



Are new rights the right answer?

A discussion on the proliferation of individual rights brought about by social changes and new technology

Speakers:

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**transcript not reviewed by the speakers*

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Crossroads: Welcome everyone on behalf of Crossroads Cultural Center. A special thanks to the World Youth Alliance who has helped to organize this event.

It is a common experience of contemporary life that more and more political and social issues are framed within the language of "rights." Whereas our culture is usually very uncomfortable with any kind of appeal to universal moral truths or to a "natural law," it is quite willing to recognize all sorts of "human rights," both of individuals and of social groups. Hence, the "proliferation of rights" mentioned in the title, which is not at all an academic question, but a social trend that we all can encounter in our daily circumstances, i.e. at our workplace, or at school. This evening's discussion is an attempt to ask some fundamental questions, such as: Why are there rights in the first place? What determines what they are and who enjoys them? Can this process be abused? What role should rights play in our legal system? To address these and other related questions, we are fortunate to have two outstanding scholars who have done extensive work on the role of "rights" in our society.

David Kretzmer, LL.B, LL.M (Jerusalem), Dr. Jur. (York, Canada), Dr. Jur. h.c. (Potsdam), is Professor Emeritus of International Law at the Hebrew University of Jerusalem and Professor of Law at the Academic Centre for Law and Business, Ramat Gan. From 2006-2009 he was at the Transitional Justice Institute in Belfast, Northern Ireland and in the 2009-2010 academic year he served as an Inaugural Fellow at the Straus Institute for the Advanced Study of Law and Justice, NYU. From 1995-2002 he was a member of the UN Human Rights Committee under the International Covenant of Civil and Political Rights, serving as vice-chairperson in 2001 and 2002. Dr. Kretzmer's main fields of research are constitutional law, human rights and international humanitarian law. His books include *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories* (SUNY Press, 2002); *The Concept of Human Dignity in Human Rights Discourse* (edited together with E. Klein) (Kluwer International, 2002) and *The Legal Status of the Arabs in Israel* (2nd edition (Arabic), 2002).

Marta Cartabia is Professor of Constitutional Law in the Faculty of Law of the University of Milano-Bicocca, where she has taught the Jean Monnet Course in European Constitutional Law since 2005. She received her Ph. D. in Law from the European University Institute in Florence, Italy, and was a clerk in the Italian Constitutional Court from 1993-1996. She is Senior Expert for Italy of the Fundamental Rights Agency Legal Experts (FRALEX). She is a member of the editorial boards of several journals including *Quaderni Costituzionali*, *Revista Española de derecho europeo* and *Rivista Italiana di Diritto Pubblico Comunitario*. Dr. Cartabia is the author or editor of several books -

including most recently *I diritti in azione* (2007) – and articles including “Prospects for National Parliaments in EU Affairs,” in *Genesis and Destiny of the European Constitution* (2007), and “Europe and Rights: Taking Dialogue Seriously,” in *The European Constitutional Law Review*.

I would now like to offer our welcome to Professor Kretzmer and turn the floor over to him.

Kretzmer: Good evening and thank you, Mr. Wiener, for that very kind introduction. I want to start by welcoming my colleague and friend, Dr. Marta Cartabia, for introducing me to the organizers of this event, and especially to Crossroads Cultural Center for inviting me.

I’m going to be talking this evening about international protection of human rights. You would ask, what is the connection between international protection of human rights and the issues which we are going to discuss? In order to show why I’ve chosen this topic, mainly of course because that’s my topic of expertise, but I want to start with two cases which have recently come before international bodies, one an international court, and another a treaty body which acts under an international treaty, and illustrate the kind of questions that we’re going to begin with tonight. The issue that I’m going to raise is: Who is deciding whether to recognize new rights? Are we deciding it in a political process in a domestic political scene, or are we somehow delegating this task to international bodies like the European Court of Human Rights or the Human Rights Committee.

Let’s start off with the first case that deals with reproductive rights. I know it’s a very sensitive topic among the Catholic community, but it’s illustrative of the issues of recognition of new rights. Now, in Austria and in Germany and in many other countries, they had to deal with the question: When do we allow what we could call use of modern technology in order to overcome biological problems that couples have—married couples, unmarried couples—in reproduction, generally using artificial insemination, implanting ova in the womb of a woman, even allowing surrogate motherhood? The Austrian legislature gave a lot of thought to this, and they passed legislation which regulated the issue which allowed in certain cases sperm donors, in certain cases not. The general feeling was you always had to know exactly who the genetic parents of any child who was born was. And that was the legislation.

