

Völkerrechtsblog

Der Blog des Arbeitskreises junger Völkerrechtswissenschaftler*innen

≡ Navigation



DEBATING "BEYOND HUMAN RIGHTS" SYMPOSIUM

De-constitutionalizing individual rights beyond the state?

Democracy and universality below and between human rights

MICHAEL RIEGNER — 27 January, 2016



Print



0



With its translation into English, Anne Peters' "Beyond Human Rights" provokes reactions from a

wider scholarly community that does not necessarily share her doctrinal methods, theoretical commitments or underlying political philosophy. Zoran Oklopic thus reads her work critically as a call for a “ius cosmopolitanum” based on “normative individualism”, as a liberal legalism which empowers the *bourgeois* to effectively enforce individual – read: corporate – property rights through investment arbitration but ultimately fails to protect consular rights of Latino migrants in US courts. In this post, however, I would like to put forward a different reading: I argue that introducing a layer of “simple” rights *de-constitutionalizes* individual rights, thereby opening a space for collective self-determination of *citoyens* and for legal scholarship and political contestation *beyond* universalist claims inherent in human rights.

“Simple” individual rights and collective self-determination

Peters’ conception includes two layers of individual rights embedded within a normative hierarchy: higher-ranking, constitutional-type human rights, and lower-ranking, “simple” rights of ordinary international law (p. 3, 388 in the German version). This opens up a new doctrinal category and a new register of argumentation: UNESCO, to use Peters’ example, can still argue that “sport” is an individual right but does not need to claim that there is a *human right* to sport. This is desirable because simple rights help avoid the inflation and banalization of human rights. But Peters has a second reason, based on a democratic logic: Simple rights are subject to legislative amendment by democratic

majorities, whereas constitutional rights are protected to some extent by court-enforced supermajority requirements (p. 395). Downgrading individual rights to “simple status” de-constitutionalizes them and brings them back into the realm of democratic politics and representative institutions. Reversibility of simple rights is ultimately a demand of majoritarian democracy, which rests on political equality of *citoyens*, not *bourgeois*.

But does this argument from domestic constitutionalism hold beyond the state? I want to make two points here, a first on collective self-determination and a second on universality. Firstly, can simple rights help balance rights and democratic politics in international law? Peters states that simple rights can be amended or repealed by treaty or custom but does not elaborate mechanisms or source aspects (398). International law in general is relatively hard to amend or repeal, which poses a problem for domestic democracy, at least at first sight. Is there a difference between “simple” international rights and human rights in this respect? Both are hard to amend – at worst, a single state can prevent amendment of a multilateral treaty – and international lawmaking procedures do not differentiate between simple and human rights as such. But a closer look reveals some nuances that would warrant further research.

Compare reversibility of human rights and investors’ rights, as discussed in [Evelyne Lagrange’s post](#): While human rights treaties are hardly ever denounced formally, several Latin American states have recently

terminated Bilateral Investment Treaties (BITs) or withdrawn from the ICSID convention after fundamental political changes, and countries like India are revising their BITs. Still, doubts remain: even terminated BITs linger on for as long as a decade, and interpretations of “simple” investors’ rights by non-representative arbitral tribunals are hard to correct by any legislative mechanism, even if democratic majorities on all sides agree on amendments. Thus, even if investors’ rights are simple rights, the institutional and doctrinal consequences are yet to be drawn to differentiate them from human rights. Peters own work on “dual democracy” indicates her concern in this respect, and it would be interesting to see these two constitutionalist strands linked.

“Simple” rights and the universality of international law

My second point is that simple rights open a discursive space below and between human rights which allows scholarly and political arguments about individual rights that do not per se carry the same universalist claim that is inherent in human rights. Universality claims, as Sundhya Pahuja argues, have their own politics that risk to internationalize parochial – often “Western” – concepts and to relegate its Others to the particularistic, the national. But if not all individual rights are universal human rights, it becomes politically possible to regulate simple rights differently. BITs can differ just as much as domestic property rights can vary, from relatively strong constitutional protection in the US, via the socially-bound, normatively-shaped German right to

property, to the fading right to property in India. Arguably, simple rights can be a terrain for what Pahuja calls “empty universalism” – a universalism with no fixed, but negotiable content that could be a common ground for scholarly and political debate.

Indeed, Peters herself hints at her sympathy with political conceptions of rights as put forward by Cristine Lafont (415). Yet, doubts remain: Would the two-layer approach not just shift the debate to the delineation of simple and human rights? Would UNESCO not still want to claim a universal human right of sport, instead of just a simple right? Would de-constitutionalizing individual rights not risk the emancipatory, counter-hegemonic potential also inherent in universal rights, if the claims of the Others become categorized as “simple” rights (cf. the debate on whether African, “third generation” rights are really human rights)?

Information rights as research agenda beyond human rights

The issues of democracy and universality become particularly evident in another area of rights that is largely absent from the book but that seems promising for further research: transparency, access to information, and competing information rights, such as privacy and data protection. Peters’ earlier claim that freedom of information is more than a “simple” right may have barred inclusion in this book, but information rights nevertheless illustrate well the complex interplay of fundamental rights, simple rights, democracy and universality. As domestic freedom of information legislation surged,

international law, too, has increasingly granted simple transparency rights to individuals in environmental law, WTO law and finance. The World Bank's secondary law stipulates such a right for everyone regardless of personal interest in the matter, even without consent of the state concerned, and makes this right enforceable in a quasi-judicial Access to Information Appeals Board. This emerging international institutional law of information is full of tensions, not least when it comes to balancing access to information with privacy, but it has some potential to improve democratic deliberation and accountability within and beyond the nation state – or even in helping to bring it about. This is a dynamic field in which rights evolve as technology and political preferences develop. In this situation, fundamental rights provide a bottom line, but simple rights have important functions beyond concretizing individual entitlements and duties: rather than constitutionalizing and universalizing today's solutions, they remain open for experimentation and revision as societies learn and deliberate how they want to balance transparency and openness with privacy and data protection in the future.

Michael Riegner is researcher at Humboldt University Berlin.

Tags: *Human Rights, International Legal Theory, Transparency*



Print



Facebook 4



Twitter



Email

Related

Beyond Human Rights: Beyond a Convertible Vattelien? 18 January, 2016 In "Debating "Beyond Human Rights""

Beyond Human Rights – Beyond International Law? 20 January, 2016 In "Debating "Beyond Human Rights""

Beyond Human Rights 18 January, 2016 In "Debating "Beyond Human Rights""

PREVIOUS POST



Investors' Rights Short of Human Rights in a Constitutional Perspective

NEXT POST

This is the most recent story.

No Comment

Leave a reply

Logged in as ajv2016. Log out?

SUBMIT COMMENT

- Notify me of follow-up comments by email.
- Notify me of new posts by email.