

'Barbarians' and 'Radicals' against the Legitimate Community? Cultural Othering through Discourses on Legitimacy of Human Rights

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This article focuses on the mutations of rights from instruments of inclusion to instruments of exclusion. It focuses on multiple exclusionary interpretations of legitimacy of international human rights law that create and propagate otherness. The text analyses the understanding and role of 'legitimate community of rights' in contemporary crises of recognition and critically evaluates how this notion excludes those deemed too different to belong. The article does so primarily in light of managing religious difference and argues that European human rights regimes have created two distinct categories of dissidents seen as subversive and *a priori* excluded from the protection of rights – the 'barbarians' and the 'radicals'. This analysis begins with a discussion of the theoretical notions of rights and legal legitimacy and their application in contemporary human rights case-law. It subsequently theorises the consequences of legitimising a homogenously constructed 'community' as the ultimate authority and its impact on reversal of the emancipatory potential of rights.

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1. Introduction

A Europe bound by a common set of rights and inclusive of all communities and identities seemed to be the ultimate objective of European integration processes (TEU, Preamble; ECHR, Preamble). Rights and principles of inclusion have been expanding rapidly to become overarching principles of constitutional regimes, European human rights law and European Union (EU) law. The jurisprudence of the European Court of Human Rights (ECtHR) within the framework of the Council of Europe (CoE) and the ultimate inclusion of rights in the Treaty of Lisbon promised a seemingly mighty weapon in protection of diversity.

Yet, to the disillusionment of many, these legal developments have not prevented the emergence of new forms of cultural racism (Lentin & Titley 2011, 49–84), the crisis of recognition discourse also known as so-called 'post-multiculturalism' (Kymlicka 2010; Vertovec 2010; Gozdecka, Kmak & Ercan 2015) and new forms of othering (Gozdecka 2015). Developments such as minaret bans, face-covering bans or the recent burkini bans have shaped a picture of constant crisis rather than a strengthened commitment to diversity. In this crisis, discourses and discussions of the legitimacy of contemporary international and supranational rights regimes have unexpectedly contributed to cultural othering. While the legitimacy of rights is an issue of great importance, constant preoccupation with who has the right to decide about our rights propelled the emergence of tensions leading to a struggle between different notions of a legitimate community of rights. This in turn resulted in the reversal of the logic of rights leading to multiple exclusionary legal developments restricting the rights of some communities (Gozdecka 2015, 2015a). These legal changes reflected the discussion on who is the most legitimate community to legislate and enjoy rights.

This article analyses the understanding and role of legitimacy discourses in contemporary crises of recognition visible in European rights regimes and critically evaluates the development of emerging homogenising notions of a community authorised to legislate rights. It further draws on the idea of paradigm and excluded subjects developed in my earlier work (Gozdecka 2015) and expands it to argue that fixation with legitimacy led to creation of otherising tools allowing for cultural marginalisation of groups and identities deemed unworthy. These othering tools resulted in the creation of two distinct categories of dissidents seen as subversive and dangerous to the legitimate community of rights – the 'barbarians' and the 'radicals'. I argue that instead of guaranteeing legitimacy of rights, these discourses have served as a defence of established cultural hegemonies, *a priori* excluding some subjects from protection of rights. My analysis begins with a discussion of the theoretical notions of legal legitimacy of rights

and the role of the community in legitimating processes and subsequently moves on to discuss their application in the contemporary human rights case-law of the ECtHR. It then critically evaluates the construction of legitimacy of rights derived from the idea of a homogeneously constructed 'community'. Further it illustrates the impact of these discourses on the reversal of the emancipatory potential of rights in judicial decisions concerning culturally sensitive questions of freedom of religion. Finally it engages in an effort to suggest an alternative form of legitimacy focused not on the community but on the emancipatory potential of rights. This alternative, drawing on Levinasian ethics, suggests that reconstructing the emancipatory potential of rights is possible with a focus on responsibility for alterity and emancipation rather than a homogeneously defined legitimate community.

2. The expanding rights regimes of Europe and the problem of legitimacy

From the drafting of the European Convention on Human Rights (ECHR) to the inclusion of rights in the jurisprudence of the European Court of Justice (ECJ, later the Court of Justice of the European Union – CJEU) and the ultimate recognition of the Charter of Fundamental Rights of the European Union (Charter) rights have taken their place as a cornerstone of European democracies and the foundations of democratic communities. Since adoption of the Treaty of Lisbon, rights have become legally affirmed as values that Europeans share in common:

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail (TEU, Article 2).

The expansion of the overarching idea of rights and their importance for Europe and Europeans has unsurprisingly resulted in a rich debate on their legitimacy and relationship in domestic, international and European legal systems. Famously and on many occasions Jürgen Habermas has discussed the legitimacy of rights and their role for the community, both local and international. In a Habermasian model rights are legitimate only if they are the outcome of public deliberation by all who could possibly be affected by them and could express their consent and opinion in the process of their creation (Habermas 1993). But at the same time rights as deeper values provide a basis of legitimacy for the politics of the international community. Having said that,

Habermas sees rights as expanding beyond the immediate polity and, drawing his theory of rights on the idea of Kantian peace, he conceives of them as a legitimate basis for international peace. The legitimacy of rights at international level is conceived of as an extension and a logical consequence of the constitutional rule of law (Habermas 1998, 199). In this supranational model, power politics are curtailed by judicial powers operating in a functional global public sphere bound by a set of human rights (Habermas 2009, 124). It is not only that international human rights are legitimate as an extension of domestic deliberation processes but at the same time they also serve as legitimating tools conceived of in deliberative processes on an international level.