Two couples who were not able to have a child by natural means tried to contest this legislation because under the legislation they were not entitled to enjoy the benefits of the new technology although technology was available. They went through the Austrian courts and eventually reached the highest court to deal with these matters in Austria, the Constitutional Court, and one of their arguments was, this is an interference with our right to family life, our right to have children as part of raising a family, and also there was some discrimination between those couples who were allowed to use this technology and those who were not. The Austrian Constitutional Court debated the issue, but upheld the legislation and said that it was compatible with the Austrian Constitution and even with those human rights treaties to which Austria was a party. And then the two couples both appeared before the European Court of Human Rights and the European Court of Human Rights decided that the Austrian legislation was discriminatory, and that Austria was actually bound to allow these two couples to enjoy the benefits of the new technology, in a way recognizing, as Marta will be speaking about later, a new right to be a parent or to have a child which was imposed on Austria by an international body.

The second case which actually ended slightly differently, and I was actually a part of the decision in this case. You know that the issue of same sex marriage is a very, very controversial issue throughout the world. In many countries today they do recognize same sex unions, some countries recognize same sex marriage, some states in the United States recognize same sex marriage. There was a case in New

Zealand where New Zealand did not recognize same sex marriage and two lesbian couples went to the New Zealand authorities and said, “Well, you have to allow us to marry.” The authorities said, “Well, sorry, according to New Zealand law, it’s just not possible; we only recognize marriage between a man and a woman.” They went to the New Zealand courts and the New Zealand courts said, “Sorry, it’s not part of New Zealand law; we can’t force the authorities to allow you to marry.” And then they brought the issue before the United Nations Human Rights Committee in which they said, “New Zealand has an obligation to allow us same sex marriage.” New Zealand does not have the freedom, does not have the sovereignty even to regulate this issue. As it happened in this case as opposed to the first case, the Human Rights Committee decided quite correctly, seeing that I was part of the decision, that there was a universal duty of all states to recognize same sex marriage. This was left to each state to decide. If a state wanted to recognize same sex marriage it could, but it was not bound to do so.

Now what do we have here? We have cases in which you have a debate in the political process. The debate took place in New Zealand, the debate took place in Austria, and the debate is resolved in a certain kind of way through the political process. You have legislation, the highest courts in those countries even decide that the legislation is compatible with the local constitution of New Zealand, they don’t have a written constitution, and then there’s an attempt to say, well, that’s not enough. We can go to some other body which stands above the constitutional court or the constitution of this country and rule otherwise. How did we get there?

So now let’s see how human rights develop in international law. Traditionally, international law only dealt with the relations between states. It was not concerned with the relationship between a state and its own citizens or its own residents. It was there to regulate the relations which were not regulated and could not be regulated under domestic legal systems because more than one state was involved and so it had to deal with the situation: what happens when two states clash or when two states have common interests, how do we resolve these issues? That was what international law was about. As I said, it did not interfere in the relations between governments of state and its citizens or residents.

But then we had World War II, and the whole notion of recognizing the sovereignty, the total sovereignty of states to regulate the relationship between the government and its citizens and residents totally broke down. The Nuremberg Tribunal set up after the Second World War established that there were some principles of humanity which stood above the state, and that every person was bound by them even if they argue that what they did was lawful under the domestic law of their state. And following that philosophy, when the United Nations was established, one of the aims of the United Nations was to promote human rights in the world.

And following that, we had the main documents which started developing. First and foremost, on December 10, 1948, the General Assembly of the United Nations adopts the Universal Declaration of Human Rights which attempts to establish universal norms which apply in all societies across time no matter what the culture and religion or political system of the society. But that was merely a declaration, a declaration of ideology, a declaration of ideals, it was not supposed to be a document which bound states or which created rights which an individual could enforce against his own state.

