2018

'Fraternité' in ECHR Jurisprudence

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Abstract

Solidarity rights can increasingly be found in the jurisprudence of the European Court of Human Rights (ECtHR), the preeminent rights-protecting body in the world. This article examples three specific spheres in which the ideal of solidarity has left its mark on the Court's jurisprudence: (1) society's obligation to its most vulnerable members; (2) the right to collective enjoyment of public goods like the environment; and (3) the rights of particular groups to self-development. It examines the manner and extent that such rights have been instantiated and the theoretical difficulties they pose to a human rights court.

Les droits de la solidarité se retrouvent de plus en plus dans la jurisprudence de la Cour européenne des droits de l'homme (CEDH), l'organe prééminent de protection des droits dans le monde. Cet article illustre trois domaines spécifiques dans lesquels l'idéal de solidarité a marqué la jurisprudence de la Cour: (1) l'obligation de la société envers ses membres les plus vulnérables; (2) le droit à la jouissance collective des biens publics comme l'environnement; et (3) les droits de groupes particuliers à l'auto-développement. Il examine la manière et la mesure dans laquelle ces droits ont été instanciés et les difficultés théoriques qu'ils posent à la CEDH.

Can « human rights » be collective rights? At one time, the answer was « no ». The famed French revolutionary slogan, « *Liberté, Egalité, Fraternité* », did not originally include that controversial final term « fraternité »—which might be rendered « solidarity » in English—and several years after the Revolution, the term was scrapped.[2] The great human rights texts of the twentieth century spoke of « fundamental freedoms », but the subject of those freedoms was generally the *individual* in the singular. Theoretically and in practice, the relationship between the rights of individuals and the rights of groups can be full of tension.[3]

Still, today, there is growing agreement that human rights have a collective, group-based dimension. Just as with « second-generation » rights to baseline social and economic goods, « third-generation » or *solidarity rights* have emerged from the understanding that full attainment of « first-generation » civil and political rights demands more than a lack of interference from the State.[4] There are even those who argue that inter-generational obligations—to treat the Earth as a precious, finite resource, for instance—, as well as new rights of the individual in

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[1] As appearing in LE DÉFI DE LA FRATERNITÉ 153-172 (Marie-Jo Thiel, Marc Feix, ed. 2018).
[2] Mona OZOUF, « Liberté, Egalité, Fraternité », P. NORA (ed.), *Lieux de la mémoire,* vol. 3, Paris, Gallimard, 1992.
[3] Human rights' capitalistic and anti-group origins are discussed, for example, in Immanuel WALLERSTEIN, *After Liberalism,* New York, New Press, 1995, p. 201-227. On the conflict between liberal and communitarian conceptions of rights, see Michael WALZER, « The Communitarian Critique of Liberalism », *Political Theory* 18:1, 1990, p. 6-23 (at p. 6) and Allen E. BUCHANAN, « Assessing the Communitarian Critique of Liberalism », *Ethics* 99:4, 1989, p. 852-882 (at p. 852). A recent example of the conflict in practice has been in the integration of Muslims in French society, the ideal of *laïcité* providing itself rigid and unaccommodating to group difference, as seen in the well-known ECHR case *S.A.S. v. France* [GC] (no. 43835/11, 01.07.2014)
[4] Patricia BRANDER, ET AL. « The Evolution of Human Rights », in *Compass – Manual for Human Rights Education with Young People*, Strasbourg, Council of Europe Publishing, 2012, p. 395-7.

the face of technology—bioethical or reproductive rights, for instance—put us into a « fourth generation » of rights.[5]

In countries like Colombia, Brazil, Bolivia and others, new constitutions enshrine lists of « social » and « collective rights »—to consumer protection, a healthy environment, the sustainable development of natural resources, and to the « cultural identity » of indigenous minorities.[6] Recent international human rights texts also enshrine rights such as self-determination and the right to a distinct cultural identity; these include the EU Charter of Fundamental Rights (which came into effect in December 2009), the African Charter on Human and Peoples' Rights (2005), and the U.N. Declaration on the Rights of Indigenous Peoples (2007).

Solidarity rights can increasingly be found in the jurisprudence of the European Court of Human Rights (ECtHR), the preeminent rights-protecting body in the world. Although the European Convention on Human Rights (ECHR) dates to 1953, solidarity rights have gradually found their way under its aegis, through the influence of changing norms of domestic and international law. This new solidarity-oriented jurisprudence has at least three specific facets: (1) society's obligation to its most vulnerable members; (2) the right to collective enjoyment of public goods like the environment; and (3) the rights of particular groups to self-development. The article examines whether and to what extent such rights have been instantiated, and considers likely future trends in their development.

A. Generations of Rights (1946-2018)

As initially proposed by Czech jurist Karel Vasak in 1977, modern human rights have unfolded in three « generations » roughly corresponding to the three elements contained in the French revolutionary motto.[7]

Until the second half of the twentieth century, more or less, human rights had existed largely in the ideal realm of moral and political philosophy. But after the collective horror and depredations of the Second World War, human rights advocates sought out to rein in arbitrary State power by positivising a catalogue of basic human rights that would be unabridgeable.[8]

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[5] See, e.g., Graham HAUGHTON, « Environmental Justice and the Sustainable City », *Journal of Planning Education and Research* 18:3, 1999, p. 233-243 (at p. 233), ARLETTE GAUTIER, *Les droits reproductifs, une nouvelle génération de droits?* Autrepart 15, 2000: 167-180). Cases from the ECHR touching on these themes include: *Evans v UK* [GC], no. 6339/05 (2007) (assisted reproduction), *Pretty v UK,* no. 2346/02 (2002) (end of life), *R. v Poland,* no. 27617/04 (2011) (right to genetic testing), *S and Marper v UK,* nos. 30562/04 and 30566/04 (2008) (retention of genetic samples and data taken from criminal suspects).