Having gradually acquired the role of legal fundamental principles, the question of legitimacy of rights has been rephrased to the question of their role as the very tools of legitimation (e.g. Dworkin, 1978). For instance Kaarlo Tuori's three-level model of law (Tuori 2002, 193–194) sees rights as deep legitimating sources of changeable legal norms. Rights belong to the deepest structure of law and are seen as the most basic categories among other fundamental principles. At that deepest level Tuori envisions that rights are similar in a majority of legal systems and may play an important role in legitimating surface level norms in a process called legitimacy by justifiability (Tuori 2002, 245). Law on the surface level, according to Tuori, is normatively legitimate if and only if it can be legitimated through principles from the subsurface (middle or deep) levels.

But emphasis on the legitimating role of rights has not stopped the debate on the mutual relationship between different legal regimes securing rights and the respective communities responsible for those regimes. The discussion of this relationship has been polarised ranging from the vision of different rights regimes as a structure of mutually reinforcing legal orders (Pernice 2008) to the vision of rights as existing in a potential state of conflict (Sweet 2009, 245). The emphasis on possible conflict that might include issues of incompatible rights and diverse protected interests propelled the search for another potential source of legitimacy. After all, legal contestation in problematic cases could lead to a situation where domestic, international and European judicial organs become a battlefield of influences (Lasser, 2009). The resolution models for these conflicts have focused on the role of courts and international mechanisms of judicial enforcement (Sweet 2009, 245) but were not always able to resolve the possibility of a far-reaching conflict of interest. The search for legitimacy has therefore led scholarly discourse further into scrutiny of the role of the political community in legitimating rights.

3. What rights for which community?

In the diverse landscape of possibly conflicting rights regimes, inquiry revolves around the central question: 'who constitutes the community best legitimising rights regimes'? While the discussion on the community and rights is complex and involves multiple tensions between liberalism (e.g. Rawls 1993), communitarianism (e.g. Walzer 1990) and other theories attempting to preserve the emancipatory potential of rights for those marginalised (e.g. Douzinas 2000), the European discussion went in a slightly different direction: considering the impact of rights for a post-national community. Models of European post-national cosmopolitanism, seeing rights as quintessentially legitimating sources, ascribe to them the role of unifying moral values capable of binding different members of the European body in spite of their differences and creating a feeling of common awareness and belonging to a post-national community. Jürgen Habermas in his famous 'Why Europe needs a Constitution', written at the time of the failed debates concerning the European Constitution project, assigned just such a role to the Charter of Fundamental Rights, arguing that:

This new awareness of what Europeans have in common has found an admirable expression in the EU Charter of Basic Rights (...) The Charter goes beyond the limited view [of market integration] articulating a social vision of the European project. It also shows what Europeans link together normatively (Habermas 2004, 27).

But this vision does not solve the possibility of conflict between different rights regimes. It also risks being overtly Eurocentric and based on universalising and exclusive notions (Delanty 2002, 349) consequently disregarding basic societal disagreements concerning law and notions of rights (Delanty 2002, 248).

The thin nature of the international community has been also challenged as lacking the appropriate legitimacy for independent delineation of rights (Besson 2011; 2006). Perceiving the international community as incapable of appropriate legitimacy has shifted conceptualisations of a legitimate community to a domestic level. For instance, according to Samantha Besson rights can be legitimate only if in a minimal way they match an existing set of domestic human rights (Besson 2011). Likewise, according to Joseph Weiler the definition of human rights often differs from polity to polity. Since these differences reflect fundamental societal choices and are formative for different communal identities, rights must have their own distinct 'flavour' (Weiler 2009, 74). Not unlike Besson and Weiler, Bellamy has also frequently insisted that European citizens need to have a say in defining their rights (Bellamy 2008; 2006). The European public sphere, according to Bellamy, is not yet operative and thus cannot reflect rights

adequately. For rights to acquire appropriate legitimacy people must take part in decision-making processes that determine their rights (Bellamy 2008, 607).

Seeing the immediate political community as the only legitimate legislator of rights was not of course meant to construct any exclusionary notions of a community. Yet, as with any search for essence, the unfortunate side effect of these discourses has been the ultimate narrowing and homogenisation of the idea of a community. The notion of a political community seen as the only legitimate source of rights risks was not conceptualised in the vein of those who sought a definition of a community based on an expression of reciprocal power sharing and fair minimisation of exclusion by virtue of birth, cultural or religious belonging (Benhabib 2002, 148). Instead, the essentialisation of community that occurred replaced this diverse vision with a vision of an entity focused on homogeneity and preoccupied with unconditional power to decide whom to include and whom to exclude from the community and what follows from protection of rights (Gozdecka 2015, 339–340).

