, INTERNATIONAL LAW 224 (5th ed. 2003); P. DAILLIER, A. PELLET, DROIT INTERNATIONAL PUBLIC 1051 (7ième éd. 2002) ; The Third US Restatement of Foreign Relations Law, St Paul, 1987, 126 notes that the transnational corporation, while an established feature of international life, "has not yet achieved independent status in international law".

an ongoing one and some "soft law" instruments already foresee certain responsibilities for corporations. Clapham highlighted the new UN Human Rights Norms for Business[26] as well as the OECD Guidelines for Multinational Enterprises,[27] both being voluntary and legally unenforceable. A field where corporations may be confronted with obligations under these instruments is and will increasingly be international investment arbitration. However, it will primarily rest with domestic courts to apply human rights law to corporations; currently national courts and tribunals still tend to be reluctant to exercise jurisdiction in cases concerning alleged human rights violations by corporations, particularly if these occurred abroad. Another issue is the question of the applicable law, as Clapham illustrated with the *Case of Doe I v. Unocal Corp*.[28] concerning claims for human rights violations based on the U.S. Alien Tort Claims Act (ATCA) against an investor in Myanmar. In this context he also referred to the U.S. Supreme Court case *Sosa v. Alvarez-Machain* including some difficult questions on the scope and interpretation of the ATCA as well as the applicable substantive law:[29] as this case was concluded on 29 June 2004, the last day of his general course, Clapham was not yet able to present his evaluation of the Supreme Court's decision which reversed the Judgment of the Court of Appeals for the Ninth Circuit which had awarded Alvarez-Machain summary judgment and damages on the basis of the ATCA claim. To put it briefly, the Supreme Court adopted a restrained concept of the federal courts' discretion in recognizing private causes of action for certain torts in violation of the

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[26] *See Commentary on the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, U.N. Doc. E/CN.4/Sub.2/2003/38/Rev.2 (2003).

[27] The OECD Guidelines for Multinational Enterprises, Revision 2000 with Commentaries, *available at* http://www.oecd.org/dataoecd/56/36/1922428.pdf.

[28] *Doe I v. Unocal Corp*., 963 F.Supp. 880 (C.D. Cal. 1997, appealed in the 9th Circ. 2002).

[29] *Sosa v. Alvarez-Machain*, , (US Supr. Ct. Decided 29 June 2004 together with *United States v. Alvarez-Machain*) The case of Alvarez-Machain began in 1985 when an agent of the US Drug Enforcement Administration (DEA) investigating in Mexico was kidnapped, tortured and murdered by a group of Mexicans. Among the suspects was Humberto Alvarez-Machain, an obstetrician from Guadalajara, who was taken custody of by DEA officials (among them the former policeman Jose Francisco Sosa) and abducted to El Paso, Texas. In the subsequent criminal proceedings against him, Alvarez-Machain argued that federal courts lacked jurisdiction to try him due to the manner by which he was apprehended. The Supreme Court finally held that Alvarez-Machain could be tried in the US following the doctrine of male captus, bene detentus (*Alvarez-Machain v. United States*, 504 U.S. 655 (1992). However, in the following federal court trial Alvarez-Machain was acquitted. In 1993, Alvarez-Machain now on his behalf brought a civil lawsuit alleging various torts against Sosa and other individuals (based on the Alien Tort Claims Act) as well as against the United States (based on the Federal Tort Claims Act). The district court granted the government's motion to dismiss the FTCA claim but held on the basis of the ATCA that Alvarez-Machain could recover damages for his detention prior to his arrival in the United States and awarded him $25,000. The latter decision was affirmed by the Court of Appeals for the Ninth Circuit on 11 September 2001, while the dismissal of the FTCA claim was reversed (266 F. 3d 1045 (2001)). The Supreme Court granted certiorari to clarify the scope of the FTCA and the ATCA (540 U.S. 1045 (2003).

law of the nations.[30] In the question of the applicable law, the Supreme Court denied that Alvarez-Machains's detention of less than one day violated any norm of customary international law.[31]

