

INTERNATIONAL HUMAN RIGHTS AND THE PHILOSOPHY OF LAW: HOW MUCH TOLERATION CAN BE ENFORCED?

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RESUMO:

O principal objetivo deste trabalho é apresentar uma série de casos que foram submetidos à apreciação da Corte Européia de Direitos Humanos por violação e a esses direitos, como o caso do Dudgeon versus Reino Unido, 1981; Bruggemann e Scheuten v. FRG, 1976. Dudgeon desafiou a lei sobre a qual ele foi preso, apresentando queixa junto da Corte Européia de Direitos Humanos, sob a alegação de que a legislação penal em vigor na Irlanda do Norte, a qual proíbe o homossexualismo masculino constitui interferência indevida com relação ao respeito da sua vida privada, em violação do artigo 8º da Convenção Européia dos Direitos do Homem. Analisa, ainda o caso do Bruggemann e Scheuten, onde mostra a criminalização do aborto na legislação alemã, exceto em situações específicas e durante as primeiras doze semanas de gestação. Tanto a Comissão quanto a Corte não têm sido sensíveis aos padrões de moralidade que prevalecem internamente aos estados membros, mas têm respeitado aquilo que se conhece como "margem de apreciação" (flexibilidade para dar resposta às diferentes regulamentações nacionais existentes) nos casos em que os padrões da comunidade como estado-membro são refletidas.

PALAVRAS-CHAVE: Direitos Humanos. Moralidade. Discriminação. Tratados e Mecanismos de Adjudicação.

ABSTRACT:

The main objective of this paper is to present a series of study cases which have been submitted to the European Court of Human Rights for violation of Human Rights, as the case of Dudgeon versus United Kingdom, 1981; Bruggemann and Scheuten v. FRG, 1976. Dudgeon challenged the law under which he was arrested, filing a complaint with the European Commission on Human Rights, alleging that the criminal law in effect in Northern Ireland outlawing male homosexual conduct constituted an unjustified interference with his right to respect for his private life, in breach of article 8 of the European Convention on Human Rights. On analyzing the case of Bruggemann and Scheuten, it is stated how the German legislation criminalizes all abortions except those taken in specific situations of distress during the first twelve weeks of pregnancy.

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The Commission and the Court has not only been highly sensitive to prevailing standards of morality among the member states, but it respects what is known as a “margin of appreciation” (flexibility responsive to differing national custom) in cases where community standards within a member state are reflected.

KEYWORDS: Human Rights. Morality. Discrimination. Treaties and Adjudicative Mechanisms.

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1. Introduction

In 1981 the European Court of Human Rights decided the case of *Dudgeon v. United Kingdom*. Mr. Dudgeon is a homosexual who challenged the anti-sodomy laws of Northern Ireland. He had been active in the gay rights movement. In 1976, on a criminal search warrant for possession of drugs, his house was searched, some cannabis was found, and his correspondence and diaries were seized and examined. They revealed his involvement with homosexual activities. He was taken to the police station and questioned for 4.5 hours about his sexual life. His file was sent to the public prosecutor for consideration, but criminal prosecution for homosexual acts was declined, and his personal papers were later returned.

Dudgeon challenged the law under which he was arrested. He filed a complaint with the European Commission on Human Rights, alleging that the criminal law in effect in Northern Ireland outlawing male homosexual conduct constituted an unjustified interference with his right to respect for his private life, in breach of article 8 of the European Convention on Human Rights. Article 8 reads as follows:

1. Everyone has the right to the respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

After careful consideration of the statute, its history of enforcement, and the strong religious views among Northern Irish communities, the court ruled in Mr. Dudgeon's favor. The opinion reads:

As compared with the era when that legislation was enacted, there is now a better understanding, and in consequence an increased tolerance, of homosexual behavior to the extent that in the great majority of the member-states of the council of Europe it is no longer considered to be necessary or appropriate to treat homosexual practices of the kind now in question as in themselves a matter to which the sanctions of the criminal law should be applied; the Court cannot overlook the marked changes which have occurred in this regard in the domestic law of the member-States.