[6] Detlef NOLTE and Almut SCHILLING-VACAFLOR, *The New Constitutionalism in Latin America*, New York, Routledge, 2012.

[7] The idea of generations of rights is a useful, but imperfect heuristic. It should not be taken to mean that rights unfold with perfect chronological periodicity, that first-generation principles have priority over later ones, or that the attainment of these rights is an inevitable « forward march » free from struggle, failures, and retreats.

[8] Hersch Lauterpacht's influential *An International Bill of the Rights of Man* (1945) drew upon a wide range of natural law theory, as well as constitutional and international customary law, to make the case for a written Bill of Rights to be enforced by the United Nations.

The thirty or so rights and freedoms that appeared in 1948 in the triumphant new Universal Declaration of Human Rights (UDHR) form the « moral backbone » of the modern human rights.[9] These constitute, as Vasak described, the core of the civil and political rights and freedoms owed to the individual today : the right to life, liberty and security; the equality of all persons under the law; freedom from torture and arbitrary detention; the right to private property; and the great political rights of freedom of opinion, expression, and peaceful assembly. The International Covenant on Civil and Political Rights (ICCPR) (entry into force 1976) would elaborate and expand upon this catalogue, while the European Convention on Human Rights (ECHR) invoked a similar list of rights upon which to erect the machinery of a supranational judicial rights-protecting system.

In the decades that followed, increasing solicitude for the material conditions of dispossessed groups like workers, trade unions, consumers, children and the elderly led to the recognition of second-generation rights.[10] The UDHR contained an embryonic list of these rights—for instance, the right to work for a « just and favourable remuneration », as well as rights to social security, collective bargaining, leisure, and the right to a decent standard of living, education, and health care (Arts. 21-29).

In the '60s and '70s, however, international and domestic law began to take on a more social and economic dimension. A partial list includes the International Covenant on Economic, Social, and Cultural Rights (ICESC) (1976), the European Social Charter (ESC) (1961, the Freedom of Association and Protection of the Right to Organise Convention (1948), the Discrimination (Employment and Occupation) Convention (1958), the Minimum Age Convention (1973), and the Declaration on Fundamental Rights at Work (1998). Most recently, the EU has proposed a « European Pillar of Social Rights » (April 2017), which aims to boost working and living conditions in member states by ensuring equal access to the labour market, fair working conditions, and social protection and inclusion.

Of recent provenance are *third-generation* or *solidarity rights*. Vasak saw these as a response to two problems brought about by the first two rights generations: first, the social isolation of individuals that a culture of individualism produced; second, the growing inability of states acting independently in a globalizing world to resolve problems that second-generation rights were designed to address. Vasak saw third-generation rights as requiring cooperative action

[9] Out of over two hundred post-war human rights instruments (declarations, conventions, protocols, treaties, charters and agreements) that have succeeded the UDHR, no fewer than sixty-five invoke it explicitly, as well as sixty domestic constitutions. Johannes MORSINK, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (Pennsylvania Studies in Human Rights), Philadelphia, University of Pennsylvania Press, 1999, p. 20.
[10] These developments also reflected the long shadow cast by prewar social texts like the Weimar Constitution and philosophies like Franklin D. Roosevelt's « Four Freedoms », which enshrined, among others, the right to « freedom from want. Duncan KELLY, « The Weimar Century: German Emigrés and the Ideological Foundations of the Cold War », *Politics, Religion & Ideology,* 16:2-3, 2015, p. 305-307 (at p. 306); UDI E. GREENBERG, « Germany's Postwar Re-education and its Weimar Intellectual Roots », *Journal of Contemporary History,* 46:1, 2011, p. 10-32 (at p. 10); Mary Ann GLENDON, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights*, New York: Random House, 2002, p. xviii, 42, 66, 165.

between individuals at the domestic level and States at the international level, and believed they would stimulate productive coordinated responses.[11]

Third-generation rights tend to view society, not as a conglomerate of atomized individuals, but as a body with a sense of *collective* fate; and individual freedom and self-expression as best achieved, not through isolation and non-interference but through belonging to one or another diverse groups. Rights *within* groups (cultural or linguistic rights, as found, for instance, in Article 15 ICESC) are important, as well as rights *between* them (duties and obligations to others, especially toward society's weakest members and future generations, who cannot speak for themselves).

Such rights can be found in many recent documents of international law. Texts on group rights include ICESC, the UNESCO Universal Declaration on Cultural Diversity (2001), as well as U.N. Declarations on Social Progress and Development (1969), the Right of Peoples to Peace (1984), the Right to Development (1986), and the Rights of Indigenous Peoples (2007), and the respective rights charters of the EU and Africa (2000 and 2005). Environmental rights, meanwhile, have found expression in texts like the 1972 Stockholm Declaration on the Human Environment, the U.N. Declaration on the Use of Scientific and Technological Progress in the Interests of Peace and for the Benefit of Mankind (1975), the Rio Declaration on Environment and Development (1992), and the Johannesburg Declaration on Sustainable Development (2002).