What is true for international criminal law equally applies to international humanitarian law: for it is of course closely intertwined with international human rights law. Firstly, Common Article III of the four Geneva Conventions expressly lays down the duty of "each Party to the conflict" to respect certain basic human rights such as the prohibition of torture. According to the International Committee of the Red Cross and various other sources, the notion "each Party to the conflict" applies, regardless of reciprocity, also to non-signatory Parties;[32] as a corollary, Clapham considered that rebel groups and insurrectional movements might qualify as such parties what leads him to the quandary in which (at least a part) of the international community is trapped between the wish to indict such groups and movements without thereby acknowledging their existence. In this context, he puts emphasis on Art. 10 of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts providing that the conduct of an insurrectional movement which becomes the new government of a State shall be considered an act of that State under international law.[33]

## III. Implementation

Clapham presented a very thoroughly prepared, interactive and inspiring general course, covering so many items that it is impossible to be all-embracing here. At the beginning, he had announced that the course would be a test of his approach among young international law lawyers. Clapham's concept basically passed this test, but, however, he must not overlook that there was substantial vigorous and justified opposition. More than once his separation of *de lege lata* from *de lege ferenda* argumentation became extremely blurred. Time running out, the other side of the coin, the implementation of human rights obligations of non-state actors was pre-

[30] The Supreme Court put forward several reasons arguing for great caution in adopting the law of nations to private rights (see pages 30 – 37 of the judgment) and reversed the award of damages. The reversal of the dismissal of the FTCA claim by the Ninth Circuit Court of Appeals was also repealed.

[31] Referring to its established case-law (*The Paquete Habana*, 175 U.S., at 700) the Supreme Court, albeit cautiously, recognized at page 40 of its judgment that, in the absence of a treaty "[R]esort must be had to the customs and usages of civilized nations".

[32] *See* Commentaries of the ICRC to the Geneva Conventions 1949 and the 1977 Protocols, Art. 3, 52, *available at* http://www.icrc.org/ihl.nsf/WebCONVART?OpenView.

[33] *See* Art. 10, Commentaries to the Draft Articles of States for Internationally Wrongful Acts, ILC Report, 53rd Session, 56 UN-GAOR, Supp.No.10, UN-Doc.A/56/10(2001), 111.

sented only in a nutshell. However, enforcement constitutes the core problem of the issue; thus, it appears to be arguing for the application of the principle of complementarity, which figures so prominently in international criminal law,[34] to international human rights law as well – but how should this precisely be accomplished? The Gordian knot not yet dissolved, it is important to have a rebel like Andrew Clapham heading in the right direction.

### C. An Evaluation of Political Rights in 21st Century Europe

#### I. Context of Political Rights

Different from the subject of Andrew Clapham's general course, the Human Rights Law Session's specialized courses presented an overview of the current status of political rights in Europe. Although those lectures covered a wide range of issues, they all relied on two basic principles constituting the thread in the context of political rights: democracy and human rights. Regarding their typology, political rights are to be qualified as human rights. Focusing on their content, they have important functions in a democracy. The interesting aspect of this distinction is the relationship between democracy and human rights. The typical function of human rights is to limit the powers of the democratic legislator. On the contrary, political rights – although human rights – are necessary to constitute and guarantee democracy.

Michel Rosenfeld (Benjamin N. Cardozo School of Law, New York) introduced the theory of political rights and highlighted the topic in a broader perspective. Democracy became the outset of his considerations. The concept of democracy is a matter of perspective. There are three traditional conceptions of democracy: the liberal, the republican and the communitarian conception. According to the liberal concept (John Locke), the function of society is to ensure better protection of the people. Human beings who govern are agents for the people, and as much as possible should be left to the private sphere. As a result, political rights are limited because of the restricted nature of politics. From a republican perspective (Jean-Jacques Rousseau), democracy is a matter of duty. People *have to perform* their political rights because these are not only rights but also duties. Finally, from a communitarian perspective, political rights are not necessary. In this model of self-determination, only fair political process is important.

There are, according to Rosenfeld, five different levels of democracy: the international level (global level), the supranational level (*e.g.* the European Union), the

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[34] *See* Preamble, Arts. 1 and 17 of the Rome Statute of the International Criminal Court,note 20.

level of the nation-state, the subnational level, and the local level. The "*Secession of Quebec*"- Case highlights the importance of democracy in relation to federalism.[35] The Canadian Supreme Court held that the democratic principle requires, in the case of secession, a referendum in Quebec and that all other provinces and the federal government come to the negotiating table to discuss some kind of constitutional amendment. According to Robert Dahl, there are seven aspects of an ideal and functional modern democracy:[36] elected officials, free and fair elections, inclusive suffrage, the right to run for an office, freedom of expression, alternative sources of information (non-government controlled information) and the access to associations, interest groups and parties. Thus, the success of democracy depends on political rights. These rights are positive rights because it is a prerequisite that they are organized by the State.