As this case demonstrates, the ECHR has been inclined to protect private consensual relations. Yet it has been more reluctant to apply the convention to protect the civil rights of same-sex couples against unequal government treatment. In 1996, for example, the Court took a different view of prevailing standards in the European community, and upheld the denial of benefits to same-sex couples.

In another case, *Bruggemann and Scheuten v. FRG*, 1976, the ECommHR declined a challenge to a decision of the Federal Constitutional Court as well as to German legislation criminalizing all abortions except those taken in specific situations of distress during the first twelve weeks of

pregnancy. The couple challenging the German law again alleged a violation of article 8, in that their right to protection of their privacy and family were violated in that they were not free to obtain an abortion in the event of an unwanted pregnancy. They stated that, as a result of this stringent law, they would either have to renounce sexual intercourse or apply methods of contraception or carry out a pregnancy against their will. In deciding against the challenge, the Commission ruled as follows:

The commission has had regard to the fact that, when the European Convention of Human Rights entered into force, the law on abortion in all member states was at least as restrictive as the one now complained of by the applicants. In many European countries the problem of abortion is or has been the subject of heated debates on legal reform since. There is no evidence that it was the intention of the Parties to the Convention to bind themselves in favor of any particular solution under discussion--e.g. a solution of the kind set out in the Fifth Criminal Law Reform act which was not yet under discussion at the time the Convention was drafted and adopted.

The commission finally notes that, since 21 June 1974, the relevant legal situation has gradually become more favorable to the applicants.

Since that case, the German Constitutional Court has indicated that a pregnant woman has competing rights that in some circumstances may outweigh the rights enjoyed by fetal life. The German court has further held that the state is not obligated to criminalize all aspects of abortion in order to implement the prohibition against abortion, and that a regime of counseling that respects the ultimate decision of the mother in certain circumstances is adequate to protect the rights of the fetus.

I cite these examples at the outset, in order not to lose touch with actual cases, as we get further into the speculative aspects of my subject. The Commission and the Court has not only been highly sensitive to prevailing

standards of morality among the member states, but it respects what is known as a “margin of appreciation” (flexibility responsive to differing national custom) in cases where community standards within a member state are reflected. I could give other examples, in various areas: in *Johnston v. Ireland*, decided in 1986, a divorced man and his new partner and their daughter challenged the strict provisions of Irish law barring divorce. He wanted to remarry and provide the two with security and legitimacy. The ECHR denied the application, saying that “this is an area in which the parties to the Convention enjoy a wide margin of appreciation.”

But in a 1987 case, *F. v. Switzerland*, the Court did find a violation of article 8 for the denial of the right of an individual to remarry after his third divorce. It overruled the imposition by Switzerland of a 3 year waiting period on Mr. F., thus supporting Dr. Johnson’s famous description of remarriage as “the triumph of hope over experience.”

And so it goes in other areas, freedom of speech, association, artistic expression, religious belief, we find the court giving effect to the prevailing standards of not only the European community but, when clear and prevalent, those of the individual member states. Against this is balanced the idea that a “democratic society” implies pluralism, tolerance, and broadmindedness. As the court said in *Young, James, and Webster v. United Kingdom*, “although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail.”

As I just noted, we find here a sensitivity to the prevailing standards of morality in the broader European community, and in addition of the narrower

community of the member states. We also find something else, which is crucial for my point today: we find judicial recognition that such cases arise within a context of evolving, changing community standards.

The constant flow of cases raises the question whether the Court should be the catalyst, or whether it should wait and thereby encourage non-judicial, or even non-legal, mechanisms to flourish. Just what importance do we give to these factors in a philosophy of law?