But following that, there were a bunch of international treaties which were adopted. On the international level, the two most important treaties were the two international covenants—the International Covenant of Civil and Political Rights, and the International Covenant of Economic, Social and Cultural Rights which were both adopted in 1966 and came into force in 1976. Now these were documents which regulated the relationship between the governmental authorities in a state, and

persons in that state and subject to the jurisdiction of that state. It was interfering in what really had been regarded as the sovereignty of the state, the relationship between the state and its citizens. These covenants were on the universal level, but in Europe even before the covenants were adopted, in 1950 they adopted the European Convention on Fundamental Rights and Freedoms, in 1969 the American Convention on Human Rights, and later in 1986 the African Convention. Besides that, we've got a whole list of conventions dealing with specific issues. I've just named three of them here: the Convention Against Torture and Other Forms of Cruel, Inhuman and Degrading Treatment or Punishment, the Convention for the Elimination of All Forms of Discrimination Against Women, and the Convention for the Elimination of Racial Discrimination.

Now note what has actually happened here. It's an interesting development. How do we try to make these new norms in international law? In the international community, we do not have the hierarchy of institutions which you have in a domestic legal system. We do not have any body which is recognized universally as a legislature which has the power to legislate new norms. The only mechanism that exists is fundamentally a contractual mechanism that states contract between themselves and they agree in a convention or a treaty to act in a certain way. The peace treaties are very, very different from the treaties which came before them, other treaties related to the relations between the parties of the treaties. The United States had a treaty with Mexico regulating the relations between the United States and Mexico. Human rights treaties do something else entirely. They do not really deal with the relationship between the parties to the treaties, between all the countries—165 states which are a party to the International Covenant on Civil and Political Rights. They deal with the relationship between each state and the persons in its territory and subject to its jurisdiction, which was something totally innovative.

But in order to undergo this, we had to deal with certain fundamental problems. These are the issues which we're really going to be discussing tonight. The first question is: Do we have such a thing as universal norms? Are norms not tied to any given society in a special time? Can we say that we have the same norms which apply in a developed Western society that apply in a society which is a feudal society or a post-feudal society? Do we have the same norms which apply in Western societies and Oriental societies? There were some at the beginning of this project who denied the very legitimacy of the project. Before the Universal Declaration of Human Rights was adopted by the United Nations General Assembly in 1948, the American Society of Anthropologists issued a statement saying that this was an impossible and unacceptable project, that there were no such things as universal values, values were tied to each and every society, and this was the way of the West trying to impose its values on the rest of the world. They've changed their tune since then, but one still hears voices about that.

So first of all, even if we accept that there are some values which are universal, and it's rarely accepted today—the value that you cannot torture persons is a universal value and it doesn't really matter which society you come from. You cannot kill people arbitrarily—a universal value. You cannot arbitrarily deny people of their liberty—one could say, well, that is clearly a universal value, and we could then start debating what is arbitrary.

But are we going to go further than that? And part of the debate and part of the work that Prof. Cartabia has been doing recently is to say, well, we've actually gone too far. Nobody is arguing today that we shouldn't have a core of rights which are protected, and if the state is inadequate to protect them, they should be protected by some universal mechanisms, international mechanisms, but that does not necessarily mean that we have to go the whole hog and say that every kind of value is going to be turned into a universal value which can be imposed from above on a society, even though within the political process of that society it is not acceptable.

So then we have which rights? And are we going to adopt a minimalist approach? Are we going to say, well, let's just try to find those norms which we can really say should be acceptable in every society. The problem is that even if we adopt that approach, it becomes controversial. And one of the most controversial issues in every single international decision-making body is the question of equality and the place of women in any given society because quite clearly, and the international covenants say this specifically and expressly, that all rights guaranteed must be guaranteed equally to men and to women. Yet when you come across certain societies, this does not seem self evident. You have many societies in which the law of marriage and divorce is discriminatory. It is not equal as far as women and men go. The role of women is not accepted as equal, and when we start talking in the rhetoric of human rights to people from these societies, you get the cultural arguments of saying, "Well, wait a second! That happens to be your culture, but we think differently."

So you have the question of culture and politics—what effect are those going to have on the way we interpret the rights and the way we determine which norms are going to be protected? For instance, are we going to have a law which says there's going to be total equality between persons, no discrimination on the basis of sexual orientation? And the implications are that you have to recognize marriage with same sex couples as well. Are you going to say that? The human rights committee was not prepared to say that and we'll come a bit later to some issues of why not.

So the first question was defining the norms and trying to work out some norms which could be acceptable, not only in the Western societies, but across the board in the West, in Africa, in Asia, in Latin America, and originally also in Eastern Europe.