**II. Militant democracy**

Political rights – as democracy in general – are under stress at the beginning of this new century. It is controversial whether and to what extent democracy contains limits in cases democracy is attacked by people misusing its basic values. How long can democracy accept anti-democratic activities and how far should the system go to stop these developments? These are the questions of militant democracy. Militant democracy measures are essential to protect the people from themselves. There is an inherent tendency of governments (persons in power) to become authoritarian. Political rights are of uttermost importance in establishing a democracy, but in a context in which democracy is under threat, the limitation of political rights is required to sustain democracy.

On the other hand, political pluralism is absolutely necessary for democracy. The limitation of political rights can also be dangerous in a sense that any other political views (than governmental) would be called anti-democratic. The topic becomes even more complex if these "anti-democratic" movements are elected democratically by society, as in the take-over of the Nazi Party in the early 1930s. The democratic dilemma is immanent and parallels that of tolerance. If tolerance is accepted and established it will meet Popper's paradox of tolerance:[37] can the tolerant accept also the intolerant? If yes, intolerance will establish itself; if not, the tolerant are not tolerant anymore. There are various implementation measures of militant democ-

[35] *See* Reference Re Secession of Quebec, Supreme Court (Canada) [1998] 2.S.C.R. 217; N. Dorsen et al, Comparative Constitutionalism (2003) Chapter 11, Sect. A.

[36] R. DAHL, DEMOCRACY AND ITS CRITICS 221 (1989) 221.

[37] M. Rosenfeld, *Spinoza's Dialectic and the Paradoxes of Tolerance: A Foundation for Pluralism?*, CARDOZO LAW SCHOOL, PUBLIC LAW RESEARCH PAPER NO. 79, 12, *available at* http://ssrn.com/abstract=466360.

racy such as limitation on freedom of speech, especially hate speech, or the control over political parties. In post-communist countries, the de-communization process had a "militant democracy" aspect. Lustration, which means the revelation of the cooperation of former politicians or officers with secret services, was intended to defend democracy against non-democratic actors. It was not justified as an act of revenge; it is not past-orientated, but utilitarian, future-orientated.[38] People engaged in such secret service activities in the communist era might not be trustworthy because it could not be certain that they would adhere to democratic values.

The limits of political rights are also relevant regarding the right to freedom of association. Eva Brems (University of Ghent, Belgium) discussed the delicate question of party bans. In her lecture, she covered various possibilities for handling anti-democratic or human-rights violating political parties. A refusal of registration is, for instance, possible in the same way as prosecution of individual party members (for acts committed but even because of mere party membership) or restrictions on state subventions. Such measures taken against parties are, as a rule, very controversial. In the case of *Refah Partisi v. Turkey*, the ECHR accepted the dissolution of the Welfare party, even though this political party was part of the government and legitimately elected.[39]

**III. Freedom of expression**

The right to freedom of expression turned out to be the crucial point of all the discussions about political rights. Every subject was linked to the freedom of speech in some way. But why is free speech a political right? There are different justifications: the first way of justifying it is that free speech is necessary to discover "truth". We could experience truth in debate. Another "collective justification" is to argue that different views have to be tested in order to generate democratic rules. Dworkin's justification focuses on the speakers. It is a necessary part of the autonomy of the individual. The fourth justification is related to dignity: free speech should not concern autonomy solely with respect to the speaker but also involves the dignity of the listener. In conclusion, free speech is a political right because in a liberal democracy the individual has to choose his or her political arrangements. Discussion is necessary for democracy.[40]

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[38] *See* Council of Europe Resolution 1096 (1996) 1 on measures to dismantle the heritage of former communist totalitarian systems, *available at* http://www.coe.int/.

[39] *Refah Partisi (The Welfare Party) v. Turkey*, Eur.Ct.HR (Judgement of 13 February 2003), *available at* http://www.echr.coe.int/Eng/Judgments.htm.