2. International Human Rights Law

International human rights law, as a branch of international law, inherits from that relationship a philosophical question of the greatest interest, and of the greatest importance: the question of the nature of law itself. Is law enacted, or is it somehow “natural” or “in nature?” The former is called the “positivist” view, the latter sometimes referred to as natural law and other times as “universalist.”

Because human rights are expressed, like constitutional rights, in sweeping abstractions with moral overtones, it highlights the same question as constitutional law: what is fundamental law, and how is it to be interpreted and applied?

The problem is that neither positivism nor universalism fits the unique conditions of international rights. Universalism runs counter to the need for deference to regional standards and marginal appreciation. Positivism has never reached a satisfactory answer to the question of Who is the sovereign commanding the enforcement of international human rights? Nor does contemporary positivist theory, the Oxford School, emphasizing the definition of

law as a body of rules, easily fit the law of international human rights, which consists of a body of case law derived from broad principles.

Yet the dualism of this ancient dichotomy still looms over the discussion. The presence of rights enforcement grows, through treaties and adjudicative mechanisms, but there is little agreement on its foundation. Scholars writing in academic journals address particular legal issues, but they constantly return to the question of foundations. There is a double reason for this. One, it affects the justification, the validation, of the regime of enforcement. And second, it affects how the very rights themselves are interpreted by judges and put into practice.

Since the cases I cited, the work of the ECHR has dramatically increased. The Court has been described as “a victim of its own success,” and now faces a docket crisis of massive proportions. This is a consequence of the growing number of states subject to its jurisdiction, its favorable reputation, its often expansive interpretations of individual liberties, a distrust of domestic judiciaries in some countries, and entrenched human rights problems in others. The court will increasingly be urged to take the lead in social change.

Constitutional law in America went through a similar growth experience. James Bradley Thayer, who taught constitutional law for many years at Harvard Law School at the end of the 19th century, wrote this in reaction to a similar stage of anticipated expansion:

[T]he safe and permanent road towards reform is that of impressing upon our people a far stronger sense than they have of the great range of possible harm and evil that our system leaves open, and must leave open, to the legislatures, and of the clear limits of judicial power; so that responsibility may be brought

sharply home where it belongs.¹

Thayer influenced the American Supreme Court Justice Felix Frankfurter, who at the height of the Second World War dissented in a case involving the enforcement of a state law requiring participation in the flag salute in public school. Frankfurter wrote:

Of course patriotism can not be enforced by the flag salute. But neither can the liberal spirit be enforced by judicial invalidation of illiberal legislation. . . . Such an attitude is a great enemy of liberalism. . . . Reliance for the most precious interests of civilization, therefore, must be found outside of their vindication in courts of law. Only a persistent positive translation of the faith of a free society into the convictions and habits and actions of a community is the ultimate reliance.²

Not to overdo the point, let me give you one more example of eloquent defense of this otherwise unpopular position. Judge Learned Hand said in "The Contribution of an Independent Judiciary to Civilization:

A society so driven that the spirit of moderation is gone, no court can save;...a society where that spirit flourishes, no court need save; ... in a society which evades its responsibility by thrusting upon courts the nurture of that spirit, that spirit in the end will perish.³

The stakes are high as this process grows. There are powerful forces, public and private, including intellectual and philosophical challenges, deploying against the increasing role of international courts. Preparing this lecture, as I looked through recent issues of academic journals on the subject, I found far more criticism than I found original constructive thought. The matter is described in almost apocalyptic terms: international rights law is described as

¹ THAYER, J.B. **The Origin and Scope of the American Doctrine of Constitutional Law**. 7 Harvard L. Rev. 129 (1893), p. 156.

² West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624,650 (1943), p. 166.

³ HAND, L. **The Spirit of Liberty**, 1959, p. 144.

an oxymoron--a self-refutation; as a choice between universalism and "imperialism;" as a "paradox."