Rights-protecting bodies tasked with enforcing these include the Committee of Social Rights, an arm of the Council of Europe, the OSCE High Commissioner on National Minorities, and the EU Directorate-General for Environment. A few countries, too, have experimented with mechanisms for guarding environmental and inter-generational rights: Finland's Committee for the Future and the Future Generations Commissioners in Hungary and Wales (and proposed in the UK).[12]

B. Three Facets of Solidarity in the European Convention on Human Rights

On its face, the European Convention on Human Rights (ECHR) is demonstrably a « first-generation » text. Dating to 1953, it contains a concise catalogue of rights of the political variety—the freedoms of expression, assembly and association; and the civil—the rights to life, liberty and security, to marriage and private or family life, as well as freedoms of thought, conscience and religion, and others. Yet as « a living instrument » which is « interpreted in the light of present-day conditions » (*Matthews v. the United Kingdom* [GC], no. 24833/94, § 39,

[11] Patrick MACKLEM, « Human rights in international law: three generations or one? », *London Review of International Law*, 3(1), March 2015, 61-92, at p. 74.
[12] In Australia, the Commission for the Future operated between 1985 and 1998 (apparently with little success), while the Israeli Knesset established a Commission for Future Generations from 2001 to 2006.

18.02.1999), the Convention continues to evolve as it is permeated by changing currents of international human rights law.

The entry into force of the European Social Charter in 1961 brought an influx of social, economic and cultural rights into the Council of Europe.[13] That Charter supplemented the Convention, setting out rights to health, housing, education, full employment, social security, reduction of working hours, equal pay for equal work, parental leave, protection from poverty and social exclusion, as well as free movement of persons and freedom from discrimination.[14] The Charter stresses the protection of vulnerable persons such as elderly people, children, people with disabilities and migrants, and 1988 revisions added additional protections for the elderly and increased workers' rights: freedom from workplace gender discrimination, the right to be informed and consulted on workplace decisions, as well as participatory rights in setting working conditions. Newer protections target workers with family responsibilities, as well as mothers, employed children, and handicapped people.

Early on, the Commission of Human Rights affirmed that socio-economic rights had no independent existence under the Convention, existing only as emanations of the core civil and political rights (*Airey v. United Kingdom,* no. 6289/73, 09.12.1973, § 26), second-generation rights are now entrenched in Convention law. For instance, in the landmark case of *Demir and Baykara v. Turkey* [GC] (no. 34503/97, 12.11.2008), the right of workers to engage in collective bargaining was held to fall under the freedom of association (Article 11). As the Grand Chamber wrote, « the Court has always considered that Article 11 of the Convention safeguards freedom to protect the occupational interests of trade-union members by the union's collective action. » (§ 140)

Third-generation or solidarity rights have since appeared in connection with the right to culture (*Khurshid Mustafa and Tarzibachi v. Sweden,* no. 23883/06, 16.12.2008), animal and environmental rights (*Hermann v. Germany* [GC], no. 9300/07, 26.06.2012), the right to schooling (*Tarantino and Others v. Italy,* no. 25851/09, 02.04.2013; *Altinay v. Turkey,* no. 37222/04, 09.07.2013), the right to access the Internet (*Ahmet Yıldırım v. Turkey,* no. 3111/10, 18.12.2012), and stem cell research (*Parrillo v. Italy* [GC], no. 46470/11, 27.08.2015). As *Airey* established, these rights have appeared as emanations of prior Convention rights, or to a lesser extent, in light of evolving rights concretized in international texts. For instance, considering whether parental leave could be denied to male servicemen where it was available to female military officers, the Court referenced international texts on gender discrimination and parental leave.[15]

[13] The Charter stands separately from the Convention, with its own enforcement mechanism, the Committee for Social Rights.

[14] It is true that some of the provisions of the Convention and the Charter overlap, such at the right to an education (Art. 2 of Protocol 1 ECHR (1952) and Articles 7, 9, 10, 15, 19 of the 1961 Charter and Revised Charter.

[15] *Konstantin Markin v. Russia* [GC] (no. 30078/05, 22.03.2012). These texts included the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW, 1979), ILO Convention C111 on Discrimination in Respect of Employment and Occupation (1961), the European Social Charter, and European Union law. Interestingly, in that case the Court did not find a right to parental leave arising from these materials. Instead, it decided that the leave policy violated the Convention's prohibition on discrimination (Article 14 in conjunction with Article 8). However, the concurring opinion insisted that such a right had been established under

Solidarity rights have appeared in Convention law in three primary spheres: first, *protection of the vulnerable*, including refugees, the poor, individuals with disabilities, women, children, and the elderly? In this category of rights, a history of disadvantage, as well as considerations of membership, are paramount. Second is the *right to a healthy environment*. This right has emerged with the growing recognition that the individual needs safety and health in their environment in order to enjoy the right to respect for private and family life (Article 8). Third and finally, *cultural and educational rights* speak to the notion that a group is owed, not just the right to culture, but the right to *its own* culture, especially insofar as this relates to self-development. Here fall cases involving language rights, the rights of the Roma people, as well as the duty of States to create an environment of tolerance and free speech.[16]