The second question which you have to contend with—who's going to monitor whether the states which agree to these norms comply with them? It's very nice, we all know the countries which have wonderful constitutions. We look back at the whole Soviet Union, you read the constitution, and it seemed quite nice. Yet there was no connection whatsoever between the rights that were written into the constitution and what was actually happening in practice. Russia, the Soviet Union, was a party to all these human rights conventions and treaties, but of course they weren't complying. So the next question is—who's going to monitor compliance? And one of the advances that we have right on the international field is to say that we cannot leave compliance only in the hands of states. There have to be international bodies which are going to try to monitor whether the states are compliant. One of the many universal bodies on the international level is the Human Rights Committee which monitors compliance with the International Covenant on Civil and Political Rights, and you have a similar body which monitors compliance with the International Covenant of Economic, Social and Cultural Rights.

Much more problematic is the question of enforcement. Now there is a principle in international law, and it's quite clear that the state has precedence. We are not going to resort to international mechanisms unless it's a last resort. And this principle has become one of the principles which demands exhaustion of domestic remedies, so that in the two cases mentioned before—the Austrian case and the New Zealand case—it was clear that those couples could not approach the international bodies—the European Court, or the Human Rights Committee unless they'd been through the local courts. In Austria they went to the highest court which was the court constitutional court. In New Zealand they went to the Supreme Court, and only after they'd done that and said, "Well, we have no further recourse within our own countries. Could we approach the international bodies?"

Even when one has overcome this hurdle, the biggest question is: How are international bodies going to go about interpreting these documents? I'm going to go back to these cases. These two cases which I

choses are illustrative of the very deep problems that are involved. In the Austrian case, it seems to me that they could make out a fairly strong argument that, in fact, the Austrian legislation did discriminate between different couples who wanted to resort to the new technologies. Now Austria made some rational distinctions between these couples, but the fact that a distinction is rational does not necessarily mean to say that it's justifiable, especially when you're dealing with such a sensitive issue as the right of a childless couple who wants to have a child to have a child, and they see that their next door neighbor who is in a similar but not exactly the same situation can do so, and they are denied the right to do so. So I think that there was a very strong argument that this legislation was discriminatory.

But then we come to a second part of the question: Is that good enough for an international court to intervene? Shouldn't the international court in this case say, well, this is such a sensitive issue, we are talking fundamentally about new rights and their differences between the different countries; this is a case which has been debated in the political process. A lot of thought was given to it. The Austrian legislature had a rationale behind what they did, and in that kind of situation we should respect the sovereignty of the state. In terminology which is used very much in the European Court of Human Rights, but not used in the Human Rights Committee, it would say that we are allowing a margin of appreciation to the states, we are allowing them a certain latitude in interpreting their rights, and even though we may have decided otherwise, and in France they decided otherwise, and in Croatia they decided otherwise, but we're not going to interfere with the Austrian legislature.

Take the same sex case. The same sex marriage case raises a fascinating question because in that case it seems to me that a very, very strong substantive argument was made by those lesbian couples that, in fact, not allowing same sex marriage was discriminatory. They had an excellent brief by their lawyer which showed that you can make arguments for restricting marriage only to a man and a woman, and of course millions of people like myself who come from a religious background would probably accept that. But when you start breaking down these arguments you see that they really don't hold up in modern society. If you say that marriage is so that you can reproduce, we do allow marriage between couples even when we know they have no possibility whatsoever of reproducing. We allow people of 80 and 90 years old to get married. We allow people to get married even though we know they can't reproduce. So the lawyers went through the arguments one by one, and the biggest question is the institutional question. The Human Rights Committee had to look at this issue and say, well, where do we stand now? It's very nice. We could say to New Zealand, "You know what? You have to recognize same sex marriage." But we cannot lay down one norm which is going to apply only to New Zealand. If we say that New Zealand has to recognize same sex marriage, we have to say the same thing tomorrow when we are dealing with Morocco, or Egypt, or certain of the other countries which even criminalize homosexual consensual relations between adults, and you are now going to tell these societies not only are you not allowed to do that, you have to recognize same sex marriage. The international body would've lacked all legitimacy if it had done that. Nobody would've accepted its actual decision. So here you have actually the tension between deciding on the merits and knowing the institutional limitations of what you can do as an international body. And the Human Rights Committee is very, very aware of that.