There is much postmodern jargon: "The paradox of international law will never be definitively overcome, because international law is intrinsically paradoxical. It is paradoxical because it is both one *and* the other, it is an instrument for universalization and a rejection of ambivalent particularities; a means of domination and a space for cooperation and emancipation."⁴ One distinguished scholar even borrows the idea of *kitsch*, or base popular culture, from Milan Kundera, and I quote: "Universal human rights; courts as dispensers of enlightened justice; the sense that most people intuitively accept and obey the law – *kitsch* assumptions vulnerable to a million critiques, but still condensing the heart's hopes. 'The brotherhood of man on earth will be possible only on a basis of kitsch'

There may be literary value in this, but there is nothing practical--no guidance, indeed the opposite of guidance, this is not to think, not to act, not to address the problems and to solve them. There are real problems, and this kind of writing, which to a considerable degree reflects the ancient philosophical dilemma, fails to take them into account. Lacking a firm point of reference, thought about the problem oscillates between unrealistic alternatives.

3. Toleration

How much toleration can be enforced? John Locke asked that question _ hundred years ago in his Letter Concerning Toleration. That's the question of

those passages from Thayer, Hand, and Frankfurter. Can toleration be enforced at all? The law works through positive mechanisms, by proscription, adjudication, and enforcement. This is the tradition of legal positivism, dating back to Thomas Hobbes, law as command.

But Locke pointed out that law also can work as part of a civic conversation, in ways wherein its greater effect lies in persuasion. To do this sometime requires it to stand back. So we must look at legal mechanisms in the context of their general goal. Toleration is the central constitutional ideal. It is "at the very moral heart of the dignity of constitutional law, and is thus the central or paradigm case of the rights that constitutionalism protects."⁵ But the problem with mainstream jurisprudence is that it tends to see law and its goals in a direct relation.

That's fine, of course, when the law is quite specific, such as a 5% sales tax or a prohibition against driving without a license. Where it runs into trouble is exactly where we were when I started, the enforcement of a text that reads "Everyone has the right to the respect for his private and family life, his home and his correspondence." Neither of the two great traditions helps us much; positivism once flirted with the idea that sweeping constitutional rights were not law at all, but morals. Now (depending on whom you talk to) it takes the position either that there is a gap in the law which judges can fill with their own "legislation," or that judges can appeal to certain moral/legal "principles" in debating the answer. Meanwhile, Universalism appeals to an ideal so ethereal

⁴ JOUANNET, Emmanuelle. **Universalism and Imperialism: The True-False Paradox of International Law?** European Journal of International Law, vol 18, no. , 2007.

⁵ RICHARDS, David A. J. **Toleration and the Constitution**. New York and Oxford:Oxford University Press, 1986.

that we find many intellectuals running for the exits hollering things like “oxymoron,” “paradox,” and “kitsch.”

There have been exceptions, of course. Great minds have sought to address this problem. The image they bring, though, is often of a “bridge” between the two traditions. The late Austrian Albert Verdross, called the “Viennese master,” is an example. I will return with a story about this fascinating man toward the end of my paper.

The passages I cited from Thayer, Hand, and Frankfurter are from another whole tradition, one which I teach in my lectures at the graduate faculty of the School of Law at UFPE. That is the tradition originating in America in the 19th century, called pragmatism, a word that does not do justice to the subtlety and originality of this school.

The political and legal theory that grows out of this school sees law and democracy as taking place within a society naturally given to disputes, large and small. It sees these disputes not as conflicts to be suppressed by law, which is how Hobbes saw the matter, but as an exercise in problem-solving. The small disputes are often representative of larger ones. In those larger disputes, public discussion is the best way of dealing with the conflict of interests in a society. As Dewey said, “The method of democracy is to bring conflicts out into the open where their special claims can be discussed and judged in the light of more inclusive interests than are represented by either of them separately.”⁶

Democratic societies are constantly seeking to attain desirable goals,

⁶ DEWEY, John. **Liberalism and Social Action**, LW II, p. 56.

and much of this involves arguing over how to do so, and also at the same time arguing over precisely what our goals should be. In other words, democratic politics is not simply a channel through which we can assert our interests through the vote once every few years, but an ongoing forum in which we arrive at conceptions of what our interests are. That is the nature of what we are doing here in this symposium. Public discussion of the challenge of international human rights is the reason why I am here where you can agree or disagree with me.

