The European Court of Human Rights' Assault on Natural Rights

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Elisabeth Sabaditsch-Wolff's account deserves close attention by all concerned about the erosion of liberty in liberal societies, and especially by those who are not.

Totalitarian states deny the existence of human rights, and authoritarian states restrict human rights. This is not difficult to understand. But what does it mean when United Nations human rights institutions endorse and legitimate the violation of freedom of speech; when laws in nominally liberal, democratic societies violate fundamental freedoms; when international courts uphold those laws; and when the civil society human rights community is largely supportive of these restrictions on liberty? What does is mean when the laws of European countries sanction behavior in the manner of the blasphemy laws of Islamic theocracies, which, along with secular authoritarian states, exert strong influence on the interpretation and enforcement of international human rights standards?

These are among the questions raised by this book. They are questions that show the challenges we face in trying to secure freedom now, and for future generations.

As a human rights advocate, I have been disappointed by a number of decisions by the European Court of Human Rights (ECtHR) over the past several years. One can, and should question the Court's judicial activism in watering down authentic human rights, and for rulings that have intruded into questions that are should be decided democratically, not by judges. But perhaps most egregiously, the Court has also not protected religious freedom.

The freedom to criticize religious beliefs, dogmas and practices is essential to religious freedom itself, and really inseparable from it. A large portion of my human rights activity has been devoted to defending members of Muslim communities – in the Balkans, in Chechnya; in Central Asia; defending the Ahmadi Muslims in Pakistan and elsewhere; and opposing discrimination against Muslims in European countries. When France imposed a ban on forms of religious clothing, a ban really aimed at Islamic practices, my

colleagues and I were confident it would be rejected by the ECtHR. But in 2014, it was upheld in a ruling that revealed the shaky ground beneath human rights in Europe. The Court placed vague social goals over the right to religious freedom. The Court said wearing the burqa could undermine the notion of "living together," thus upholding the French assertion that the veils "breached the right of others to live in a space of socialization which made living together easier." Aside from undermining the freedom of religion, in indeed any exercise of freedom that might be interpreted as at odds with "socialization," the ruling alienated many Muslims and has thus arguably contributed to radicalization. The decision received only muted criticism from major human rights groups. The establishment human rights community tends to regard international human rights courts and human rights institutions as sacrosanct.

By the time it ruled on Ms. Sabaditsch-Wolff's case, the Court had thus established a record of failure, and the ruling described in her book should have surprised no one. All the same, it shocks and depresses. The ECtHR undermined a basic human right with the argument that speech is only protected as long as it does not hurt the feelings of others. Elisabeth was convicted by an Austrian court for "disparaging religious doctrines in a manner capable of arousing justified indignation." The ECtHR ruled that this did not violate the European Convention on Human Rights, the charter set up to protect our basic freedoms from laws imposed by governments –a bill of rights for Europeans to defend their natural, inherent rights.

According to the Court, religion may be criticized, but only in the right "manner," in order to ensure "religious peace." The implication is clear: we are legally required to address religious questions only in a certain way, in order to avoid violent reactions on among those who might be justly indignant, and react in an un-peaceful manner. In other words, the responsibility for religious peace lies in restricting speech, not restricting reactions to speech. This is demeaning, and wrong – seeing individuals in a programmatic way, as if they bear no free will to rein in their passions, responsibility for civil behavior. We have no right not to be offended, but we do have a legal and moral obligation, and individual responsibility, to express our indignation in a nonviolent way.

Once again, as in the ruling against Muslim attire, the ECtHR's language included a multitude of ambiguous terms, which as we know, often allow authoritarian regimes to repress freedom through the politically-motivated manipulation of vaguely worded laws. Since the Enlightenment, it has long been a foundation of human rights reasoning and practice that no one has a right not to be offended, but apparently that no longer holds. The decision said she had not discussed the question of the Prophet Mohammad's marriage to a nine-year old girl in a "neutral" manner. This may to be true, but how much public debate about controversial moral questions is in fact "neutral"? Given its deeply partisan and ideological character, and the distance and anonymity offered by social media, the charge is irrational. Indeed, is "neutrality" desirable, or even possible? Are we now under the control of overlords who monitor the "manner" in which we discuss social and moral questions, and penalize us for violations based on highly subjective and arbitrary criteria?

The ECtHR decision endorsed what is in effect a blasphemy law. Blasphemy laws are laws that restrict and punish speech that is considered offensive to the faithful and leaders of religious communities. Austria's legislation follows principles one finds in archaic Islamic jurisprudence: the Islamic prohibition of slander set down in *The Reliance of the Traveler (umdat al-Salik)*, an Islamic manual of jurisprudence written in the fourteenth century and considered to contain absolute legal rulings. It defines slander as "to mention anything concerning a person that he would dislike." (r2.2)

The law is one of numerous pieces of anti-"hate speech" legislation that European Union member states have installed, in part directed the EU itself, which mandates such legislation. Hate speech legislation also has its basis in Article 20 of the International Covenant on Civil and Political Rights (ICCPR), which obliges parties to the treaty to pass legislation against "any advocacy of national racial or religious hatred that constitutes incitement to discrimination, hostility or violence." This language, because of its inexact and thus dangerous language ("hatred," "discrimination," "hostility') had been proposed by communist dictatorships and authoritarian states, and strenuously opposed

by liberal democracies that knew it could be misused for political purposes.[i] But the anti-liberal UN members won in the process. Many of the liberal democracies that objected now boast, and promote hate speech legislation. And while the UN Human Rights Committee has insisted that the dangerously vague language in Article 20 must not be interpreted as supporting blasphemy laws, in effect it does.