Now interestingly when you look at the institutional questions, of course there's going to be a difference between a regional body, such as the European Court of Human Rights, and an international body like the Human Rights Committee which was established under the International Covenant for Civil and Political Rights. The European Convention originally, now this has changed since the end of the Cold War and the breakdown of the iron curtain, but originally it was dealing with a fairly homogenous set of countries, most of them western liberal democracies. There weren't that many differences between the cultures of the societies and the rights recognized in the societies. This has

somewhat changed since Europe has expanded and there are now 47 countries which are parties to the European Convention including all the former Soviet Union countries. When you're dealing with a body like the Human Rights Committee, which monitors the International Covenant of Civil and Political Rights, they are dealing with 165 states. Totally different, totally different cultures, totally different political systems, totally different religions, totally different economic development, and so certain things which can be done within the European system certainly cannot be done within the international system, although the substantive norms in the two documents, the European Convention on Human Rights and the International Covenant on Civil and Political Rights are not that different. The difference is in the political context and the mandate of these two bodies.

As I've said, the big question is: What is going to be the relationship between national and international human rights? And part of the problem of course is that in most countries of the world you have constitutions, and sometimes there's some disparity between the constitution and the international conventions to which that country is a part. You sometimes have this situation where the constitutional court of that country says, "Well, I'm bound by the constitution which would stand above any treaty." And when you go to the international body, they say, "Well, that's not how we perceive the matter. The country has agreed to comply with these norms and they cannot cite the constitution or their norms as an excuse of not doing so." We also know of course that there's a political dimension to many of the norms, interpreted in one way in one place and another way in another place.

I've dealt with the question of the different cultures and the different circumstances, and here we come to the question of innovation. Who is going to start with the innovation of human rights? Are we going to allow this to develop on the domestic level and eventually when it has developed enough on the domestic level in enough countries we say, well, this has now become a universal law, or do we think that the international bodies should be taking the lead and saying, "We are going to lead the fight for recognition of new rights and the other countries are going to follow suit,?" Those are the questions which my colleague, Prof. Cartabia, will be dealing with.

Thank you very much.

Cartabia: Thank you to the Board of Crossroads and to the World Youth Alliance for inviting me to speak about this subject that I've been so passionate about these past months.

My presentation will be complimentary to David's presentation because we have had a wonderful overview of the institutional problems involved in the protection of human rights at the national and international level, and the role of the institutions. I would like to go in a different direction, moving towards some substantial problems that affect the time we're living in. In a way I don't want to speak about the general protection of human rights, especially in the period after the Second World War, but my focus will be rather on the period, let's say conventionally, that started with the end of the Cold War.

I would like to start with this quotation taken from a novel, and I would like to draw your attention to the year, 1991, just after the political international equilibrium changed. And in this novel *Immortality*, Milan Kundera says,

The world has become man's rights and everything in it has become a right; the desire for love the right to love; the desire for rest the right to rest; the desire for

friendship the right to friendship; the desire to exceed the speed limit the right to exceed the speed limit...

Reading these words at that time could have seemed an exaggeration. Why speak about the right to love, the right to rest, the right to friendship? But as we will see in some examples that I'd like to give you, the legal language, not the language of a novelist, but the language of the courts is not so far from this description that we find in a novel.

First of all, before going to the examples, I would like to give you a quick overview of why we can say that we are at a different stage of human rights protection now called this stage after the Cold War, "The Age of Rights." In this time we have two different problems in different parts of the world. In our Western democracies—I would say Europe, the United States, Canada, and some other places in the world, we have this problem of the proliferation of rights, an excess of rights language in our political societies, whereas in other parts of the world we still have a lack of protection of the very basic rights. So the description I am giving concerns only the first kind of democracy—the United States, Europe and Canada mainly.

Just to give you a flavor of the dimension of the problem, have a look at the figures here. This is taken from the official reports of the European Court of Human Rights. At the end of 2009 the pending cases were about 120,000, and of course if you see the different years you can notice a dramatic increase in the number of cases pending. It's not that the court doesn't work because, as you can see, the number of full decisions is also a high number. There are 47 judges sitting in that court, and they issued 2,400 case decisions, but still they have a lot of work to do, and it is always, always, always increasing.

This proliferation of rights has very different facets. For example, David already mentioned that we have a lot of new charters of rights when he spoke about after the Universal Declaration of Human Rights, the Covenants, and also all the conventions. But what is interesting is that now in this phase of history, we have charters of rights at all levels, not only international and constitutional, but also at the original level and sometimes at the municipal or sub-national level, like, for example the Statute of Cataluña. Every region, every community wants its own charter of rights.