Dewey was the great social experimentalist. His conception of democracy as inquiry affects the conception of law. It affects the nature and shape of legal criteria like rules and principles. Often the legal criteria, the legal principles, have to be hammered out in the search process. This implies a difference from the traditional conception of looking to a body of law to resolve a legal problem. I call this the ABJLD model: A sues B, and judge J listens to the evidence and looks in law library L for the decision D. This works, as I suggested, for driving infractions and tax cases, and perhaps most of everyday courtroom cases. It works, I might add, for some aspects of international law. But when A sues the government G, on a matter of general controversy, this dispute may implicate the process of democratic inquiry.

Not all legal cases are the same, and not all human rights cases are the same. Some cases are initiated to reverse the democratic process by groups that have already lost in the democratic process. One case that I cited, involving the couple that alleged an article 8 violation for being forced by the strict German anti-abortion law to use contraceptives, *Bruggemann and Scheuten v. FRG*, may have been that kind of case. We can see why traditional

jurisprudence doesn't help much here. It follows the ABJLD model of law. For the legal positivist, the text alone of article 8 provides no definite answer--so assuming there is no answer in the law library, do we let the Court legislate? For the natural law theorist, while the main tradition is Catholic, there are models that could decide the case either way. I think the commission was right in *Bruggeman* and it was properly left to the political process. Pragmatists like Dewey would certainly agree.

The key question is, should judges engage in moral argument, argument over political principles, in these cases? What about the occasional case that squarely raises an issue of distributive justice, like *James v. United Kingdom*, where the British government decided to change the real estate law of Belgravia in London, where you would typically find 99 year building leases that people would buy with a mortgage just like a purchase, except when they have paid off the debt and got close to the end of the 99 years they realize their property is worth a lot less than they paid.

In 1967 the labor government passed a compulsory buyout plan for the tenants, which the leaseholders challenged as unfair for different reasons, raising opposing models of distributive justice. Should the court debate which model is better, under a close reading of John Rawls' *A Theory of Justice*? Rawls himself would appear to have said yes. In his book *Political Liberalism*, Rawls makes the claim that "public reason in a constitutional democracy with judicial review is the reason of its supreme court."⁷

I fear that this comment by Rawls is indicative of a widespread attitude

⁷ RAWLS, John. **Political Liberalism**. New York: Columbia University Press, 1993, p. 231.

that constitutional courts are policymakers, not adjudicators of disputes. This attitude actually finds support in contemporary jurisprudence, particularly the works of Ronald Dworkin, who has for over 3 decades argued strenuously for the proposition that judges do, and should, appeal to moral and political principles in constitutional decisions.

This idea has immediate appeal, but it needs to be very carefully considered. It assumes that the decisions judges make on controversial issues are not argued out in the public arena, and if we buy into Dworkin's thesis it means that they will not be. Recall what Thayer said in 1900: if you do not impress upon the people a sense of **their** responsibility for what the government does, it will pass by default to the courts. The judges will accept that power--they're human. And there will be a price.

Harvard University Press recently published a book by Ran Hirschl titled *Towards Juristocracy: the Origins and Consequences of the New Constitutionalism*. (Now there's a catchy title for a law book; that should sell some copies.) Hirschl's thesis is that there is nothing altruistic about constitutional review. The practice has been put in place by political, economic, and judicial elites, who, after seeing their power threatened by democracy, which he calls "mass sentiment," set up a juristocracy to take it back. To keep their own power and status they transfer power to the courts. Hirschl calls this "hegemonic preservation."