1. Solidarity towards society's vulnerable

As applied by the European Court of Human Rights, solidarity rights adhere in the duty imposed upon States to shield a variety of populations : prisoners, children, the elderly, women, refugees, and the very poor, from the extreme hardship or ill-treatment to which they might otherwise be faced. The Court has often, in regard to vulnerable populations, highlighted the *particular status or circumstances* of a group that trigger a greater need for legal or social protection by the State. For instance, in the context of violence against women, the Court took note of « the particular state of emotional, physical, and material precariousness and vulnerability » in which victims find themselves (*Talpis v. Italy* (no. 41237/14, § 130, 02.03.2017). Asylum-seekers also fall under the notion of « vulnerable persons » (*Tarakhel v. Switzerland* [GC], no. 29217/12, 28.01.2014), particularly in cases where children are involved (*Sen v. the Netherlands*, no. 31465/96, 21.12.2001; *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, 12.10.2006; *Sh. D. and Others v. Greece*, no. 14165/16 (communicated case)). This applies to prisoners, too, who face isolation and uncertainty during interrogation (*Salduz v. Turkey* [GC], no. 36391/02, § 54, 27.11.08), a high risk of ill-treatment (*Poghosyan v. Georgia*, no. 9870/07, 24.02.2009; on the detention of physically disabled persons, see *Asalya v. Turkey,* no. 43875/09, 15.04.2014), and relative political powerlessness (*Hirst (n° 2) v. the United Kingdom* [GC], no. 74025/01, 6.10.2005, §§ 58-61 and 69-71; *Firth and Others v. the United Kingdom*, no. 47784/09, 12.08.2014)). Children have received the same treatment, with States given especially robust duties to protect them (*O'Keeffe and Others v. Ireland* [GC], 35810/09, 28.01.2014, §144-46; *Z and Others v. United Kingdom* [GC], no. 29392/95, 10.05.2001, § 73).

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the Convention. See « Partly Concurring and Partly Dissenting Opinion of Judge Pinto de Albuquerque », *Markin,* at p. 50-64.

[16] Just because a right adheres to a group does not mean that it necessarily falls into the third-generation category. It depends on how the right is conceived : as we have seen, under the Convention, the right to form unions falls under freedom of assembly (Article 11; *Daymara*, above), while under the Charter, trade union membership is a stand-alone economic right (Arts. 5, 6 of Part 1, Part 2). Regarding vulnerable populations, what makes the following cases belong to the third dimension is their appreciation of the relevance to rights protection of specific facts (namely an individual or group's specific position in society, especially in light of historic disadvantage or specific needs or challenges). This, in turn, shapes the Court's treatment of : (1) the *aim* of Convention rights, namely remedying an individual or group's *factual* disadvantage; (2) their *application* in light of a group's specific history and status; and (3) the specific obligations upon society to remedy these. See, linking the particular rights of vulnerable persons to positive obligations upon the State, Dimitris XENOS, « The Human Rights of the Vulnerable », *International Journal of Human Rights*, 13:4, 2009, p. 591-614.

The Court's jurisprudence on the elderly is another example.[17] One case involved a decision by UK authorities to reduce funds allocated for the weekly care of a 71-year-old lady with severely limited mobility so as to require her to meet her night-time toileting needs by using incontinence pads and absorbent sheets instead of a night-time carer to assist her in walking to the commode. The Court considered that « in an era of growing medical sophistication combined with longer life expectancies », State inaction should not leave the elderly « forced to linger on in old age or in states of advanced physical or mental decrepitude which conflicted with their strongly held ideas of self and personal identity » (*McDonald v. the United Kingdom*, no. 4241/12, 20 May 2014, § 47). In *Jablonská v. Poland* (no. 60225/00, 09.03.2004), the Court took into account the advanced age of the applicant (81) in assessing the scope of the right to a fair trial (Article 6), finding that proceedings on the annulment of a notarial deed, which had gone on for over ten years, had exceeded a reasonable time. In view of the applicant's advanced age, the Court observed, the Polish courts owed her a particular degree of expediency and diligence in handling her case. Likewise, the Court has found violations of the prohibition on degrading treatment (Article 3) in cases involving prison detentions of elderly persons (*Farbtuhs v. Latvia*, no 4672/02, 02.12.2004; *Hénaf v. France,* no. 65436/01, 27.02.2004).

What such cases also demonstrate is a concern for the *practical applicability* of rights. In these cases, the Court takes into account the individual's particular status or condition in order to assess whether their enjoyment of rights has been rendered « theoretical and illusory » in practice (*Airey v. Ireland,* above, § 24). For instance, the Court has found violations of the right of access to court (Art. 6 § 1) in cases involving disabled persons who could not reasonably exercise their right to legal representation (*Câmpeanu v. Romania* [GC], no. 47848/08, 17.07.2014).[18] The same was true where two young children were deprived of a sum of money inherited upon the death of their father because they had missed the statutory limitation period for judicial action to recover it. The Court concluded that given the age of the applicants, it had been « practically impossible » for them to defend their assets, and that the « rigid application » of the statutory limitation period by the authorities was a disproportionate interference with their right to access to court (*Stagno v. Belgium*, no. 1062/07, §§ 30, 32-33, 07.07.2009).

Persons who live in a state of extreme poverty represent an interesting marginal case at the frontiers of generations of rights : for instance, in the case of ethnic minorities who suffer from a long history of stigmatisation or dispossession. Only in rare circumstances has the Court applied the right to protection of private property (Article 1 of Protocol 1) in such a way as to require State provision of public benefits as a form of property owed the individual. *Airey v. Ireland* affirmed the indivisibility of socio-economic and basic civil and political rights ; yet, in that same case, the Court made clear that socio-economic rights would not be defended except insofar as these emanated from principal Convention rights (§ 26). Therefore, in the rare cases we see something like the « creation » of a property right for indigent people—to welfare

[17] Describing old age as evolving from « simply a question of demographics, social issues, and welfare to being a question of rights, » see Claudia MARTIN, Diego RODRÍGUEZ-PINZÓN, and Bethany BROWN, *Human Rights of Older People: Universal and Regional Legal Perspectives,* New York, Springer, 2015, p. 2.

