European Human Rights Binaries

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Abstract: In the following lines the symbolic oppression founded on binary hierarchies that exist inside the framework of the European Convention for the Protection of Human Rights and Basic Freedoms will be presented. In those binary oppositions opposed terms are not equally valued. One of these terms is dominant, while the other is subordinated and mostly defined only as the first term’s other. This symbolic oppression creates various forms of discrimination. This paper argues that this problem can be resolved by deliberative democracy. Effective deliberation leads to more informed public sphere which is capable to embrace otherness and diversity.

Keywords: rights, binary, oppositions, deliberation, law, transformation

1. INTRODUCTION

Derrida’s critique of binary hierarchies can be applied to the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950). The European Convention for the Protection of Human Rights and Fundamental Freedoms is founded on the binary oppositions: objective/subjective, essential/contingent, nature/culture, public/private, individual/society, physical/mental and so forth. Those distinctions are based not on real, but on imaginary differences. They point to metatheoretical presuppositions which create inequalities on the metatheoretical level. Consequently, discrimination and exclusion can result from the symbolic oppression immanent to the human rights legal discourse. Thus, analysis of the symbolic aspect of human rights discourse (not only social, economic and political) is required.

However, in this paper it will be argued that Derrida’s critique does not resolve the problem of binary hierarchies. This problem can be solved by deliberative democracy which leads to transformation of the law and its basic concepts. Deliberative democracy leaves room for diversity and different voices are equally valued.
2. DERRIDA’S CRITIQUE OF BINARY HIERARCHIES

According to Derrida the history of Western metaphysics and thought can be perceived as the history of metaphors and metonymies, which are based on binary hierarchies. In his *Of Grammatology*, Derrida argues that logocentrism is the part of his project of deconstruction. Logocentrism perceives Western discourse as based on logos (reason, law). It gives priority to identity over difference, universality over particularity, necessity over contingency, nature over culture, etc. The first term is considered as dominant and universal, because it is perceived as it has its origin in the reason which is the same for all human beings. The other is perceived as contingent and particular and mostly excluded from Western discourse.

Derrida emphasizes that the existence of these binaries shows that the Western discourse is founded on metaphysics. The purpose of Derrida’s critique is not to change power relations in these binary oppositions, because this will make another kind of metaphysics. Derrida argues:

What must occur then is not merely a suppression of all hierarchy, for anarchy only consolidates just as surely the established order of a metaphysical hierarchy; nor is it a simple change or reversal in the terms of any given hierarchy. Rather the *Umkehrung* must be a transformation of the hierarchical structure itself. (Derrida 81)

The purpose of Derrida’s critique is deconstruction of Western metaphysics and discourse. Derrida’s deconstruction exposes assumptions that underlie these binary oppositions and create discrimination and inequality in a metatheoretical level. Derrida argues that two terms of the binary oppositions present in Western discourse (signifier/signified, objective/subjective, male/female, etc.) cannot be opposed, because every term of these binary oppositions contains in itself the phantom of the other. He introduces the concept of “differance”, which overcomes the fixed identity of “difference” and it represents a constant interplay of meanings. The purpose of Derrida’s deconstruction is transformation of the hierarchic structures which create metaphysical character of philosophy. Deconstruction rejects the discourse based on the power of reason.

Derrida’s critique of binary hierarchies as a foundation of Western discourse and law was employed by a number of authors. It is mostly emphasized by feminist authors who recognize the symbolic oppression
inside the framework of Western discourse and law based on these binary hierarchies. According to Charlesworth

International legal discourse rests on a series of distinctions; for example, objective/subjective, legal/political, logic/emotion, order/anarchy, mind/body, culture/nature, action/passivity, public/private, protector/protected, independence/dependence. Feminist scholars have drawn attention to the gendered coding of these binary oppositions – the first term signifying ‘male’ characteristics and the second ‘female’. Like many other systems of knowledge, international law typically values the first terms more greatly than their complements. (Charlesworth 163)

The greatest number of critics of this approach to rights emphasize that they are based on the idea of universality. These critics argue that universal agent does not exist.

