Are New Rights the New Right Answer?

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By: Lisa Mahowald Galalis

In the midst of the recent controversies swirling around newly-discovered "rights" to health care and same-sex marriage, Crossroads Cultural Center and the World Youth Alliance brought together two scholars of international human rights law to put these "rights" in perspective: David Kretzmer, Professor Emeritus of International Law at the Hebrew University of Jerusalem, and Marta Cartabia, Professor of Law at the University of Milan, Italy.

Professor Kretzmer explained that international human rights law was born in the wake of World War II and the Holocaust, when Nazi war criminals were prosecuted in the Nuremberg trials. The Allied nations that sat in judgment on the German defendants needed to appeal to a source of values with greater authority than the laws of the sovereign nations according to which these defendants could be judged---because many of the actions for which the Nuremberg defendants were on trial were legal under German law at the time.

The United Nations promulgated the first statement of these ideals in 1948: the Universal Declaration of Human Rights. It was soon followed by international covenants on civil and political rights, and on economic, social, and cultural rights, then by regional human rights conventions, and by conventions on specific rights. International tribunals were created to adjudicate human rights under these new conventions and covenants.

Thus the field of international human rights law was born. It greatly expanded traditional international law, which had until then consisted mainly of treaties between states. The new thing about these conventions was that they recognized certain principles that existed above the state, and that governed the relations between a state and its citizens.

Recent decisions by international tribunals, however, suggest that the international human rights project may have gone too far.

In April 2010, an Austrian couple appealed to the European Court of Human Rights, challenging an Austrian law that regulated the use of new medical technology to treat infertility by forbidding the use of sperm and ova from donors. Pushing aside the legislative concerns motivating the Austrian law, such as the risks of exploitation of women, of generating a commercial market for ova and sperm, and of eugenic reproduction, and a finding that it was in the best interests of children to have a unique biological mother, the European Court of Human Rights found that these concerns were trumped by the Austrian couple's "right" to use this technology.

This decision contrasts the result in another recent human rights case, in which lesbian couples appealed to the United Nations Human Rights Committee challenging a New Zealand law limiting marriage to a man and a woman. The Human Rights Committee did

not recognize that a same-sex couple had a "right" to marry that trumped New Zealand's legislative interest in proscribing same-sex marriage, but rather deferred to the legislature.

Why the different result? According to Professer Kretzmer, it was not because the New Zealand couple had poor arguments in their favor; on the contrary, their arguments were compelling in a society in which arguments based on natural law and religious tradition no longer carry weight. Professor Kretzmer rather attributed the different result to the fact that the United National Human Rights Committee enjoys a weaker perception of legitimacy among the nations under its sway. While the European Court of Human Rights presides over European nations, which share a certain consensus regarding the values of privacy and non-discrimination, the Human Rights Committee presides over an international audience of 165 states, including Muslim nations, many of which criminalize sodomy. To these states, a decision upholding a right to same-sex marriage would have obliterated any perceived legitimacy that the Committee might have been seen to possess. International tribunals cannot go ***too*** far beyond the consensus of the nations over which they preside in recognizing human rights violations, or their decisions will be ignored.

This limitation may not be a bad thing, according to Professor Marta Cartabia.

Professor Cartabia addressed the proliferation of new "rights" in western nations since the end of the Cold War: the period she called "The Age of Rights." For example: between 2007 and 2009, the number of pending cases before the European Court of Human Rights increased by 50%. Newly-enacted regional and municipal conventions have recently identified new "rights," such as the right to die, to have a child, to security, and to a clean environment. New "rights-holders" have been identified: women, the elderly, the disabled, children, and lesbian, gay, transgendered, and bisexual people. Rights have been identified not just as against the state, but against members of one's own family: such as one's spouse or one's parents.

At the origin of this proliferation of rights are the values of non-discrimination and privacy---particularly with respect to the newly-emerging "rights" at the edges of life---and the change in the western mindset to an individualistic, reductive understanding of the human person.

According to Professor Cartabia, both of these trends were at work in the Austrian case, in which the European Court of Human Rights held that the Austrian law violated both the principle of non-discrimination and the couple's right to privacy. This decision was notable because it was the first time an international tribunal has pronounced that the right to privacy encompasses an individual's "right to have a child"---including the right to use medical technology to do so. In this decision, Professor Cartabia said, the court found that a couple's privacy right implied the choice to have or not have a child, and that this right trumped ***all*** other considerations.

What kind of humanity, Professor Cartabia asked, is implied in a "human right" that trumps all other considerations?

To answer this question, she compared two decisions by the U.S. Supreme Court: *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261 (1990) and *Washington v. Glucksberg*, 521 U.S. 702 (1997). In *Cruzan*, the Supreme Court recognized an individual's right to refuse medical treatment, even if that person were incompetent, and even if it were necessary to save that person's life, based on a right to privacy that the Court had previously found to be implicitly guaranteed by the U.S. Constitution. In *Glucksberg*, however, the Supreme Court declined to recognize that the right to privacy encompassed a right to assistance in committing suicide.

According to Professor Cartabia's analysis, the *Cruzan* decision was based on a reduction of the human person solely to her will to choose, as if that person existed in isolation, "unencumbered" by sickness or relationships. The *Glucksberg* Court, in contrast, recognized that a person exercises her free will from within circumstances that affect her choices. The Court stressed that persons who ask for assisted suicide tend to be poor, sick, and vulnerable to pressure from their doctors and family members. The acknowledgement of these factors by the Court led to a refusal to recognize a new "right" to assisted suicide.

Professor Cartabia noted that the proliferation of "rights" in western society also results from a widespread inability to differentiate between rights, needs and desires. Thus, the natural desire to have child seamlessly translates into a "right" to have a child; a sick person's need to be relieved from pain becomes a "right" to die. And once rights are confused with desires, which can never be fully satisfied, rights proliferate and become absolute. As "rights" become absolute, one person's "rights' inevitably collide with other people's "rights," and violations of justice result.

Professor Cartabia concluded by translating Voltaire's axiom that a right pushed too far becomes an abuse of a right. She said that western society has a misconception that it can satisfy people's desires by creating new rights. In fact, there is a structural limit in human justice. Justice is an ideal to be striven for, but not something we can actually expect to achieve. We can not expect a total solution to the human craving for justice from human institutions that work within political constraints.

Therefore, she said, western society will not become more just by recognizing more new rights. Acknowledgement of the structural limit in human justice would rather suggest a more modest approach to striving after justice, with an awareness that courts and lawyers are not charged with the task of bringing justice on earth, but rather with arranging things in an ever more reasonable way.