Lentin and Titley call this type of community domocentric (from *domos*, a place of home) and identifying it as a homogenising body politic based on a distinction between 'us' and 'them' and emphasising a place of 'natural belonging' (Lentin & Titley 2011, 206). The domocentric community is a democratic community in its narrowest understanding based on the sheer numerical majority. While the rule of the majority is one of the defining features of democracy, multiple scholars have attempted to add nuance to this narrow understanding by focusing on protection of minorities (Kymlicka 1995; Patton 2005) or construing the idea of a community which defies essentialist approaches (Nancy 1991; Agamben 1993). The domocentric community, however, ignores any such nuances and is preoccupied with constructing a coherent version of 'us' that can be contrasted with many other communities and identities. In its search for essential definition, the domocentric community positions itself against any other entity endangering its essence, be it the European community, cultural or religious minorities, migrants, or even some individuals. What follows notions of rights legitimated by a domocentric community are likewise based on exclusive and narrow notions. When coupled with a homogenous sense of domocentric community and its identity, 'legitimate' rights can be used as tools for framing certain lives as more or less worthy of protection, a process observed in another context by Butler (Butler 2009, 7). Bringing rights 'closer' to their respective communities has often resulted in protection of the cultural 'essence' of a community and deployed rights-based notions to 'exclude and stratify the less desirable' (Lentin & Titley 2011, 206). The resurgence of the domocentric national community has invaded the discourse on legitimacy and found an expression in multiple exclusionary developments within and beyond the strict domain of

rights (Gozdecka 2015). The less desirable is framed as the Other in the delineation between 'us' and 'them'. While the visibly different become the first target in this process, the delineation does not stop there. The excluded foreignness mutates and I argue that it can take on two dimensions.

Most frequently the Other continues to be symbolised by those traditionally perceived as 'barbarians' (Brown 2008, 149–175; Douzinas 2013, 56) – communities and identities whose claims are presented in terms of culture that possesses 'them' rather than culture that is controlled by 'them' (Brown 2008, 187). The notion of a barbarian echoes the historical barbarian invasions and operates with the logic of defending the 'civilised' from unwanted intrusion by those considered a threat to it. The domocentric community focuses first on drawing a distinction between the 'civilised' and the 'barbarian' but it does not stop there. As the process of identifying the essence continues, the contemporary exclusion from protection of rights eventually expands beyond the simple contrast of 'civilised' liberalism and 'barbaric' cultures. In the end it is driven by a perception of conflict and danger to the domocentric community coming from any side, including the inside. Those excluded may come from cultures framed as 'barbaric' or may be of foreign origin, but they may also be those parts of the community who appeal to cosmopolitan notions legitimating rights and supranational visions of community (Gozdecka 2015, 337–339). Those who appeal to cosmopolitan notions of rights in their struggle with 'tradition' or the 'moral views' of the majority are seen as another type of threat – one from the inside. Those who cannot be classified as barbarians are instead seen as 'radicals'. Radicals are not obviously foreign, but the danger they represent for the domus lies in their lack of attachment to the essentially defined values of the domocentric and homogenously constructed community. In some sense this danger is even more serious than that coming from the side of the 'barbarians' for radicals are typically the foreshadows of revolutions (e.g. Calhoun 1982; Meyerson 1995). Radicals announce a break from the *status quo* and a need for a drastic departure from the familiar and the known in which the domocentric community finds comfort. The danger of the radical lies in their capacity to appeal to various non-domestic values, including values of transnational formations, to challenge the imagined homogeneity of a narrow notion of political community (Brown 2008, 187). However, contemporary notions of the domocentric community legitimating rights are so narrow that they leave no room for either culturalised 'barbarians' or community-breaking 'radicals'.

The 'radicals' and 'barbarians' of today are those put in opposition to 'paradigm subjects' (Gozdecka 2015) of a liberal nation state constituting the most legitimate form of domocentric community. Constructed as a threat to the values, security, laws and rights of a liberal nation state, 'radicals' and 'barbarians' must unconditionally yield

before an exclusive reading of 'constitutional tradition', 'moral views', or even 'equality'. The emerging exclusive competence of the domocentric community to regulate areas of cultural conflict leads to otherisation imposed on the basis of 'unexamined prejudices, ancient battles, historical injustices and sheer administrative fiat' (Benhabib 2004, 178). As a result, 'radicals' and 'barbarians' must all yield before the homogeneous and domocentric national community and stand in an uneven position *vis-à-vis* the state.

Unconditional protection of the interest of domocentric communities reverses the idea of legitimacy based on unity in difference, common history or rights. Contrary to hopes for the emergence of an ethos of pluralisation (Delanty 2002) or unity in rights (Habermas 2004), bringing rights closer to their respective communities began an era of otherisation through the discourse of legitimacy. In this discourse, 'barbarians' and 'radicals' remain perpetually excluded from the realm of rights whereas the 'legitimate' community whose boundaries are continually narrowing remains both the bearer and the sole source of rights. In the following section I illustrate how these notions have entered the jurisprudence of the ECtHR and how the Court has employed the notions of legitimacy and community in an otherising and homogenising manner.

4. The fusion of othering and legitimacy discourse in judicial practice of rights

Not surprisingly, the attention given to the legitimate community has become focal in cases dealing with culturally contested issues. In its jurisprudence concerning such cases, the European Court of Human Rights (ECtHR), as the most prominent European judicial organ dealing with issues of rights, quickly demonstrated a shift acknowledging the strong position of the traditionally understood community.