We have a lot of new institutions; for example, we have a lot of new UN bodies for the enforcement of human rights, and also at the European level we have not only judges who are charged with the task of enforcing rights, but also administrative bodies. And of course we have new kinds of rights, rights that were not written and are not written in the charters that are spelled out by the interpretation of these bodies, like, for example, the right to die, the right to have a child, the right to security, the right to environment, and so on.

We have a lot of new categories or classes of rights-holders. It used to be that when we spoke about the rights of man, but now we are more precise because we have split the rights in different classes of people—rights of women, rights of the elderly, the rights of the lesbian, gay, transsexual, bisexual, the rights of disabled people, and a lot of new other categories.

And of course we also have an expansion of rights in different kinds of relationships. Originally the reason for having rights was to defend the individual against the public. At present we have an expansion of rights in all the private relationships, like, for example, in the family. This is a very interesting case. In Italy, my country, we are refused to have a regulation of the family relationship because it was something that reminded us of the totalitarian regime, regulating even the family relationships. We have been refusing all of this type of legislation for a long period of time, but now

this regulation is coming back through the language of rights—rights of women, rights of wives against husbands, children’s rights against their parents, and so on.

From the substantive point of view, we can see that this proliferation of rights first of all is generated by two major matrixes from the cultural point of view—the right to privacy, which is at the origin of all the new rights related to the bioethical issues at the edges of life, and the right to non-discrimination as we have seen in the example given by David that is in a way also a combination of these two matrixes that originates in new rights—the new rights that we mentioned before.

But all along with this increase in the number of the language or rights, we also see that this increase is not neutral. It brings about a specific kind of culture which I would define with the idea of liberal individualism. So it’s not just a problem of quantity, of the number of rights, but the number brings about a change in the mindset in the cultural understanding of the human being. And this is the point to which I’d like to draw your attention to using two basic cases to explain. One is the very same case about the Austrian legislation. I had a long discussion with David. In these days we’ve had different points of view; we saw different problems. For both of us it’s problematic, but we saw different problems. And the other one would be taken from the US Supreme Court concerning the right to die.

So this is a very, very recent case, the one David already explained concerning artificial reproduction, and it was issued in April, 2010. The basis of this issue, there was legislation in Austria regulating medically assisted procreation. It is legislation that allows the use of homologous fertilization using the sperm and the ova of the couple having the child, but establishing strict rules and almost banning heterologous fertilization based on the use of the ova and the sperm from donors. David pointed out a problem of discrimination because this ban of heterologous fertilization had an exception, and this was the point that made it kind of irrational in this legislation. But we can assume that the basic framework of the legislation was allowing homologous fertilization and prohibiting instead heterologous fertilization.

Well, there were these couples who went to the Supreme Court first, and the Constitutional Court in Austria, and then to the European Court, and the assumption of the European Court is that the Austrian law was in violation of the European Convention of Human Rights for a combination of reasons: One is the principle of non-discrimination that was explained by David, and the other one was based on the idea that banning the access to a certain kind of reproductive technique was in violation of the right to privacy of the couple because (and here I am quoting the words of this decision) the right to privacy encompasses “*the right of a couple to have a child and to make use of medically assisted procreation.*” This is important because there were in no other precedent cases in the European Court of Human Rights the words, *the right of a couple to have a child*. It has used different kinds of expressions, like, for example, there should be no interference on the part of the public authorities—in the decision of a couple to have or not to have a child, noninterference. But the court for the first time in this case used in the affirmative sense, there is a right to have a child.

Just to give you an idea what the reasons were why the Austrian legislation and also the German (Germans intervened in the case supporting the position of the Austrian legislation), why did this country, as well as other countries in Europe, want to forbid the use of heterologous fertilization? They gave a bunch of reasons spelled out in the legislation, but also in some decisions of the constitutional court of these countries. For example, they said that they wanted to ban heterologous fertilization because of the risk of exploitation of women, because of the risk of opening a sort of market of ova and sperm, because of the risk of selective and heugenic reproduction, and also considering the problem that can be suffered by the future child, especially in the case of ova donors, in the case of

mothers, the child would have not just one mother, but two mothers—one that gave the ova, the other who carried the pregnancy. So problems of identity, a lot of problematic issues brought about by this specific technique of heterologous fertilization. All these reasons were considered and rejected by the European Court of Human Rights because in the European Court of Human Rights the focus was on privacy read in conjunction with non-discrimination, as David said before, and the privacy right implied the free choice to have or not to have a child, the right to have a child.