[18] Here again the Court could have gone further. It has been argued that the Court's approach to the issue of legal representation of disabled person was insufficient to render such rights meaningful in practice. See « Concurring Opinion of Judge Pinto de Albuquerque », *Câmpeanu,* p. 61-73.

benefits, to an old age pension, and so forth—these developments may have less to do with the second-generation notion of the State's positive duty to maintain a baseline standard of living for its citizens than with the third-generation notion that permitting a person to suffer in extreme poverty is itself inhumane.

The Court refuses to interfere with States' budgetary and allocationary decisions, except in very particular circumstances. A series of cases emerging out of European austerity involving individuals complaining of deprivation as a result of State budget cuts emphasised this point.[19] And early decisions by the Commission refused to find that compulsory contributions to a pension fund created a property right to a portion of said fund.[20] Yet in more recent cases, the Court has backtracked somewhat. In one case, it found a right to emergency assistance, a social benefit linked to the payment of contributions to the unemployment insurance fund (*Gaygusuz v. Austria*, 16.09.1996, § 41, Reports of Judgments and Decisions 1996‑IV). In another, the State was required to give out a pension payable from a lawyers' pension scheme – once such contributions had been made, the Court found, an award could not be denied to the person concerned (*Klein v. Austria*, no. 57028/00, § 43, 3.03.2011). In another, the applicant was an elderly woman receiving a disability pension who had no other significant income on which to subsist. The Court noted that the applicant belonged to that category of « vulnerable » individuals who « for all or part of their lives, completely dependent for survival on social-security and welfare benefits » (*Béláné Nagy v. Hungary* [GC], no. 53080/13, §§ 80-81, 13.12.2016). Each of these outcomes may be best explained by the Court taking account of applicants' economic status, insofar as these were individuals dependent on State aid.

Cases of extreme poverty have also been treated under other articles of the Convention, including Articles 8 (right to respect for private life) and 3 (prohibition of degrading or inhumane treatment) (*Larioshina v. Russia,* no. 56869/00, 23.04.2002 (dec.); *Budina v. Russia,* no. 45603/05, 18.06.2009). Although more limited in the asserted scope of the right, these are arguably also more generous in their protections. That is, Article 3 does not apply except where a minimum threshold of severity is reached, yet the Court has also insisted that its protections are *absolute,* and not amenable to abridgment in light of budgetary concerns (*O'Rourke v. United Kingdom,* no. 39022/97, 26.06.2001). In the context of homeless persons, the Court has been clear in stating that there exists no stand-alone right to lodging under the Convention (*Chapman v. United Kingdom,* 18.01.2001, § 99). At the same time, the right to a decent lodging is intimately connected with the possibility for an individual to enjoy some sort of a private life. For instance, the Court found Czech authorities at fault where these separated children from their indigent parents because the latter could not provide an adequate family residence. Emphasising that the right to live together constituted the heart of the right to family life, the Court held it the responsibility of the State to assure material assistance to such families

[19] *Mockienė v. Lithuania*, no. 75916/13, 04.07.2017 (dec.); *Koufaki and ADEDY v. Greece*, no. 57665/12, 07.05. 2013 (dec.); *Valkov and Others v. Bulgaria*, no. 2033/04, 25.10.2011; and *Wieczorek v. Poland*, no. 18176/05, 08.12.2009 (in all of which reductions in benefits gave rise to no violation).
[20] See, e.g., *X. v the Netherlands*, no. 4130/69, decision of 20 July 1971.

(*Wallová and Walla v. Czech Republic,* no. 23848/04, 26.10.2006).[21] Likewise, insofar as reasonably possible, it is the State's responsibility to prevent harm to impoverished people living in unsafe conditions, even where these are living in illegal situations due to their extreme poverty. This was the case in *Öneryildiz v. Turkey* [GC] (no. 48939/99, 30.11.2004), in which the applicants were residents of a shantytown surrounding a rubbish dump which posed a high risk of explosion due to high quantities of methane gas produced by decomposing waste.[22]

Inchoate but yet perhaps visible in these cases involving vulnerable populations is a jurisprudence entailing State responsibility under the Convention for providing a healthy environment and basic means for survival.

2. Solidarity and the right to a healthy environment

The Convention provides no autonomous right to a healthy environment. Yet, where individuals are directly and seriously affected by pollution or other environmental nuisances, the Court has heard their complaints under Article 8 of the Convention, the right to respect for private life. This right may therefore include an obligation on the State to protect people from severe environmental pollution, since pollution can « affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life. » This could be so even where pollution did not risk « seriously endangering their health » (*López Ostra v. Spain,* no. 16798/90, § 51, 09.12.1994; see also *Guerra and Others v. Italy* [GC] no. 14967/89, § 60, 19.12.1998).