Cases that have directed the reasoning of the Court into the path of discussing the legitimacy of the community through majoritarian notions have dealt with a range of culturally contested issues, among others a face-covering ban (*S.A.S. v. France* 2001), access to abortion (*A, B and C v. Ireland* 2010) and IVF (*S.H. and Others v. Austria* 2011), the display of crucifixes in public schools (*Lautsi* 2009) or publication of faith-related posters (*Mouvement raëlien suisse v. Switzerland* 2012). While seemingly different, these cases were selected due to their strong emphasis on the entitlements of a legitimate community and strong otherisation of those seen as excluded from it. While the margin of appreciation doctrine employed in these cases is familiar (see e.g. Yourow 1996) and has been used in multiple earlier cases such as those related to morality or blasphemy (*Handyside* 1976; *Otto-Preminger Institut* 1994) three main differences can be distinguished between the

earlier cases and the recent ones. Firstly, the cases come after strong emphasis on religious and cultural pluralism expressed both by the Council of Europe and the ECtHR, each emphasising that this pluralism is a value that is an important asset not only for the majority but also for minorities (*Buscarini* 1999; *Grzelak* 2002; *Zengin* 2007). Furthermore in current cases emphasis on the privileges of the community has been presented through a lens of a conflict of rights that channelled judicial argumentation towards differentiation between 'legitimate' organs capable of deciding about core majoritarian views and 'illegitimate' minoritarian views. Certainly, not all views and lifestyles are protected under the articles contested in all these cases, and the balancing of appropriate delineation often happens while weighing what is 'necessary in a democratic society' or which rights of others were infringed because of the applicant's views or their manifestation (see more: *Kratochvil* 2011). In these selected cases, however, another distinguishing feature is their speculative and unclear explanation of which rights, beyond the core majoritarian values of the perceived 'legitimate' community, were at risk by allowing these different practices to continue. In most of these recent cases the ECtHR created an area for its own non-interference with the competences of national authorities as representatives of the legitimate community in different cultural conflicts¹. The Court also created the categories that I earlier called 'radicals' and 'barbarians'.

While more complex and harder to identify, the figure of the radical features prominently in the cases of *Lautsi*, *S.H.* and *A.B. and C.* Meanwhile, it is easier to distinguish the presence of the figure of a 'barbarian', as has been observed in many earlier cases (*Gozdecka* 2015; 2015a; *Jackson & Gozdecka* 2013). The *S.A.S.* case analysed here is chosen to illustrate the most recent refinement of this category. The last case illustrates a fusion between both figures and shows how speculative evidence can be used in reasoning, distancing the applicants from their community. Since the category of barbarians has frequently been explored (*Brown* 2008; *Jackson & Gozdecka* 2012). I will begin the analysis with the cases that construct the radical – a figure harder to pinpoint and more difficult to understand when considering otherising practices.

In the famous case of *Lautsi v. Italy*, dealing with the obligatory display of crucifixes in all state schools in Italy, the reversed judgment focused little on the requirements of pluralism but instead focused on

¹ This focus noticeably modified the Court's reasoning and approximated it to the reasoning characteristic of another European judicial body, namely the CJEU. The CJEU, being traditionally the ground for contestation between conflicting legal regimes, has in the past engaged in considerations on the appropriate regime for legitimating rights. The cases of *Lautsi v. Italy* *A.B. and C. v. Ireland* (*A, B and C v. Ireland*, 2010) and *S.H. v Austria* (*S.H. and Others v. Austria*, 2011) explicitly focused on competences, equating them with legitimacy. In these culturally loaded cases the margin evolved from a tool allowing a certain leniency towards Member States in determining local understandings of rights to a tool delineating areas of exclusivity of state competences.

the ECtHR's legitimacy to judge in these culturally sensitive cases. In not so many words, the Court underlined its own lack of legitimacy to judge on these matters as an organ of the international community and shifted the responsibility back to the local community by stating that '[i]n principle it is not for the Court to rule on such questions, as the solutions may legitimately vary according to the country and the era' (*Lautsi* [Grand Chamber] 2011, para. 68). However, it was the famous concurring opinion of Judge Bonello that revealed the full otherising potential of this approach to legitimacy. Bonello emphasised among others that '[i]t is for the Italian authorities, not for this Court, to enforce secularism if they believe it forms part, or should form part, of the Italian constitutional architecture' (para. 2.9). Certainly this approach would not differ from others in similar cases if the judge did not turn the applicant herself into the 'illegitimate' other who attacked the very heart of the legitimate community:

May it please Ms Lautsi, in her own name and on behalf of secularism, not to enlist the services of this Court to ensure the suppression of the Italian school calendar, another Christian-cultural heritage that has survived the centuries without any evidence of irreparable harm to the progress of freedom, emancipation, democracy and civilisation (para. 1.6).

The cultural other was framed as a radical not entitled to protection of her beliefs under the principles of pluralism. The mere action she took in defence of her beliefs was seen as inherently illegitimate and violating the cultural core of the community she lived in (Gozdecka 2015, 337). This turn towards prioritising the morals and traditions of the community found clear expression in the Court's 'view that the decision whether or not to perpetuate a tradition falls in principle within the margin of appreciation of the respondent State' (*Lautsi* [Grand Chamber] 2011, para. 68). The majoritarian tradition itself became the source of legitimacy, allowing disapproval of action taken by a *status quo*-breaking 'radical'. As is evident from Judge Bonello's opinion, the focus remained solely on what the other can do to the majoritarian tradition and how this danger impacts the legitimate mandate of the community to delineate rights for all. The inclusion of difference or the rights of the applicant were hardly a consideration when this approach to legitimacy prevailed in the Grand Chamber's reasoning.