So we can see in the reasoning of these national courts that there was a much more complex and problematic vision of the issues, whereas here we have just one theme—free choice, the freedom of choice, the said determination of each individual that trumps all other consideration. Free will and free choice trump all other interests.

So after the analysis of this case, we are led to ask ourselves: What kind of humanity is implied in these new rights of the present era? Of course human rights want to defend the human person. They were instituted exactly for that reason. David mentioned the Holocaust. Without that we wouldn't have had a Universal Declaration of Human Rights because from the political and the legal point of view, that document is a miracle. You had to put together people from all different countries—from the USSR, the USA, and Europe, with different visions and also with a lot of tension because the Cold War was beginning and still we had the Universal Declaration of Human Rights. We saw the need to defend the dignity of the human person, but now with these new rights, what kind of human is implied in these human rights?

As you can see, I'm just opening a lot of problems. We can't over-simplify and say, "This is good; this is bad; I accept this right; I don't accept that one." But at least to ask the question is important. To go deeper in this problematic examination of the situation, I would like to use two American cases comparing the subjects that were understood by the US Supreme Court. They are both related to the right to die. The first case is *Cruzan* (1990) in which the American Supreme Court recognizes the rights of every person to refuse unwanted medical treatment even when the medical treatment is life-saving, and even, as in this case, when the person is incompetent. We had a similar case in Italy with Eluana Englaro, a person who was in a coma for many years, and it was assumed that there was proof that she wanted to refuse medical treatment, and the US Supreme Court, much longer before the Italian Supreme Court, decided that this is part of the right of the individual taken always from the right to privacy which by the way, is not openly stated in the US Constitution, but is the result of an interpretation of it.

The other case is *Glucksberg*. A few years later the US Supreme Court denies the right to assisted suicide. It's not just refusing medical treatment, but the request of the person was to be helped to die with medical treatment, in a positive euthanasia way. The Court said that there is no such right implied in the right to privacy.

So we have the two edges. On the one hand we have the US Supreme Court saying you can refuse medical treatment even if you are aware that you are going to die, but on the other hand, you cannot ask for some people to kill you.

I read these cases a couple of times with this question in mind: What kind of person is the US Supreme Court thinking about? Who is the subject of these rights? And reading these cases, the result is two completely different images of a person. In *Cruzan* the only concern of the Supreme Court was the will of the person, exactly the same kind of understanding that we saw before in the European Court of Human Rights decision about fertilization. Free will—if you want you can refuse, even if it means

your death. After this decision, in a way, the definition of the person using a sort of Descartes statement became, “I will therefore I am.” The definition of myself is focused on my free will, free choice. In *Glucksberg* we have a different understanding of the human person because there is a long digression in the US Supreme Court saying that the reason why the Court was not ready to recognize the right to assisted suicide was due to the fact that in most cases people who ask for assisted suicide are neither wealthy nor healthy; they are vulnerable in most cases because they are sick and they are poor, and for that reason they are very likely to undergo undue pressure on the part of the doctors sometimes, and even of their relatives, the people in their own family, or for maybe benign reasons keeping alive people who are terminally ill is very costly, so maybe it’s for economic reasons. There are a lot of reasons that can make suspect this decision of assisted suicide. And thanks to David I saw the numbers and the figures of Euthanasia in the Netherlands, and the reports that the UN Committee gave about the Netherlands that confirmed this problem and this problematic side of the free will to die.

So you see, we had a completely different image of the person. On the one hand we have: “I will therefore I am.” The subject is defined by his or her free will, and on the other hand, the subject is not denied his or her free will, but we consider that his or her free will is something that is the result of a process considering the concrete situation of the person—his or her relationship with other people, the economic situation, etc... We have a *homme situe*. This phrase is from Georges Burdeau and was written at the beginning of the last century, so we can understand why he is speaking about “homme” and not women.