[40] J. HABERMAS, FAKTIZITÄT UND GELTUNG: BEITRÄGE ZUR DISKURSTHEORIE DES RECHTS UND DES DEMOKRATISCHEN RECHTSSTAATES (2nd ed. 2001).

A separate special course was dedicated to the jurisdiction of the European Court of Human Rights concerning the right to freedom of expression (Victor Ferreres Comella, Pompeu Fabra University, Barcelona). The limits of free speech are related to the general distinction of the European Court between factual statements and value judgments. This distinction has been developed in three Austrian Cases[41] because of the strict interpretation of Austrian courts. Whereas a factual statement can be proven, value judgments have to be proportionate. If the underlying facts of value judgments are wrong, there is no protection by the Convention.

The current justification for parliamentary privileges (immunity) can be questionable in cases regarding freedom of expression. When politicians insult other persons who can not protect themselves against these unfounded attacks,[42] there should be a possibility for the attacked person to sue the politician. Moreover, the "protection" of judicial decisions against unfounded attacks is necessary to establish and uphold the authority of the judiciary.[43] This special protection is justified since judges usually must abstain from responding to (excessive) critique. In order to protect their independence, judges are normally under a duty to remain silent. Thus, if their possibilities of response are limited, it would be necessary to balance these differences. As insulting remarks are more easily offensive if they are directed against a judge, the limits for insulting judges are lower than in other circumstances. It is controversial whether it is necessary to differentiate between constitutional courts and ordinary courts, between lawyers – non lawyers, lawyers in this case – other lawyers, criticism of a judge as a private person or as a judge. The importance of freedom of expression as political right is also affected by privatization. In this respect, the adherence of political rights by non-state actors becomes more and more important.[44]

It follows that freedom of speech has two main aspects: First, it is a human right that gives individuals the possibility to articulate ideas. Freedom of speech in a liberal society prevents suppression by the State. Moreover, freedom of speech is a

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[41] *Lingens v. Austria*, Eur.Ct.HR Ser. A-103, 11 (Judgement of 8 July 1986); *Andreas Wabl v. Austria*, Eur.Ct.HR (Judgement of 21 March 2000), *available at* http://www.echr.coe.int/Eng/Judgments.htm; *Unabhängige Informationsvielfalt v. Austria*, Eur.Ct.HR RJD 2002-I, 271 (Judgement of 26 February 2002),.

[42] *A. v. United Kingdom*, Eur.Ct.HR RJD 2002-X, 119 (Judgement of 17 December 2002),.

[43] *Perna v. Italy*, Eur.Ct.HR (Judgement of July 25, 2001 and Judgement of 6 May 2003 – Grand Chamber); *Amihalachioaie v. Moldova,* Eur.Ct.HR (Judgement of 20 April 2004), *available at* http://www.echr.coe.int/Eng/Judgments.htm.

[44] *See* under B.II. and in particular *Appleby and Others v. The United Kingdom* (*supra* at note15); *VGT Verein gegen Tierfabriken v. Switzerland* (*supra* at note 16).

fundamental part of democracy. It is absolutely necessary to allow and support political discussions to guarantee free elections of members of parliament. Everybody should make up his or her mind himself or herself. Therefore, freedom of speech has to be established as a political right. As political rights in general, freedom of speech in particular is under stress and has to challenge the upcoming conflict in modern societies. In a time of increasing radicalism the protection of freedom of speech as political and human right is essential. Only the cautious application of political rights in view of the actual problems will guarantee democracy in the future.

**IV. New challenges**

Political Rights in the 21st century are, as Jiri Priban (Charles University, Prague), emphasized, confronted with a variety of new challenges. Two actual problems of human rights are the exercise of human rights in Eastern European countries and the current fear concerning global terrorism. In relation to transition in Eastern Europe, there are two points. Firstly, the transition from communist dictatorship regimes to democracies had four legal goals: rule of law, separation of powers, constitutionalism (protection of human rights) and democratic republicanism. An important role in the transition process was played by the so-called round table talks in the Eastern European countries. The function of this institutional framework was not to negotiate the new constitution but to guarantee transitional peace. Major issues of the round table talks were the establishment of political rights, as for example free access to media (free speech), free elections and freedom of association and assembly.