The Court approached legitimacy similarly in the case of *S.H. v. Austria*, dealing with access to assisted procreation. Through fear of creating 'illegitimate' and 'cosmopolitan' notions of rights, the Court emphasised that its 'task is not to substitute itself for the competent national authorities in determining the most appropriate policy for regulating matters of artificial procreation.' (*S.H. and Others v. Austria* 2011, para. 92). The homogenising vision of the legitimate community

was, on the other hand, expressed through a focus on the national authorities' mandate 'to give an opinion, (...) "on the exact content of the requirements of morals" in their country' (*S.H. and Others v. Austria* 2011, para. 94). This view unnaturally presented the community as a domocentric and internally homogenous moral space. Plurality of moral views, on the other hand was dismissed by reference to the legitimate authorities, presented as the sole custodians of 'morals' in their country. The action by the applicants was again not seen as a matter of their rights but as a matter of the legitimacy of their local community to define and narrow rights in accordance with the morals defined by them.

The fusion of the legitimacy discourse with the discourse of morals of a national community was also refined in the case of *A.B. and C. v Ireland*, where the Court acknowledged the role of the 'profound moral views of the majority of the Irish people' (*A, B and C v. Ireland* 2010, para. 241) in limiting access to abortion. These 'views' have very recently turned out to be, in fact, contrary to that assumption (McDonald, Graham-Harrison & Baker 2018). In this decision, however, the Court referred back to legitimacy grounded in protection of those presumed majoritarian moral views on abortion. The alleged existence of those views was construed as a legitimate aim in a democratic society and evaluated as striking a fair balance between diverse moral views in a pluralistic society. Even the fact of a growing European consensus on access to abortion was found insufficient to minimise the state's margin of appreciation in the case of protecting the 'profound moral views' of the majority. Again, the legitimate authorities became custodians of the moral core of the community defended against community-breaking 'radicals'. These three cases clearly delineated the protected core of a domocentric community and shielded it from radical cosmopolitan notions of rights. The applicants became illegitimate 'radicals' appealing for the protection of illegitimate cosmopolitan notions and contrasted with legitimate subjects of rights – those adhering to the majoritarian moral views constituting the core of the community.

In contrast to 'radicals' the case of *S.A.S. v France* (*S.A.S. v. France*, 2014) refined the long existing category of 'barbarians'². *S.A.S.* is the most recent case in a long saga of cases concerning religious head covering before the ECtHR (e.g. McGoldrick 2006). In the previous cases the Court construed 'barbarity' in diverse ways, including the applicants' alleged disrespect for women's rights. This framing was particularly strong in *Dahlab v. Switzerland* (Jackson & Gozdecka 2012) where the applicant was informed that the decision to wear Islamic

² *Dahlab v. Switzerland*, European Court of Human Rights, Decision, Application no. 42393/98, 15 February 2001; *Sahin v Turkey*, European Court of Human Rights, Grand Chamber Judgment, Application no. 44774/98, 10 November 2005; *Şefika Köse and 93 Others v Turkey*, European Court of Human Rights, Decision, Application no. 26625/02, 24 January 2006; *Dogru v France*, European Court of Human Rights, Judgment, Application no. 27058/05, 4 March 2009.

covering was 'hard to square with the principle of gender equality (Dahlab v. Switzerland 2001, p. 13). In contrast, the Court in S.A.S. abstained from the simplistic contrasting of the practice of covering with gender equality and emphasised that 'a State Party cannot invoke gender equality in order to ban a practice that is defended by women – such as the applicant' (S.A.S. v France 2014, para. 119). Despite this sudden change in approach, the decision nonetheless maintained the category of the 'barbarian' by employing another type of othering discourse. Given the growing entitlements of the domocentric community, the Court strengthened the mandate of the legitimate community by linking it with the comfort of the majority. As a result the S.A.S. case created a new exclusionary tool that can be employed in the discourse of the legitimate community and the 'barbarians' within – the 'requirement of living together'. Despite acknowledging that wearing a face covering may have legitimate objectives under freedom of expression and freedom of religion (S.A.S. v. France 2014, para. 119), the very final statements of the judgment dismiss these objectives and expand the mandate of the legitimate community to decide whether certain clothing creates discomfort, thus impacting the conditions of 'living together'. In other words the legitimate community, in regulating the practice of veiling, can decide whether the practice discomforts the majority. The mere discomfort of being exposed to cultural difference suffices to restrain the practice of the minority. The category of 'living together' (S.A.S. v. France 2014, para. 142) while presumably meant to be 'neutral' created another strong entitlement of the majority to create norms for the 'barbarian' other and prevent practices that disrupt core majoritarian morals. The legitimacy and homogeneous understanding of community morals once more merged in an effort to erase otherness and secure the cultural hegemony of the majority to decide about the shape of protected rights. The alleged social discomfort caused by dealing with a person who covers her face not only fails to embody a legally protected right that would justify the limitation under the Convention but is also highly speculative.