I do not go along with this thesis; I find it naive and conspiratorial. It is also not original, except maybe for the catchy term "juristocracy." There is a long history of resistance to international adjudication as the imposition of the interests of the stronger and wealthier states, and of the classes or "elites" that

rule them, over the weaker and poorer ones.

I think it is important for those interested in international human rights to recognize that the critical literature is not insignificant, nor is it isolated from larger forces increasingly resistant to the transnational system of adjudication. It is by no means confined to a political fringe; it includes serious and mainstream scholars and public figures. And of course, there are obvious reasons why major resistance to the human rights process can build up among the international political community.

For me this is not a political problem. It is truly a philosophical one, a need for a wholesale rethinking in the philosophy of law.

4. The Nature of Law

As I said at the outset, the field of international human rights implicates the most fundamental questions regarding the nature of law, and is filled with interest for both the philosopher and the historian of ideas. For a taste of this intellectual drama, I will draw on a recent article on Albert Verdross by his student and eventual colleague, Bruno Simma, which was brought to my attention by my colleague in Recife, Professor Clovis Falcao.

Albert Verdross was born in Vienna, Austria and lived from 1890 to 1980. His father was a retired general called into service in World War I, who repelled the Italians at Tyrol with a makeshift force. Verdross was raised as a Catholic and was a brilliant law student and scholar of international law and jurisprudence. As a conservative he was initially sympathetic to the rise of national socialism as a bulwark against communism.

But his principles led him to speak out against the unconstitutionality of

the Dolfuss regime, and after the *Anschluss* he was suspended from teaching, but then allowed to resume teaching international law but not philosophy--his natural law leanings were considered too dangerous by the Nazis. During the Second World War he served as a judge of the German Prize Court of Appeals, a refuge from collaboration with the Nazi regime, and later noted with pride that the Allied powers had left the judgments of this court intact. He was eventually appointed to the European Court of Human Rights, where he brought a background in both traditions, positivism as well as natural law.

Throughout this period, legal positivism, the theory of positive law, defended its dominance over legal theory in every domain, including international law. Before the First World War it only recognized international treaties and customary international law, as manifestations of the will and consent of the state. Then, after the War, Article 38(1)(c) of the Statute of the Permanent Court of International Justice was passed, requiring the World Court to apply “the general principles of law recognized by civilized nations.”

Professor Simma, who helped Verdross write his famous treatise on international law, writes that this very event “shook the positivist view and gave rise to a heated doctrinal as well as philosophical debate.” He continues:

The protagonists of legal positivism reacted to Article 38(1)(c) of the Statute by attempting to downplay its theoretical importance. Thus, Anzilotti, while conceding that the provision constituted an exception to the principle that States could only be bound by products of their own sovereign will, regarded judicial decisions on the basis of general principles not as decisions made on the basis of international law but as judge-made law created by way of analogy, the international judge hereby assuming the role of the legislator.

Against such views, Alfred Verdross endeavor[ed] to prove that the positivist assumption of all international law emanating from the consent of States is not based on experience but on a sort of metaphysics. He d[id] so by

demonstrating that in the practice of international arbitral tribunals general principles of law had been applied as crystallizations of international justice for several centuries; in other words, that the positivization of general principles as a source in Article 38(1)(c) of the PCIJ Statute constituted anything but a revolutionary innovation.