Such laws are deeply injurious to the right to freedom of religioun and conscience; they thwart the exercise of reason, which can bring us together as a main element of our common human nature. They are recognized as incompatible with human rights, although about a quarter of all the nations of the world have them, and in a number of those countries, blasphemy may be punished by the sentence of death. At an international meeting to defend religious freedom convened by the United States in the summer of 2019, 27 countries condemned blasphemy laws. They called on governments that utilize these laws "to free any individuals imprisoned on such grounds, and to repeal blasphemy, apostasy, and other laws that impede the exercise of freedoms of expression and religion or belief, in a manner inconsistent with international law." Few European states joined this appeal.

The ECtHR reasoning for upholding a blasphemy law suggests a form of pseudo social science, or social engineering, whereby courts interfere with individual freedom in the interest of supporting social goals. But human rights are not there to shape our actions, by the use of penalties, in the service of any particular vision of the good society; they are there to protect liberty so that citizens can ensure that society is just and fair, through political processes. The utilitarianism of the ECtHR's approach is incompatible with the principle of individual liberty, but it reveals a backward social science nonetheless, a social science based on discredited determinism. Restrictions on freedom of speech, and freedom of religion and conscience, do not necessarily make societies stronger, more humane, or more tolerant. The evidence of history suggests otherwise.

Upholding the standards of responsibility and civility that allow a pluralistic society to peacefully exist requires the cultivation of reason and moral character. A democratic ethos is

not something that can be imposed by courts, but must instead emerge in the family, in education, in religious institutions and in other parts of civil society, in processes that inform the way individuals think and act towards one another, how they go about supporting the principles they consider paramount for the good of individuals and their communities. According to the Dutch theologian Hans-Martien ten Napel,

> This democratic ethos will need to be developed by citizens through their participation in various institutions and civil society organizations, among other things. In order for these institutions and organizations to flourish, natural rights such as freedom of religion, freedom of expression, and freedom of association and assembly are prerequisites. By limiting such freedoms, without realizing it, liberal democracies are cutting off the very branches on which they rest. At a minimum, restrictions on these natural rights will result in a transformation of the nature of liberal democracy. From a system in which citizens are free to pursue the good life they have chosen for themselves, it runs the risk of changing into a system which imposes one particular conception of the good life on society as a whole.[ii]

The idea of inherent, universal human rights come to us from the idea of Natural Rights, an idea that in turn is rooted in visions of a Natural Law, to which the laws of rulers and legislatures must conform if they are to avoid impinging on our common human nature. The insouciance with which legislative bodies and courts in supposedly "liberal" democracies now violate basic liberties is without doubt due to our contemporary lack of appreciation for the principle of Natural Rights, which is the foundation for freedoms that are not to be conditioned by arbitrary laws.

The inclination to limit our most basic and original human right to freedom is on the ascendant, and it operates within the framework of international human rights, a field that has partially morphed into a political correctness regime promoting, rather than fighting, speech codes, and siding against citizens forced to participate in same-sex marriage rituals against their religious beliefs. When the U.S. Secretary of State Mike Pompeo

announced the formation of a commission to examine what has happened to the idea of "unalienable rights," most of the human rights community strenuously objected. A coalition of 430 human rights, civil rights, foreign policy and faith organizations, leaders and scholars sent a letter to Pompeo urging him to dismantle the new Commission on Unalienable Rights. In their letter, the groups wrote that "(W)e view with great misgiving a body established by the U.S. government aimed expressly at circumscribing rights through an artificial sorting of those that are 'unalienable' and those to be now deemed 'ad hoc,'….*These terms simply have no place in human rights discourse*." (emphasis added)[iii]

If, indeed, it is believed that a distinction between inherent human rights, and those rights that have their basis not in nature, but in politics, has "no place in human rights discourse," it is a sure sign that that discourse is not one capable to defending liberty. By the same token, the conviction of Elisabeth Sabaditsch-Wolff and the incapacity of the European Court to rule against a thought-terminating blasphemy law, can, and must, have a silver lining if we are to believe freedom of thought has any future in Western societies. It can show us what is wrong with the way we are treating our most cherished freedoms, and help us revive our commitment to honoring and defending them.

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[i] Jacob Mchangama, The Sordid Origen of Hate-Speech Laws, Policy Review, December 2011
[ii] Hans-Martien ten Napel, The Natural Law and Natural Rights Tradition: A Foundation for Religious Freedom, London School of Economics Religion and Global Society Blog, 15 July 2019
[iii] National Catholic Register, 25 July 2019