The last case selected here is the most problematic as it fuses the figures of the 'barbarian' and the 'radical' into one. While distanced from the legitimate community, these two blend into one and present the same danger to a domocentric cultural core. In the case of *Mouvement raëlien suisse v. Switzerland* (*Mouvement raëlien suisse v. Switzerland* 2012) the applicants – whose community of faith takes as its objective establishing contact with extraterrestrial life – published a range of posters with large yellow characters on a dark blue background with extraterrestrial faces stating 'The Message from Extraterrestrials' and the address of the Raelian Movement's website. Below another phrase claimed that 'Science at last replaces religion'. Due to its classification as a 'sect' the Movement was refused authorization to place the posters on the streets. The main objection from the police was the fact that the

Raelian Movement in principle rejects democracy but advocates government by the most intelligent ('geniocracy') and that potentially and theoretically some of the passages from the writings of the founder Raël could advocate paedophilia by saying that children are sensual beings. While the last objection appears to be serious and in contrast to the 'discomfort of the majority', giving potential grounds for limitation of rights, the police objection was based on passages rejected by the movement itself. Raelians also emphasized they were running an anti-paedophilia association devoted to fighting pedophilia in the Catholic Church – Nopedo – and had a strict policy of rejecting all members on the slightest suspicion of any intention to abuse minors. The objection was thus entirely hypothetical and based on the police opinion that certain passages speaking of children as sensual beings could potentially and theoretically lead some potential adults to commit acts of child abuse. While these adults would be unlikely to join the movement due to its strict denouncement of abuse of minors, the authorities nonetheless prevented publication of the posters.

In its final judgment the ECtHR once more framed the margin of appreciation doctrine as a matter of competence, underlining that:

In exercising its supervisory function, the Court's task is not to take the place of the national courts, but rather to review, in the light of the case as a whole, whether the decisions they have taken pursuant to their power of appreciation are compatible with the provisions of the Convention relied upon (para. 60).

The Court averred that states enjoy a broad margin of appreciation in 'matters liable to offend intimate personal convictions within the sphere of morals or, especially, religion' (para. 61) and found the posters to only incidentally refer to social or political ideas, where such a margin would according to the Court be narrower (para. 62).

Once more developing the doctrine of the margin in the direction of legitimate competences of a community, the Court insisted that states are in a better position to assess the situation due to 'continuous contact with the vital forces of their countries' (para. 63) and declined its own competence to evaluate and 'interfere with the choices of the national and local authorities, which are closer to the realities of their country' (para. 64). The Court declined to 'substitute its own assessment' for that of national authorities (para. 66). In assessing proportionality the Court referred to the domestic courts' findings and raised a moral objection to the teachings of the Raelian Movement, which according to the Court include 'offensive' (para 5.6) ideas such as 'promotion of human cloning, the advocating of 'geniocracy' and the possibility that the Raelian Movement's literature and ideas might lead to sexual abuse of children' (para. 71). While the movement's strong anti-paedophilia position was not addressed, the reference to ideas that 'might' lead to abuse

immediately positioned the applicant as an uncivilised 'barbarian' dangerous to the legitimate community. The Court also ambiguously stated that 'a distinction must be drawn between the aim of the association and the means that it uses to achieve that aim' as if implying that the Raelian movement was indeed contributing to possible child abuse. Other ideas, while departing from the community's attachment to democracy and the legal ban on cloning, were on the other hand seen as too 'radical' and community-breaking. The dual 'barbarian-radical' fusion justified the limitation on posters for the protection of the 'morals and rights of others' (para. 72) and for 'pressing social need'. Classifying the Raelians as a sect and as the Other allowed for dismissal of the organisation's defence and limiting its rather benign form of self-promotion to protect the local community from political ideas deemed too dangerous (para. 74).

5. The asymmetric relationship between the dissident and the community of rights

The Court's abstention from examining national laws addresses the problem of legitimacy by placing rights closer to their respective local communities. However, as illustrated above, the Court also redefined the local community as entitled to exclude difference for reasons of protecting its cultural core. Even though the local 'legitimate' community was placed as close to defining rights as possible, the exclusionary focus expressed the core of 'domopolitics' (Lentin & Titley 2011) signifying the emergence of cohering practices leading to affirmation of a place of 'natural belonging' (Lentin & Titley 2011, 206). The site of a domus is protected from risks coming from sources both internal and external. The emphasis on cultural certainty of 'moral views', 'traditions' or 'requirements of living together' marks a protectionist attitude against both those deemed too radical as well as those deemed too barbaric to fit in. As evident particularly in the IVF and abortion cases, the adapted notion of 'community' holding legitimacy to decide about rights does not reflect the diversity of the actual local community but instead reincarnates the traditional notion of an undiversified national political community. It echoes the Schmittian emphasis on the unity of social multiplicity as the foundation of the nation state (Schmitt 1999, 201). This unity in the Schmittian account would depend on the existence of a community based on homogeneity and guaranteeing an identity link between the governed and the governing (Schmitt 1999). If that account of community is taken as a foundation in the search for legitimacy, rights regimes 'exclude what is alien and other. Community as communion accepts human rights only to the extent that they help submerge the I into the We (...)' (Douzinas 2013, 59).

When the validity of a claim challenging the cultural *status quo* is questioned on the basis of legitimacy, the otherised barbarian or radical is positioned in striking asymmetry *vis-à-vis* the legal system. This framing conceals 'the deep roots of strife and domination' and presents the conflict in terms of 'law and rights themselves' (Douzinas 2013, 61). The denial of ability to challenge the cultural hegemony presents law and rights as a sphere beyond contestation. Whereas 'radicals' and 'barbarians' must always justify why they wish to do something different from the majority, the majoritarian system in question is always legitimate and freed from that expectation (Simmons 2011, 70–71) in such a vision of a 'legitimate' community of rights. When the very existence of legal regulation serves as a means of silencing the rights claims of 'radicals' and 'barbarians' and when law is presented as a place beyond contestation, cultural hegemony can never be successfully challenged. When appeals to the cultural rights of these dissidents are seen as an attack on the fundamentals of law rather than a simple challenge to the essentialist vision of a domocentric community, the individual is no longer a bearer of rights. Instead it is the state and its values that are protected from the dissident in the name of 'tradition', 'moral views' or 'secularism' or 'requirements of living together'. This asymmetric position of the dissident *vis-à-vis* quasi-rights of the domocentric community (Gozdecka 2015) transforms rights regimes from 'relative defence from power to modality of its operations' (Douzinas 2013, 51).