3. BINARY HIERARCHIES WITHIN THE FRAMEWORK OF THE EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND BASIC FREEDOMS

In the following lines some basic binary hierarchies inside the framework of the European Convention for the Protection of Human Rights and Fundamental Freedoms will be presented. It will be argued that Derrida’s critique of binary hierarchies can be applied to the European Convention. Some binary oppositions such as public/private, sex/gender etc. inside the framework of European and international legal discourse are emphasized by feminist scholars. However, these analyses mostly emphasize the gendered coding of these binary oppositions and neglect their wider context, which was emphasized by Derrida in his critique of logocentrism.

Article 2 (Right to life) of the European Convention seems to refer to “life” only in “stable conditions”. It is not mentioned how this right should be perceived in revolutions and wars as well as in self-defense. (Heath) It is also not mentioned what “life” means. It can be questioned whether living in poor conditions which contradict to every idea of human dignity can be considered as “life”. Dignity is defined as a basic characteristic which should be attributed to every human being by the Preamble and Article 1 of the Universal Declaration of Human Rights. On the other hand, it is not clear from Article 2 of the European Convention for Protection of Human Rights
**and Fundamental Freedoms** whether right to life includes the possibility of euthanasia and the right to death when life damaged by illness cannot be led in dignity. Consequently, Article 2 includes binary oppositions: peace/war, developed/poor, health/illness, life/death, and so forth. The right to life defined by Article 2 includes only the first terms of those binary oppositions. It completely neglects the second terms contained in these binary oppositions and the questions they open up.

Article 3 (Prohibition of torture) of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* is founded on the binary opposition physical/mental. It mostly regards poor conditions in the detention and police violence. Thus, it mostly refers to physical abuse and neglects the question of mental torture. This problem is neglected in the entire human rights legal discourse and particularly complication to prove mental torture.

Article 4 (Prohibition of slavery and forced labor) includes binary opposition freedom/slavery, where neither of these terms is exactly defined. It is not clear on which assumptions freedom lies, and in which sense it should be understood. Subsequently, the concept of slavery is not clear enough. Article 4 is not applied to prison labor and national service, and it leaves a number of problems such as long terms contracts and forced labor by prisoners unsolved. (Heath)

Article 8 (Right to respect for private and family life) of the *European Convention* is based on the binary distinction public/private and puts the “family” into domain of “private” and silences the voice of women. It is also open to different kinds of discrimination and domestic violence, because it divides reality into the two separate spheres: law and life, public and private, dependent and independent, and so forth. According to Olsen, state respect for the privacy of the family is founded on the presupposition that there are pre-existing roles and obligations.

There are different consequences and perspectives on the public/private distinction and a number of studies has been written on this topic in the past two decades. Although the greatest number of these studies and critiques is written by feminist authors, this distinction does not only represent an attack to women’s rights. In Leander v Sweden case the “applicant had been refused a job because of information in his file which suggested he was a security risk.” (Ritchie 4) The European Court of Human Rights (At page 456 para. 74) said: “The right to freedom to receive information basically prohibits a Government from restricting a person
from receiving information that others wish or may be willing to impart to him.” (Ritchie 4)

Article 9 (Freedom of thought, conscience and religion) states the freedom of every human being to “manifest his religion or belief, in worship, teaching, practice and observance”. However, French law which came into effect on September 2 in 2004, which banned religious symbols in French public primary and secondary schools strictly made the distinction between public and private, and moved the freedom to express religious belief into the domain of “private”. According to Radacic,

recent endorsement of the state’s interference with the freedom of religion in the form of prohibitions of wearing the Islamic headscarf even by adult women, on the grounds of gender equality, is also problematic. They further deny women agency and restrict women’s already restricted choices. (Radacic 453-4)