Thus, in international state and arbitral practice, positive international law never figured as a closed consent-based system but from the very outset drew from and referred to principles whose legal validity was not established but pre-supposed by positive law. For Verdross, the validity of such general principles stemming from universal recognition of certain legal values is a sociological precondition of the very existence of international law. [emphasis added and all footnotes omitted]

These principles derive from the shared legal conscience (*Rechtsbewußtsein*) of the peoples of the world, which Verdross regard[ed] as anchored in natural law. Thus, says Verdross, if a *Grundnorm* (basic norm) in the Kelsenian sense had to be formulated, it would not have to be merely hypothetical, or fictitious, as Kelsen was constrained to assume, but it could very well be filled with concrete normative substance, namely that of the fundamental principles of law. Such a *Grundnorm* could then read as follows: The subjects of international law ought to behave as prescribed by the fundamental legal principles deriving from the social nature of human communities as well as by the rules of international treaty and customary law created on the basis of such principles.⁸

This argument, both brilliant and profound, was designed, as I suggested, as a bridge between the two ancient traditions. I have only given you a rough outline; Verdross was a learned and experienced scholar, and developed a sophisticated analysis of the interplay of principles in both domestic and international law. Like the very best of such efforts, it was more than a bridge, it was a synthesis, that sought to guide scholars and judges toward clear limiting standards, and away from the naysayers and relativists, who lately have been throwing up their hands and crying things like “paradox” and “kitsch.”

In a telling phrase, Professor Simma concludes his article on Verdross

with the comment, “to me it does not matter whether, ultimately, such limits are conceived in legal or moral terms; I consider the ‘conscience of mankind’ or ‘elementary considerations of humanity’ imperative for international law, irrespective of whether these phenomena are cast in the language of natural law or not.”

So now the pragmatist will ask, How about *Bruggemann and Scheuten v. FRG*, the case of the German couple that challenged the strict abortion law because they would be forced to use contraception? Or for that matter how about all the other cases in which the European Court of Human Rights could have found a violation of terms of the Convention but instead deferred to local standards and the evolving national consensus?

In *Bruggeman* the effect of Verdross’s synthesis would be to force the judges to tackle the question head-on, of whether the strict German law was opposed to the ‘conscience of mankind’ or ‘elementary considerations of humanity.’ I dare say that the outcome would have boiled down to whether the majority of the commission was pro-life or pro-choice. If plaintiffs like Bruggeman and Scheuten can simply count the judges favorable to their view on a human rights court or commission, and use an international forum to challenge the current law of a member nation, then Hirschl can make a pretty good case for “juristocracy.”

You can argue with me that there is a **separate** legal principle here, something that the commission was able to “balance” against the principle of article 8 so they could back off in *Bruggeman*. But I defy you to tell me what

⁸ SIMMA, B.. **The Contribution of Albert Verdross to the Theory of International Law.** European Journal of International Law, vol. 6: 1995, p. 1-54.

that principle was. If you want to call it the principle of judicial restraint, that is surely an oxymoron for Verdross, as the whole point of his thesis is to defend the principles on which law should be **made**, on which judges can **act**. If you want to call it the principle of democracy, you fall right back into the paradox trap. The principle of democracy goes too far. The judges were **not** elected, but the folks that passed the allegedly intolerant legislation challenged under the Convention **were**. If you principalize democracy in a way that will explain the *Bruggeman* decision, you wipe out most of European Human Rights law.

You truly have to start again, and this is why. We simply can't accept a legal theory that ends up with the judges voting their own subjective moral and political principles, which is what happens when you let them interpret the 'conscience of mankind' or 'elementary considerations of humanity.' This is not principled judging, but rather the abuse of principle.

Verdross made a heroic attempt to put some limits on this. He drew from both his natural law and neo-Kelsenian thinking, essentially cataloguing concrete examples of general legal principles, but brought down to earth by reference to specific domestic and international caselaw.

But the trouble is, the law is constantly changing, along with public conversation and conduct, and public conceptions and habits of toleration. The contingent nature of legal **change**, how it takes place, and whether it is hegemonic or democratic, is the factor that traditional legal analysis doesn't explain, doesn't comprehend, doesn't build into its systems. Instead, the interpretive role of the judiciary is frozen into the ABJLD model of adjudication. The pragmatic conception, John Dewey's conception, opens up that issue, and it is only through that tradition that the nature of legal transformation can be fully

explored by jurisprudence.