The right to be free from environmental pollution, so to speak, exists regardless of « whether the pollution is directly caused by the State or whether State responsibility arises from the failure to regulate private industry properly » (*Hatton and Others v. the United Kingdom* [GC], no. 36022/97, § 98, 08.07.2003). As set out in *Hatton*, Court's approach in such cases is to determine whether a fair balance had been struck between the competing interests of the individual and of the community as a whole, while ensuring the State a certain margin of appreciation in determining the steps to be taken to ensure compliance with the Convention. A finding of a violation would be more likely where the Court found a failure by national authorities to comply with some aspect of domestic law or regulations (*Hatton,* § 120; see also *López Ostra,* above, §§16-22, and *Guerra,* above, § 25-27), or where the decision-making process exhibited some manifest flaw (*Hatton,* § 99).

In a number of cases, violations of Article 8 have been found as a result of suffering caused to the individual by environmental pollution or damage. Some cases involved direct physical harm to the individual (*Otgon v. Republic of Moldova*, no. 22743/07, 25.10.2016 (awarding damages to a woman who contracted dysentery after drinking dirty tap water)). In others, violations were found even where no direct harm was established (*Ivan Atanasov v. Bulgaria*, no. 12853/03, 02.12.2010 (a farmer complained of possible contamination to his property by a

[21] See, also, *Yordanova v. Bulgaria,* no. 25446/06, 24.04.2012; and *Winterstein and Others v. France,* no. 27013/07, 17.10.2013 (need to protect members of particularly vulnerable social groups, especially in matters of housing).

[22] Colm O'CINNEIDE, « A modest proposal: destitution, state responsibility and the European Convention of Human Rights, » *European Human Rights Law Review* 5, 2008, p. 583-605 (at p. 590).

nearby tailings pond from a copper-ore mine); *Taşkın and Others v. Turkey*, no. 46117/99, 10.11.2004 (applicants lived near a mining site exposing them to a high likelihood of adverse exposure); *Okyay and Others v. Turkey*, no. 36220/97, 12.07.2005 (authorities had refused to close several thermal power plants even where federal courts had found these dangerous); *Di Sarno and Others v. Italy*, no. 30765/08, 10.01.2012 (municipal authorities had failed to take out accumulating waste over a prolonged period)).

These outcomes cannot be perfectly explained by the notion of « direct harm » to the individual in the enjoyment of their private life. Rather, the operative principle seems to be some notion of State failure to perform its positive duties, whether by acting lawfully and transparently in setting policy (*Taşkın* and *Okyay*), establishing regulatory frameworks for environmental policy (*Jugheli and Others v. Georgia*, no. 38342/05, 13.07.2017, § 75-77), or, even more broadly, perhaps, in maintaining an environment free of risks caused to individuals by pollution (*Di Sarno*).

The Court in *Hatton* made clear that it would not « adopt a special approach . . . by reference to a special status of environmental human rights » (§ 122). Yet, as the above cases show, the State's positive obligation to shield its citizens from pollution seems to have transcended the pure boundaries of protecting individuals from harm to their private lives. Moreover, in balancing the State's margin of appreciation with the individual's right to enjoy nature in an unspoiled state, the Court has given heavy weight to the latter. Finally, the fact that environmental rights are so clearly entailed by the requirements of Article 8 means that these will inevitably crop up again and again, and attract notable attention when they do so. For these reasons, it may be fair to talk of an emerging "special" jurisprudence on environmental rights under the Convention.

3. Solidarity as the right to an education and culture

The Convention does not explicitly recognise a « right to culture ». Yet an increasing number of cases are being brought before the Court by persons belonging to minority groups, a greater-than-ever portion of which deal with access to culture, cultural identity and cultural heritage, linguistic rights, and education. In such cases, group rights to culture or self-determination have found protected status under core Convention rights (Article 8, Article 9 (freedom of religion) Article 10 (freedom of speech), Article 11, and Article 2 of Protocol 1 (the right to an education)).

The importance of access to culture has been illustrated in diverse contexts. For instance, Romania's failure to return a library and a museum of significant cultural and historical importance to their former owners, a Catholic religious community, was deemed a violation of the right to protection of private property (Article 1 of Protocol 1) (*Catholic Archdiocese of Alba Iulia v. Romania,* no. 33003/03, 25.09.2012. Where an Azerbaijani man was denied access to his property and home located in a disputed area between Armenia and Azerbaijan, a violation was found of the right to respect for private life, ostensibly on cultural grounds : the Court made note of « the applicant's cultural and religious attachment with his late relatives'

graves in Gulistan » (*Sargasyan v. Azerbaijan,* no. 401617/06, § 257, 16.06.2015). The Court found a violation of freedom of expression in a case involving the eviction of tenants from an apartment building in Sweden on account of their refusal to remove a satellite dish that enabled them to receive television programmes in Arabic and Farsi from their country of origin (Iraq). The Court emphasised the importance, for an immigrant family with three children, of receiving information from and retaining cultural ties with their country of origin (*Khurshid Mustafa and Tarzibachi v. Sweden,* § 44). Finally, under a similar vector, a blanket ban of all sites hosted by Google sites was held to be a disproportionate interference with the freedom to receive information (*Ahmet Yıldırım v. Turkey,* no. 3111/10, 18.12.2012).[23]

States have a wide margin of appreciation when it comes to questions involving the right to schooling, including in setting the official language of instruction[24] and in imposing restrictions on admissions to institutions of higher education.[25] However, the Court has found a violation of Article 2 of Protocol 1 where a State failed to make available necessary provisions for the education of ethnic or linguistic minorities. This was so in the case of Greek Cypriots living in northern Cyprus to whom no Greek-language secondary-school facilities were available, after having completed their primary schooling in the Greek language (*Cyprus v. Turkey,* §§ 273-280). Similar considerations have motivated findings of violations of Article 14 (prohibition against discrimination) taken in conjunction with Article 2 of Protocol 1 in cases where States have failed to make sufficient provisions for the education of students of Roma background, a « particular type of vulnerable minority requiring special protection » (*Sampani and Others v. Greece,* no. 59608/09, 11.12.2012, § 76).