So the new rights based on privacy and in part on non-discrimination tend to define an image of the person which is an abstract image. I’m using the definition taken by Michael Sandel who is a professor at Harvard Law School who defined this new man coming from the individual, liberal understanding of the person, “the unencumbered self”—no concrete situation, no relationships, no sickness, no problems, just an abstract free will. And in fact, reading those cases, especially in *Cruzan*, but also in the other case about Austrian legislation, we see that the individual is taken as an abstract person, isolated and partial, whereas on the other hand we have a concrete person, relational, with all the relational dimensions of his or her personality, and situated in a precise context.

Well, I’m approaching the end of this presentation, and if you followed my presentation, I started by describing the proliferation of rights, the number of rights that are increasing, and in the second part I tried to show you the reductive understanding of the human person that is behind this proliferation of rights. These two aspects of our present situation are not only juxtaposed, but there is a strict connection to my view because my intuition is that even if the proliferation of new rights is the fruit, the result of a reductive understanding of something that is inside every man and every woman which is the desire for justice, in our contemporary world, we merge different categories all in the name of rights. We do not make a clear distinction between needs, desires and rights. A sick person may have the need to be relieved of her pain. I’m not sure that she has a right to die as an answer or a reply to this need. Every person, or most people, have the desire to have a child. I’m not sure that the reply to this desire is the right to have a child. In the same way I see that there is a strict connection between the proliferation of rights and the unquenchable thirst for justice of every human being. We have an inexhaustible need for justice. The way we reply is to add always new rights with the illusion of approaching more closely the destination of justice. And since this need, this aspiration for justice is unquenchable, we always tend to erase all limitations of rights, like for example, in the Austrian case— no limitation to the access of artificial fertilization, and we multiply rights with the idea that we are moving closer to our destination of justice.

Well here there is something that logic has a hard time explaining, but the experience and also the historical experience shows very clearly that when we deal with the need, the desire for justice, we have to keep in mind that there is a sort of paradox that has been clearly stated since the ancient Roman law. I will read it in Latin, and then I'll try to explain: "*Summus jus, summa iniuria.*" When a right is pushed too far, no limitation, new rights for everything, there can easily be a rebound effect which instead of approaching the goal of justice, produces a violation of justice. And exactly the same concept was proposed by Voltaire, "*Un droit porte' trop loin devient une injustice.*" A right that is pushed too far becomes an abuse of rights. So to me this is something that we should always keep in mind when we deal with rules, positive law, new rights. I think that there is an obvious misunderstanding in the character of our time, adding new rights in order to satisfy all the needs and desires of people that forgets this paradox of justice.

I'm not here to propose a solution or policy that we have to adopt in order to deal with this need for justice and the response through new rights. In this moment I think it's enough to keep in mind that it's not by adding rights to rights to rights that will result in a more just society, and in the heart of each man and woman dwells an infinite desire that cannot be satisfied by any kind of human justice.

Since my words are so poor (I apologize for my English) and thanks to the help of Simonetta Wiener and the School of Visual Arts, I thought, in an attempt to illustrate this last idea of the paradox of justice I would use some clips taken from the movie *Lemon Trees*—another topic of discussion I've been having with David these past months because he has a different interpretation of this movie. I'd just like to explain this movie with a few words to give you some background. The plot is very simple. The context is Israel and the Palestinian West Bank. There is a Palestinian woman who is a widow and her son has left; he lives mostly in the United States. The only thing she owns, not only from the material point of view, but it's her whole life, is a lemon grove, a bunch of lemon trees behind her house, and this grove is beautiful. You can see that it's not just a matter of property, but it's a matter of heart, of affection. All of a sudden the Israeli Minister of Defense moves to a house close to her grove and of course there are security problems because he's a minister of the Israeli state, and this grove could easily conceal enemies and become the basis for a terrorist attack against the minister. So an order is issued to uproot all the trees of that grove. This woman is wonderful. She's courageous; she's very proud; she's very strong, and she decides to bring the case before the courts and of course they are all Israeli courts. So we see a Palestinian woman trying to defend her rights before Israeli courts. She doesn't stop with the first decision; she goes up to the Supreme Court. I don't want to add anything. You will see the result of this legal fight she has to try and defend her property, her affection, her own life, and you will see the final image of that. The only thing that I would like to add is that I beg you not to read this movie from the political level for our purposes now. This is not the reason why I'm proposing this viewing. I would like you to try to understand the feeling from the human point of view—the relationship between the different characters in this movie and the result from the human point of view of a woman trying to defend her rights, trying to fight for her desire for justice.

Thanks you very much. [movie plays]