6. The domocentric community as an extension of the self

As the contemporary rights case-law illustrates, a domocentric community can be defined by self-referential and exclusionary definitions leading to exclusivity of rights. This capacity of a community as a collective to exclude and self-define mirrors the relationship between the Self and the Other lying at the foundations of Western philosophy (Cornell 1986). While development of self-understanding and self-evaluation has been understood as allowing the egocentric individual to adopt a position *vis-à-vis* the other (Benhabib 1992, 72), the legitimacy mechanism illustrated above mirrors this egocentrism of the individual. A domocentric community focusing on self-referential notions of rights mirrors the egocentricity of the self and creates limits of itself by excluding otherness in a very similar way to that described by Derrida – by drawing the boundary of what the self is not (Derrida 1998, 197). When human rights law and jurisprudence act as a system drawing limits and excluding the other in the very same way, as does the self, then rights must exclude by definition. A narrow reading of community and its 'identity' parallels the individual's egoistic need to reaffirm their authenticity (Taylor 1992, 50). Whereas in the act of self-definition individualism 'forgets that every person is a world and comes into existence in common with others' (Douzinas 2013, 59), reliance on a self-

referential definition of community compels the other to merge into the common essence. By assuming self-referential and exclusionary definitions, the community can erase the 'individuality and concrete identity of the Other' (Benhabib 1992, 158) in the same way an egocentric self does. In contrast to the individual, the community constructs the other in opposition to the community's self-proclaimed characteristics and expels every identity that does not fall within the self-definition.

Therefore the state's employment of rights in the name of a domocentric community will 'interpret and apply them, if at all, according to local legal procedures and moral principles, making the universal the handmaiden of the particular' (Douzinas 2013, 60). Reference to particular national, cultural or economic groups most often translates these groups into elements of a dominant majority (Patton 2010, 69). This paradoxical employment of the notion of a community may lead to what Balibar calls the absolutisation of the community (Balibar 2013, 24). In an absolutised domocentric community, rights become merely competing claims prone to be employed in the interest of the existing model of the community and serving no more than rejection of the possibility of resistance (Balibar 2013, 24–25). When the concept of a 'community' is employed to suppress multiplicity in the name of cultural or national essence, the legitimising nature of a community disappears. The 'community' which submerges difference into homogeneity can no longer legitimise. The legitimising process is a process aimed at preventing abuses of power. A 'community' whose central aim is to protect itself from otherness signifies the modality of the operations of power, not a counterbalance to power. Rights employed in defence of the homogeneity of the 'community', on the other hand, become tools curtailing the possibility of emancipation and resistance. As a consequence, rights mutate and result in reversal of their original idea: from emancipation to domination and from liberation to exclusion and fear.

7. Can the emancipatory potential of rights be reconstructed?

Employing rights in cultural battles and the tendency of rights to retaliate against themselves may lead to pessimistic conclusions. But must human rights be of no more than symbolic value? (Zizek 2005) If human rights remain mere tools in struggles for power, (Zizek 2005) those struggling for recognition are left without alternative legal means of contestation. As Benhabib recalls, the critical project of postmodernism can be instructive about political traps and roads that lead foundational thinking astray, but it should not lead to retreat from Utopia altogether (Benhabib 1992, 230). Therefore, following Simmons, I would argue for constantly rethinking and constantly identifying roads

leading astray rather than abandoning the road in the face of the current crisis of rights (Simmons 2011, 28). Instead of abandonment, rethinking what has been identified as the potential of rights for empowerment (Kinley 2012) appears a useful solution, albeit certainly to some degree Utopian. Any possible reconstruction of that potential must focus on the notions of emancipation and resistance.

As pointed out by Levinasian-inclined thinkers, (Douzinas 2000; Simmons 2011, Gozdecka 2016) rebuilding the emancipatory potential of rights can be founded on the idea of responsibility and answerability. This rebuilding process can meaningfully respond to the problem of the exclusionary potential of rights based on the self and its self-definition (Lévinas 1994, 96). If we base the idea of a right on the Levinasian understanding of answerability, the right ceases to be seen as a privilege for Levinas asserts that instead of a privilege rights should be seen as a 'duty to the other for which I am answerable' (Lévinas 1994, 98). If the idea of an interest is replaced with the idea of a duty, the set of relevant questions changes. Rather than asking 'Who am I? What is my community?' and 'What is our interest' the first consideration is 'What am I answerable for?' This idea of rights puts the other before the self in an act of inexhaustible responsibility (Lévinas 1994, 98). The responsibility-based reading of Lévinas is almost contrary to the Gerin Report's reading of the philosopher, where face-covering was discussed at length by the French Parliament in reference to Levinasian theory (Gerin Report 2010). Despite explicit references to Lévinas, the understanding of the face – used by Lévinas as the source of responsibility – was reduced to the visibility of the face to the Self with little or no regard to responsibility for the other. The other was instead accused of withholding communication and violating the Self (Gerin Report 2010, 116), something rather contrary to what Lévinas meant while discussing the importance of the face. For Lévinas, the first duty is responsibility for the other, even the other that the Self may not be able to understand, rather than the centrality – or preventing the discomfort of – the Self. The act of defining who I am or what our cultural tradition is becomes perhaps not entirely irrelevant, but certainly secondary. Rights seen as duties relieve the binary tension between the self and the other and the community and its Other. A community based on answerability instead of drawing limits for itself and its interest appears to have a more promising potential for legitimating rights.