Outside of the schoolroom, broad expression has been given to cultural identity in diverse contexts. For instance, the Court considered under Article 8 the right of individuals belonging to Roma and Traveller groups to lead their lives in accordance with their cultural identity and traditions, where authorities had put up hurdles to individuals' residence in caravans (*Chapman v. United Kingdom* [GC], no. 27238/95, 18.01.2001, *Yordanova and Others v. Bulgaria*, above*; Winterstein and Others v. France,* above*; Bagdonavicius and Others v. Russia,* no. 19841/06, 11.10.2016). In *Chapman*, the Court considered that « the applicant's occupation of her caravan is an integral part of her ethnic identity as a Gypsy, reflecting the long tradition of that minority of following a traveling lifestyle. » Measures taken by the State « affecting the applicant's

[23] It is not clear whether this case stands for a general right to access the Internet. Freedom of expression on the Internet remains relatively novel terrain under the Convention. Sketching out an analytical framework for resolving such cases, see « Concurring Opinion of Judge Pinto de Albuquerque », *Yıldırım,* p. 22-31.

[24] Article 2 of Protocol 1 does not give parents right to demand their children be educated in a language of their own choosing (*Case* « *relating to certain aspects of the laws on the sue of languages in education in Belgium* »*,* no. 1474/62, §§ 3, 6, 23.07.1968).

[25] For instance, in *Tarantino and Others v. Italy* (no. 25851/09, 02.04.2013) and *Altinay v. Turkey* (no. 37222/04, 09.07.2013), the Court upheld two systems imposing broad restrictions on admissions to institutions of higher education. It found that in each, the restrictions in question—a *numerus clausus* system limiting enrolment in a number of Italian universities, and a restriction upon graduates of vocational schools from attending programs of higher education, respectively—had pursued a legitimate aim, and had been proportionate in light of the State's entitlement to regulate the right to education under Article 2 of Protocol 1 and Article 14. In each case, separate opinions argued that the Court had given scant consideration to the competing rights of institutional autonomy and access of students to higher education deriving from the State's obligations under international law. See « Partly Dissenting Opinion of Judge Pinto de Albuquerque », *Tarantino,* p. 18-26, and « Joint Partly Dissenting Opinion of Judges Vučinić and Pinto de Albuquerque », *Altinay*, p. 17-20.

stationing of her caravan therefore have an impact going beyond the right to respect for her home. They also affect her ability to maintain her identity as a gypsy and to lead her private and family life in accordance with that tradition. » (§ 73)

Linguistic rights, especially those of linguistic minorities and foreign citizens, have also been brought under the aegis of the Convention. In the context of official communications and the content of public education, the Court has granted Member States almost unlimited discretion in setting the official language of their own choosing (see *Mentzen v. Latvia* (dec.); *Bulgakov v. Ukraine,* §§ 43-44; *Baylac-Ferrer and Suarez v. France* (dec.)).[26] Yet where members of a minority group have been actively prevented or deterred from using their own language, the Court has been strict in its review. The Court found violations of the right to private life, for example, where Kurdish prisoners were prevented from sending letters in their own language (*Mehmet Nuri Özen and Others v. Turkey*, no. 15672/08, 11.01.2011) or barred from speaking in Kurdish when calling relatives on the phone (*Nusret Kaya and Others v. Turkey,* no. 43750/06, 22.04.2014), as well as of the freedom of expression where a Kurdish production of a play was banned (*Ulusoy and Others v. Turkey,* no. 34707/93, 03.05.2007) and a Kurdish newspaper prevented from circulating in prison (*Mesut Yurtsever and Others v. Turkey*, no. 14946/08, 20.01.2015). Overall, the « right to culture » and to education have been given ample margin under the Convention, particularly so where questions of minority group self-determination are involved.

Conclusion: Solidarity and Liberalism: Conflict and Reconciliation

We conclude by considering several issues raised by the present foray into the European Court's jurisprudence on solidarity rights—issues of a *theoretical, jurisprudential,* and *empirical* variety, respectively—and whether these insights may shed light on more enduring discussions of the relationship between solidarity rights and liberalism.

As a conceptual matter, pointing out the uneasy relationship between group rights and liberalism is well-trodden terrain.[27] One area of tension demonstrated in the cases above arises where the group's remedial ambitions are set against liberal aspirations to equality before the law.[28] This tension was clearly illustrated by the case of *S.A.S. v. France*, *above*, in which a

[26] Narrow exceptions lie in the contexts of detention and trial. These are the specific rights listed in Articles 5 § 2 (the right to be promptly informed, in a language one understands, of the reasons for his or her arrest) and 6 § 3 a) and e) (the right to be informed promptly, in a language one understands, of the accusation against one and the right to have the assistance of an interpreter in court if needed).

[27] Two vectors of the argument unexplored here are the historical claim, advanced by Samuel Moyn and others, that in the 1970s, proponents of these rights were fundamentally at odds with those espousing political rights such as national self-determination, and the hermeneutic point, famously raised by Lon Fuller, that « polycentric » disputes predicated on multifarious concerns of policy, equity, efficiency, and so forth, may be beyond the technical competence of the judge. MOYN, *The Last Utopia,* p. 30. Lon FULLER, « The Forms and Limits of Adjudication », *Harvard Law Review* 92(2), Dec. 1978, p. 353-409 (at p. 353).

