superlegality.

FROM HUMAN RIGHTS TO PEER REVIEW

Constitutionalism 2.0 is based upon the recognition of human rights. But it still presupposes sovereign peoples. This leaves constitutional authority in a remarkable limbo. While human rights are supposedly superior to sovereign authority, which is indeed forced to relinquish its voluntarism, they also require sovereign authority for their articulation and realization.

This relationship of simultaneous superiority and dependence is of enormous import. First, it means that any institution wielding public authority needs to be as good as any other in the face of human rights. Second, whether the institution meets the relevant standard can only by ascertained by heeding what peer institutions are doing. Human rights *depend* for their articulation and realization on public authority even though they also *transcend* any instantiation of it. The transcendence of particularity can be real only in horizontal self-relativization. There is no other way. Sovereignty *serves* human rights through its *own* abdication. Authority says: “I am one among others. In order to find out whether I live up to my standards, I will look around and see what my peers are doing.”

This marks the transition to constitutionalism 3.0. National polities retain final authority provided that they commit themselves to human rights. Owing to this commitment, the final authority needs to be *earned* by explaining oneself with an eye toward how members of the peer group behave. This is the practical implication of the simultaneous retention and abdication of sovereign authority in the field of human rights. As the discussion over the use of “foreign precedent” in American constitutional law reveals, this tension cannot be integrated into the mindset of constitutionalism 1.0. According to 1.0, the constitution is all about *us*, and not about *them*.[75] The truth, however, is that with the transition to constitutionalism 3.0, the quest for the adequate protection of human rights is conducted within informal or formal systems of peer review.

The European Convention on Human Rights established the most successful formal system.[76] In many respects, the notion of peer review most adequately captures its spirit. First, the judges deciding cases on panels of various sizes are from the participating states.[77] Second, the “evolutive” interpretation given to various provisions of the convention pays attention to an emerging convergence, in particular when it comes to determining how much leeway is left to a Member State within the so-called “margin of appreciation.”[78] Third,

Materiál chráněný autorským právem

the authority granted to the European Court of Human Rights to find a violation renders the system more hierarchical than it truly is.[79] One would expect not only that the findings by the Court are final but also that they establish binding authority for whichever country happens to participate in the system. But matters are *in fact* messier than they appear on the pages of international instruments. In certain instances, the participating states do not comply either because the countries regard their own constitutional essentials affected or because they find that the European Court has acted *ultra vires* in a case when an "evolutive" interpretation has given rise to an all too surprising result.[80]

This reflects the enduring relevance of self-relativizing sovereignty. Any site of public authority[81] has to respect human rights. Arguably, with the horizontal effect of rights, this may be also true of sites of "private" authority. Each has equal authority to give effect to its mandate. The effort to reconcile potentially conflicting peer authorities within informal or formal processes of review is commonly called "constitutional pluralism."[82]

THE MARGIN OF APPRECIATION

Pluralism is the consequence of the mutual recognition of final authority.[83] Each site of authority has the final say. The result of this stance is a growing potential for conflict. In order to avoid its occurrence each yields to the authority of the other "so long as"[84] this other does not invade that jurisdictional space where each decides that yielding must come to an end. Germany yields to the European Union with regard to the protection of fundamental rights so long as the European Union retains a standard of protection that is equivalent to its own.

Intriguingly, each participant in an international peer system retains final authority on the question of what standard needs to be sustained by others. Legitimacy is earned by comparing oneself with others, but nobody is superior to anyone else. Hence, pluralism is not at all indicative of the emergence of a post-sovereign world.

Constitutional pluralism has been implanted into the convention system already in the form of the doctrine of the "margin of appreciation."[85] In its strong sense,[86] it reflects considerations of "institutional competence" in human rights law concerning the conditions under which the international tribunal yields to the judgment of national institutions with respect to assessing the *significance* of public interests and the *necessity* of measures to secure them. The doctrine is based on the idea that national authorities are

Materiál chráněný autorským právem

better positioned to strike the balance between individual rights and the common good since they are in “direct and continuous contact with the vital forces of their countries.”[87] That the vital forces could be evil forces does not enter the picture as long as the societies continue to be democratic.

FROM THE SOCIAL COMPACT TO THE ABSTENTION FROM RESISTANCE

The structural understanding of the margin of appreciation offers a solution to the situation of pluralism before it even arises. Basically, it rests on the same gesture of yielding to the authority of another “so long as” this other respects a threshold level of constitutional decency.

“Yielding so long as” is how authority is generally conceived of under constitutionalism 3.0. There is no reason not to view even individual conduct as governed by the same principle. Individuals yield to the demands of whoever claims to have authority to direct them so long as the conditions warranting resistance are not met. This is the basic relationship to authority that is implicit in constitutionalism 3.0. Not by accident, it is homologous to freedom of conscience. Individuals or sites of authority yield to whoever wields *de facto* authority unless their conscience (or their understanding of their own law) warrants defiance. Legitimate authority is derivative of the absence of conscientious objection.

There is nothing beyond conscience. It has final authority. Only conscience can tell whether the call of conscience has to be followed. Pluralism, designed consistently, does not end at the threshold of public authority. At the end of the day, all jurisdictional authority devolves to whoever believes to be the conscience of humanity. This could be anyone. And this anyone has to constitute him or herself as that voice.[88]

While constitutionalism 1.0 explained the constitution on the basis of an analogy to the social contract, constitutionalism 3.0 is consistently anarchical. There are no promises, only various arrangements of conditional yielding. The fabric of society is not composed of agreements but woven of concurrent—and concurrently reasonable—omissions of resistance. Constitutionalism 3.0 is constitutionalism in its most individualistic form.[89]

While it is taken for granted that each system that protects human rights relies on proportionality for the articulation of normative constraints, proportionality no longer represents the ultimate standard. The margin of appreciation continues the chain of substitution that began with the understanding of normativity that puts limited powers

Materiál chráněný autorským právem