Ronald Dworkin has written a whole book--actually several books--rejecting my thesis. I mainly refer to his **A Matter of Principle**, in which he defends a “rights” conception of law, which assumes that citizens have moral rights and duties with respect to one another, and political rights against the state as a whole. It insists that these moral and political rights be recognized in positive law, so that they may be enforced upon the demand of individual citizens through courts or other judicial institutions.

He insists that judges “must and do serve their own political convictions in deciding what the law is.” the only qualification is that Judges should enforce only political convictions that they believe, in good faith, can figure in a coherent general interpretation of the legal and political culture of the community.

His argument runs that when judges encounter a “hard” or difficult case, they need to go directly to a political principle to decide the case.⁹ He is not entirely clear or consistent on the definition of principle, except to frequently refer to the concept of equality. I would call this ABJPD, A sues B and Judge J goes to principle P and then to decision D.

The pragmatic objection to this is that it is through individual disputes that the principle of equality gains its definition, not the other way round. ABJD’, and ABJD”, and ABJD”” . . . eventually leads to P (thus informed by democratic experience and debate). Principles like “equality” mean little in the abstract.

⁹ SIMMA, op. cit.: “If one wants to take sides in this grand debate and to subscribe to Hersch Lauterpacht’s famous dictum about general principles delivering *un coup mortel au positivisme*, it was above all Alfred Verdross who contributed to this victory by firmly anchoring natural law thought in the essentially positivist, voluntarist, theory of the sources of international law.”

The pragmatist does not argue from the “principal of democracy.” The details are everything, in the context of past experience and precedent. To argue from the abstract is the abuse of principle, pushing the details aside, sweeping them under the rug. In the experimental approach, principle takes on substance through individual disputes.

5. Conclusions

I am getting close to my own limits, of time, as well as your patience, so I will leave you with a few thoughts. First, this is not as simple a matter as it may seem from my explanation. Legal pragmatism takes very seriously the historical path of legal doctrine. The emergence and growth of legal principles from specific cases is the key to understanding the gradual development of consensus. As we elucidate this there is much to be learned from Verdross and other scholars of international human rights law.

Legal pragmatism, as properly understood, is still in its formative stage. The term is still misunderstood and misapplied by most writers in jurisprudence. At the school of law of UFPE in Recife, there is now a center for the study of law and pragmatic philosophy. It is the first such center in the world. We recognize that the method holds great promise for the study of domestic and international legal institutions, but there is much research and analysis to be done.

Now is the time to build on this under-appreciated insight. The eloquence of Thayer, Frankfurter, and Learned Hand grew out of an inarticulate sense of this perspective. Decades have passed since those passages were written, and they have been ignored, because this tradition has been ignored. That explains why it is urgent to undertake such research. It is not a new,

novel, radical insight, but rather has deep roots in the past.

In 1689 John Locke, in his *Letter Concerning Toleration*, advanced the proposition that:

the care of souls cannot belong to the civil magistrate (meaning the judge), because his power consists only in outward force; but true and saving religion consists in the inward persuasion of the mind, without which nothing can be acceptable to God. And such is the nature of the understanding that it cannot be compelled to the belief of anything by outward force. . . . For laws are of no force at all without penalties, and penalties . . . are absolutely impertinent; because they are not proper to convince the mind.¹⁰

There is unquestionably a role for legal enforcement of international rights. Implementation has had a remarkably successful beginning. The first 60 years since the Universal Declaration of Human Rights has been a surprise to legal theorists who assumed that there was an insufficient transnational order to effect implementation. The reason for success is largely owing to the deference of human rights tribunals to different and changing conditions among member states. This carries an implicit recognition of John Locke's insight, over three hundred years ago, as well as of John Dewey's insistence that general democratic values are affected by particular disputes.

¹⁰ LOCKE, John. **A Letter Concerning Toleration**. In Works, London: Tegg et al., 1823, p. 11-12.