[28] Avishai MARGALIT and Moshe HALBERTHAL, « Liberalism and the Right to Culture », *Social Research* 71(3), 1994, p. 529-548 (at p. 491).

majority imposed a secular liberal ideology upon a religious minority by criminalizing a particular group practice said to be hostile to liberal values.

It is important not to exaggerate the tensions between individual- and group-based rights. As democratic theorists like Habermas and Jeremy Waldron point out, group-based rights can be *sustaining* of individual rights insofar as they structure and activate the political participation necessary to effectuate them.[29] Moreover, as Vasak himself recognised, without solidarity rights to sustain some sociological baseline upon which to erect individual rights, the latter certainly would be « theoretical and illusory ».[30]

Yet there are, from a legal point of view, material differences between how individuals experience the law in light of their particular group identity. From the point of view of a rights-protecting court, this has the potential to raise issues, not only of rights balancing, but also of fundamental fairness between applicants.[31]

A second issue raised by the advent of solidarity rights under the Convention is the question, how much can and should these rights expand in the present content? Even a « living document » has its logical limits at the frontier between rights of the civil and political variety—enshrined in the Convention—and those of the second- and third-generation—which are not.

On the other hand, as the Court has noted on diverse occasions, the Convention is « a living instrument » and should be interpreted in harmony with all « relevant rules of international law applicable in relations between the parties » (*Matthews,* § 39, *R.M.T.,* § 76). Because solidarity rights are finding greater expression in socially minded international texts, these rights must be applied under the Convention, as well. Secondly, as the Vienna Declaration declares, « All human rights are universal, indivisible and interdependent and interrelated. » Partitioning rights into distinct entities is logically impossible, as the example of individuals in extreme poverty, for instance, tells us. Besides, there is inherent good in promoting slates of rights in concert, not only from an efficiency perspective, but also in light of the « emerging international consensus amongst the Contracting States of the Council of Europe » that protecting the special needs of minorities serves not only « the purpose of safeguarding the interests of the minorities themselves but [also that of] preserv[ing] a cultural diversity of value to the whole community » (*Chapman v. United Kingdom,* above, § 93). Finally, and most importantly, as Vasak and others observe, civil and political rights can be rendered vain and patently illegitimate where the substantive conditions for these rights are lacking. Attention to human rights' second- and third-generation facets is vital to the survival of human rights, generally.

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[29] Sujit CHOUDHRY, « Group Rights », M. ROSENFELD & A. SAJÓ (eds.), *Oxford Handbook of Comparative Constitutional Law*, Oxford, Oxford University Press, 2012, p. 1099-1123 (at p. 1100).

[30] David M. Davis puts this well-known point succinctly and well when he writes, "If the residents of a country are hungry, ill, thirsty, or cold and living under a constant threat of poverty, it is extremely difficult to see how they could decide on any meaningful conception of a good life for themselves and further, to what extent the first generation of rights would have significant meaning for them, living as they do in parlous conditions." DAVIS, « Socio-Economic Rights », p. 1034.

[31] « [A]lthough the fact of belonging to a minority with a traditional lifestyle different from that of the majority does not confer an immunity from general laws intended to safeguard the assets of the community as a whole, such as the environment, it may have an incidence on the manner in which such laws are to be implemented » (*Chapman v. UK*, § 96).

A final issue of great concern is the present tilt in many countries toward sovereigntism and illiberalism, which has resulted in a general denigration of democratic and liberal rights. In such a climate, third-generation rights risk becoming just so much aspirational « soft law », impossible to enforce because the baseline conditions of a liberal political system are lacking.

The present political situation is the product of numerous complex phenomena, making any quick reply here likely to be facile. However, we recall at this moment Vasak's own insights about third-generation rights. It is no stretch of the imagination to trace back much of the current political discontent to a dissatisfaction with the perceived vacuity of human rights, the continued isolation and abandonment of individuals under a globalised human rights regime, and the stubborn resistance to change of entrenched material conditions.[32] It may seem ironic, then, that the best reply to such rights-sceptics is that we need more rights—at least, we need their deeper instantiation by commitment to the egalitarian, communitarian, and self-determinationist foundations that third-generation rights demand.

It of course remains to be seen whether, under the European Convention, the present trend towards increasing protection of collective rights will continue. However, what should not be ignored is increasing attention paid in the forum of international human rights tribunals such as the European Court of Human Rights to the material conditions required for the fulfilment of basic rights and needs. Besides greater fulfilment of such basic rights, this trend may imply not only heightened possibilities for citizens' full democratic participation, but also a gradual relaxing of the supposed tension between liberal and democratic rights.

After all, as His Holiness Pope John Paul II put it in his Encyclical *Evangelium Vitae,* « the roots of the contradiction between the solemn affirmation of human rights and their tragic denial in practice lie in a notion of freedom which exalts the isolated individual in an absolute way, and gives no place to solidarity, to openness to others and service of them.[33] »

CV

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[32] Such scepticism about human rights is detailed in Charles BEITZ, *The Idea of Human Rights,* Oxford, Oxford University Press, 2011, as well as even more bitingly in Stephen HOPGOOD, *The Endtimes of Human Rights,* Ithaca, NY, Cornell University Press, 2015.
[33] JOHN PAUL II, *Evangelium Vitae*, 25 March 1995, at para. 19.

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