

Foreword

In a fiercely polarised and messy Europe, destabilised with the implosion of traditional, mainstream parties and the emergence of populist newcomers, troubled by rising economic strife and roiled by war on its borders, politics is turning towards pure, ethno-religious chauvinism. Chauvinism is not simply people acting against the inherent dignity of every human being, it is about the material benefits that the chauvinist and his or her class derive from the exercise of power, it is about the perverse way power is exercised in society. Putting fear at the core of individual consciousness in a primitive logic of *homo homini lupus* and sowing distrust among countries in a basic logic of *regnum regno lupus* are essential to their goal of undermining the credibility of international organisations and courts, further alienating Europeans from one another and weakening the cohesion of the Council of Europe and the European Union.

Yesterday's political fault lines are disappearing for the benefit of hard-line parties and populist movements that have risen at either end of the political spectrum. One major commonality among these parties and movements is their unprecedented barrage of bellicose verbiage against international organisations and courts, often disguised in a discourse promoting the benefits of 'human rights diversity' (as in *Hutchinson v the United Kingdom (GC)*, No. 57592/08, 17 January 2017), fragmentation in European law (as in *Muršić v Croatia (GC)*, No. 7334/13, 20 October 2016) and fragmentation in international law (as in *Correia de Matos v Portugal (GC)*, No. 56402/12, 4 April 2018). Such abject attitude speaks volumes about the social and political values of these parties and movements and their lack of commitment to the European culture of human rights. In recent years the resentment against international organisations has reached a new, alarming pitch, stoking sectarian rage against the European Convention on Human Rights system itself. The rhetoric of the Convention as a 'villain's charter', which protects the terrorists, the paedophiles and all sorts of criminals against the innocent majority, or the abusive, lazy migrants against the hard-working Mr Smith, or the privileged minorities against the underprivileged, common man on the

street, echoes the whipped-up fear of the outsider – of that which is foreign or different.

Two strands of criticism seem to have fused. On the one hand, the pervasive idea that the Strasbourg Court's global reach is a threat to local democracy; on the other the cynical claim that human rights law as applied by the Court stretches the limits of the concept of law, or to put it frankly, is not law at all. These ideas have gained meretricious credibility with repetition. They are hard to untangle from other markers of a reactionary ideology, which hijacks the media space with the alarmist cries that government is losing control over borders and that Europe is losing control of its identity. This rhetoric is steeped in time-worn boutades about Europe being under attack from the near-heretics, sneering forces of modernity and governments being under constant siege from international organisations with an ever-growing political agenda. Such rhetoric has long erased the fine line between telling boastful untruths and criticising the advancements of case-law. This is a dangerous rhetoric for at least two reasons. Firstly, it scorns the idea of universality of human rights with a view to revising the civilizational *acquis* of international organisations and courts and putting these into reverse gear, in the belief that naming a desire will bring it about. Secondly, it willingly obliterates the patent fact that inequality is the most crucial challenge in a Europe where far too many people have known far too much suffering and far too little opportunity, and that this rampant inequality can only be fought with universal human rights-driven choices.

The excruciating problem for international organisations and courts today is that this politically motivated narrative has contaminated the discourse, if not the hearts, of the highest judicial representatives in some countries. As a matter of fact, international organisations and courts have attracted the antipathy of parties of both sides of the political spectrum as well as a powerful elite of skilled political knife-fighters, joining forces in a coalition comprising the neo-liberal-leaning supporters who hate the intervening State and the nation-State admirers who are viscerally opposed to any form of international comity and alliance. The mood is sanguine in some quarters in Europe. Some leaders pitch populations to their worst instincts and feed their political base red meat on sensitive policies, such as criminal, immigration and minorities' policies. These ideas have gained new purchase, including among domestic courts. The narrow-minded, sovereignist-leaning mood is in full display in the reaction to some 'unpleasant' judgments of the Strasbourg Court. In a bitter, divisive and antagonistic logic of 'us and them', some domestic courts have called into question the legal force of the Strasbourg Court's

inconvenient judgments, by advocating a State-centred Westphalian interpretation of human rights, giving priority to regulatory discretion of governments over fundamental rights of citizens. The lessons of History could not be further from their mind.

Some domestic authorities are even betting on the failure of the European system of human rights. They leave no taboo unturned. After the approval of the 2015 law on the powers of the Constitutional Court of Russia, which provides for the power to declare the judgments of international courts non-executable in the Russian legal order when they contradict the Russian Constitution, the alarm bells in Europe should have rung. When the strongest taboo cracks, as it did in December 2015, lesser ones may crumble. As shown in *Al-Dulimi and Montana Management Inc v Switzerland (GC)* (No. 5809/08, 21 June 2016), the choice for governments and domestic courts is clear today: either to join the cosmopolitan view of universal human rights as a limitation of State sovereignty and an instrument of equality; or to embrace the opposite, parochial view of domestic law as the inexpungible reserve of sovereignty and consequently of universal human rights as ‘nonsense upon stilts’, to borrow the expression of Bentham. This is a proxy fight between supporters and opponents of international law.

In their ultimately losing battle against international law and courts, the cavaliers of parochialism will only be stopped by solid, principled legal reasoning, like the ones provided by this book. This book presents a thorough and inspiring analysis of the current trend to fragmentation in the domain of human rights. There is a serious risk that fragmentation will lead to a race to the bottom in terms of human rights protection. In addition to the excellency of the individual contributions, on issues that range from specialisation to contextualisation of human rights law, from human rights experimentation to strategic choice in human rights litigation, this book comes at the right time. It is a must read.

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