Article 14 (Prohibition of discrimination) is founded on binary oppositions such as: sex/gender, nature/culture, biology/construction and so forth. “Sex” is defined as biologically determined, while gender is perceived as ‘socially constructed” in the EU gender policy. Gender is defined as follows: “Gender refers to the social differences between women and men that are learned, changeable over time and have wide variations both within and between cultures.” This definition of gender which emphasizes “social differences between women and men” leaves room for various forms of discrimination of women in different cultures and societies and should be changed. In the Parliamentary Assembly of the Council of Europe in 2005, there was a discussion about the discrimination of women in the workforce and the workplace. It is argued that women are discriminated both in the workforce and the workplace. Women still encounter the problem of the lack of access in the labour market in the most Council of Europe member states. “The labour force participation rate of women is lower and the unemployment rate of women higher than that of men.” On the other hand, the problem of wage gap still exists and women are often paid less than men for the same work.

Judith Butler points to problem which arise from the distinctions such as: nature/culture, sex/gender and so forth and emphasizes that all these concepts should be perceived as culturally constructed.

This paper does not aim at presenting all binary hierarchies on which the European Convention is founded. The purpose of this inquiry is to show
that they create various forms of inequality. Although the theoretical framework of the European Convention emphasizes equality by a number of established rights, it still creates inequality by a number of distinctions and hierarchies it contains on its metatheoretical level. Consequently, various kinds of subordination and discrimination are produced. For example,

gendered equality cannot be achieved if it is respected only in the public sphere, nor can religion be relegated only to the private sphere, because religious expression is inherently social (…). The construction of the public/private dichotomy in international human rights law, according to which the religious sphere is characterized by the lack of reason and equality, while the public sphere characterized by enlightened reason and equality does not provide meaningful choices for women within religious communities. (Radacic 855-6)

4. DELIBERATIVE DEMOCRACY AS A PATH TO THE LAW REFIGURATION

The idea of deliberative democracy is based on the need for the justification the decisions made by citizens and their representatives. These reasons should be accepted by all citizens as free and equal persons who seek for just terms of cooperation. (Gutmann 2) There are different definitions of deliberation, but all of them perceive it as “a process of public discussion in which participants offer proposals and justifications to support collective decisions.” (Fung 343)

In the process of deliberation citizens can create a dialogue, which reject one-dimensionality and essentialist categories and binaries inherent to human rights discourse. Deliberative democracy creates the speech situations which lead to transformation of certain stereotypes and “absolute truths”. It leads to more substantive idea of citizenship, because persons are not treated as passive objects of legislation, but as autonomous persons who take part in public discussions and creation of the law itself. Celina Romany argues that dialogue represent an effective tool for feminist critique of international law and human rights discourse:

Concerning of international legal argument as a dialogic framework would create a significant methodological and substantive tool for subjecting the interaction of “sources”, “process” and “substance” doctrines to substantial deviation. A dialogue that incorporates a
feminist understanding of social arrangements and legal argument as part of a critique of international law and the human rights field would help to undo the repressive nature of these three doctrines and thereby enable law’s transformative potential to run its course. (Romany 124)

However, this role of the dialogue should be broadened. It cannot only be reduced to feminist critique. It should include citizens as autonomous persons and their perspective on rights. The main goal of deliberation is to encourage public debates on public issues.

Deliberative democracy is founded on the idea that

it is not enough that citizens assert their power through interest-group bargaining or by voting in elections. (…) Assertions of power and expressions of will, though obviously a key part of democratic politics, still need to be justified by reason. (Gutmann 4)

On the other hand, decisions produced in the process of deliberation are only temporary. Thus, they are open to constant transformation and change. In this way, there is less chance for essentialist categories and binaries to persist. Deliberative democracy requires their justification and reasons which could be acceptable to all citizens as free and equal persons. However, if binary oppositions presented in the European Convention for the Protection of Human Rights and Basic Freedoms were subject of the deliberative process, i.e. dialogue which would include different voices, narratives and experiences, they could not persist as such and they would be transformed.

Deliberative democracy represents a dynamic system.