Secondly, two different types of political rights should be mentioned in relation to the transition process: the referendum (direct democracy) as a tool to neutralize constitutional conflicts and civil disobedience as a means of protecting the constitutional system.[45] Although civil disobedience means that a person acts against the law (illegally), because the law is immoral, it is done to protect constitutional values; thus, the individual can be an important corrective in extreme situations. The Western European democracies played an important role in the post-communist period in Central and Eastern Europe,[46] in particular the European Union demanded the implementation of a European pattern of democracy in the enlarge-

[45] *See* Art. 23 of the Czech Charter of Fundamental Rights and Freedoms: "Citizens have the right to resist anybody who would do away with the democratic order of human rights and fundamental freedoms, established by the Charter, if the work of the constitutional organs and an effective use of legal means are frustrated".

[46] K. Smith, *Western Actors and the Promotion of Democracy, in* A. PRAVDA, J. ZIELONKA (ED.), DEMOCRATIC CONSOLIDATION IN EASTERN EUROPE Vol 2. 33(2001).

ment process. In comparison with this EU model of compliance the model of the Council of Europe is, according to Wojciech Sadurski (European University Institute), less rigorous. Nevertheless, as Andrew Drzemczewski (Council of Europe) stressed, the monitoring process of the Council of Europe is an effective tool to encourage the human rights development.[47]

Another threat to political rights and democracy is terrorism, discussed in Florence by Colin Warbrick (University of Durham). Two potential risks appear in this context: first, the destabilizing character of the attacks itself – the possible collapse of national security – and second, the anti-terrorist measures, which are limit the rights of individuals. Although it would be highly desirable to have an accepted definition of terrorism,[48] such a definition has not yet been agreed upon in international law. Human rights implications have to be considered in counter terrorism measures. Governments have the option of declaring a state of emergency in order to restrict human rights. However, some absolute rights may not be limited, the prime example being the prohibition on torture. Shall there be restrictions to this prohibition? "Do *not* destroy the village to save it", urged Colin Warbrick, referring to a famous Vietnam-era military comment about having to destroy a village in order to save it.

During the course of the Academy's Human Rights Law Session, the U.S. Supreme Court ruled in favour of jurisdiction over the detainees of Guantánamo.[49] But this decision marks only a beginning. The determination of the status of the detainees and their rights will remain essential to this discussion, which raises the question of extraterritoriality. The European Convention on Human Rights[50] concerns itself with the jurisdiction of the State yet has accepted human rights obligations applied in extraterritorial cases such as military actions, provided that the State has effective military control.[51]

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[47] *See* Council of Europe monitoring procedures: an overview, CoE doc.Monitor/Inf (2004) 2, 5 April 2004, *available at* http://dsp.coe.int/monitoring.

[48] In order to draw the line between terrorists and non-terrorists, the need for a definition results inter alia from Art. 7 ECHR which sets forth the standard of legality.

[49] Rasul *et al v. Bush, President of the United States et al,* 124 S. Crt. 2686 (2004) together with *Al Odah et al. v. United States et al.* 124 S.Crt. 2686 .

[50] Art. 1 ECHR (*supra* at note 14) states: "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention" [emphasis added].

[51] *Loizidou v. Turkey*, Eur.Ct.HR RJD 1996-VI, 2216 (Judgement of 18 December 1996), In *Bankovic and Others v. Belgium and Others*, RJD 2001-XII Eur.Ct.HR (Decision of 12 December 2001), jurisdiction was denied and the case declared inadmissible.

**D. Conclusion**

The curtain falls. The lecturers are warmly acknowledged with more or less long-lasting applause. All performed very well and created a lively and stimulating Human Rights Law Session in front of a diverse audience composed of researchers, students and practitioners. The courses were substantively not restricted to the European realm, taking into account both legal and practical developments within the international community. However, the perspective from which many subjects such as freedom of speech and militant democracy were discussed turned out to be very European, at a least a Western approach. Regardless of being titled Academy of *European* Law, an additional multi-cultural vein transmitting non-European views could contribute in upcoming sessions to even more substantial discussions. Nevertheless, it is wholeheartedly asserted that the Academy courses are of superb value for an evaluation of contemporary human rights law.