It keeps open the possibility of a continuing dialogue, one in which citizens can criticize previous decisions and move ahead on the basis of that criticism. Although a decision must stand for some period of time, it is provisional in the sense that it must be open to challenge at some point in the future. (Gutmann 6)

Deliberative democracy employs dynamic categories and concepts and rejects static and fixed terms of binary oppositions.
The three basic traits of deliberative democracy are: inclusion, participation and change. These concepts are understood in its broadest sense and include different voices, perspectives and narratives.
Deliberation helps citizens to expand their knowledge and understanding and to respect otherness and difference.

According to Trifiro, deliberative democracy can resolve the tensions between universalist claims of human rights and pluralism which is based on particularity and contingency. Deliberative democracy means equal consideration of all voices in public discussions. (Trifiro 6) When these voices are heard and respected, they can lead to transformation of the existing prejudices and stereotypes. Trifiro argues that the nature of deliberative democracy is anti-foundationalist. Deliberative democracy denies the priority of any particular concepts and practices. Thus, it is not based on binary dichotomies. On the other hand foundationalism leads to creating binary oppositions, because it is based on the idea that absolute authority which reflects the metaphysical order of things exists. (Trifiro 8) In this way the conversation is closed, because the basic concepts are perceived as fixed and unchangeable.

Deliberative democracy does not perceive binary oppositions within human rights discourse as unchangeable ontological and epistemological categories. It considers them moral and political categories which can be resolved by deliberation and public confrontation.

In the light of the deliberative democracy perspective, the European Convention on Human Rights would be perceived as a “living instrument” (Xiaoqing) that has a great impact on our reality, but that is, on the other hand, transformed and created by human experience and reality. Consequently, its concepts should be perceived as dynamic and constantly reinterpreted.

5. CONCLUSION

The European Convention for the Protection of Human Rights and Fundamental Freedoms is founded on the binary oppositions: objective/subjective, essential/contingent, nature/culture, public/private, individual/society, physical/mental and so forth. Those distinctions are based not on real, but on imaginary differences. In their critique of the authority of law, a number of authors employ Derrida’s idea of deconstruction and poststructuralist critique of the Western law and discourse. Although these authors point to problems identified by deconstruction, they do not offer a solution. They argue that Western law produces essentialist categories, which should be dismissed. However, they do not describe how new, contingent concepts can be introduced into the law and how its basic concepts can be rewritten.
In the previous lines it was argued that deliberative democracy leads to more substantive citizenship and represents an effective tool for the transformation of the law discourse, which would not be based on the binary hierarchies.

References


Notes

1 It just identifies the problem of binary hierarchies in the Western discourse.
2 According to Derrida, logocentrism gives priority to identity over difference and priority to speech over written word. Therefore, logocentrism expresses priority of the signified over the signifier, i.e. priority of the presence/speech over the absence/writing.
3 The Preamble of the Declaration of the Rights of Man and of Citizen (1789) also states that: “recognition of inherent dignity and of equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.”
4 “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”
5 There is a number of authors who had different perspectives on this idea.
6 “Everyone has the right to respect for his private and family life, his home and his correspondence.” 2. “There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”
8 “The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political and other opinion, nation or social origin, association with a national minority, property, birth or other status.”
9 http://europa.eu.int/gender
10 Assembly Debate on 27 April 2005 (13th Setting), see Doc. 10484, report of the Commitee on Equal Opportunities for Women and Men.
12 “If the immutable character of sex is contested, perhaps this construct ‘sex’ is culturally constructed as gender; indeed, perhaps it was always already gender with the consequence that the distinction between sex and gender turns out to be no distinction at all.” (Butler, J, Gender Trouble, London Routledge, 1999, p. 10-1)
13 The examples of these inequalities on metatheoretical level are well identified by Ivana Radacic in her article “Gender Equality Jurisprudence of the European Court of Human Rights” (European Journal of International Law, Vol. 19, No. 4, 2008).
14 It just identifies the problem of binary hierarchies in the Western discourse.