It is nonetheless important to bear in mind that the act of responsibility can be fulfilled only in the presence of a third person (Lévinas 1991). If the Self or the community becomes responsible and answerable for the rights of the other, the central difficulty remains: how can we reconcile responsibility for the rights of all the others? How can responsibility respond to the marginalisation of some – but not all – others? Relying solely on the notion of responsibility leaves us with this central ambiguity of Levinasian theory. Criticised for its ethical and

purely philosophical focus, Levinasian theory on its own may lack the potential to effectively translate answerability into the realm of the political (Badiou 2001; Simmons 2011, 90). Can ethical philosophy provide the answer to the question how to respond to diversity? (Smith 2009, 68–71.)

The first problem to solve is translation of the abstract ontological focus of the self and the other to the domain of rights and politics. Remaining on an abstract and general level, ethics challenges modernity but lacks the potential to respond to the demands of real life (Smith 2009, 71). While Levinasian reformulations focus on the generalised Self and the Generalised other, the sole idea of a right as a duty rather than a privilege can be translated to the concrete Self and the concrete Other. The shift from the abstract to the concrete allows for true contextualisation of rights in the context of difference (Benhabib 1992, 159). This standpoint of the concrete Other is necessary for a community to understand whose voices have been marginalised. Without this realisation 'the other cannot interrogate the original violence of the system's institutions' (Simmons 2011, 124).

The second difficulty is the relational nature of responsibility. After all, even the standpoint of a particular Other does not offer a sufficiently illuminating and effective tool in the realm of the political. The central dilemma remains the unsolvable nature of responsibility towards a third person. Even a duty to be responsible for the rights of the concrete Other requires an answer to the question how to be responsible for all the concrete others. The end result of responsibility for all the Others may be identical to that of equal freedom for all. Equal responsibility – just as equal freedom – may lead to the emergence of incompatible claims and 'possible war' (Lévinas 1994, 95) between different responsibilities. Consequently responsibility as the foundation of rights, just like freedom, may lead to the impossibility of emancipation.

8. Responsibility for emancipation as a form of legitimacy

Simmons asserts that, to prevent hegemonic developments, democracy must be at the service of the other and so must human rights institutions (Simmons 2011). But due to the difficulties noted above with translating the ethical to the political, taking the viewpoint of the other requires defining hegemony and emancipation. Rebuilding the emancipatory logic of rights in the sphere of the political requires complementing the responsibility-based understanding of rights by elaborating the notion of emancipation.

The tendency of rights to exclude and the danger of 'wars' between freedoms or responsibilities necessitates consideration of a minoritarian premise in the jurisprudence of rights. Minoritarian notions of emancipation from hegemony range from the focus of a revolutionary

event, through freedom from racial hegemony to dissent of those marginalised (Hewlett 2010, 1–3). Yet in the contemporary world hegemony no longer signifies single-axis relations of power (Balibar 2013, 22). Hegemonising discourses may stem from systemic structures, political concerns of legitimacy, new forms of cultural racism as well as from other sources as yet unidentified. Thus for responsibility towards the other to be a meaningful reconstructive effort, it is essential to adopt a notion of emancipation responding to the changing and often diffused structures of power that may marginalise the other in diverse ways. Balibar suggests that tentatively the answer to who is the one to be emancipated must depend on the local situation, the cases considered, the type of issue and the choices made by the agents themselves (Balibar 2013, 22).

In this diffused landscape of emancipatory calls, the value protected must be the freedom to think or act differently. Rosa Luxemburg's understanding of freedom and the nature of revolutionary events provides us with a useful guideline on how to contextualise an emancipatory call in a setting of diverse hegemonic powers:

Freedom is always and exclusively freedom for the one who thinks differently. Not because of any fanatical concept of 'justice' but because all that is instructive, wholesome and purifying in political freedom depends on this essential characteristic, and its effectiveness vanishes when 'freedom' becomes a special privilege (Luxemburg, 1918, 69).

Only freedom from hegemonic power of those in a minority has true emancipatory potential. Emancipation is thus the freedom of a minority³ that seeks to break the constraints of a system that marginalises and oppresses it. The established 'freedom' of those in power is not a value requiring protection. Its emancipatory potential vanishes in the instant when majoritarian norms become institutionalised. The freedom of the majority in all circumstance has achieved its goal and can no longer be realised. It cannot emancipate because it has become translated into the dominant system. As if parallel to the Levinasian account, the freedom of the majority is no longer a freedom but a privilege for the 'I' and for the 'we'.

Thus the effort to reconstruct the emancipatory logic of rights requires framing rights as a responsibility towards the Other for the possibility of emancipation (Gozdecka 2015b). This notion of rights holds a promise of curtailing exclusionary battles between different communities and offers inclusive rather than exclusive discussions of rights legitimacy. Rights as a responsibility rather than a privilege and

³ Deleuze and Guattari's understanding of minority is particularly illuminating in this context. A minority is not necessarily numerical but may instead be a numerical majority yet rendered less dominant. (Deleuze & Guattari 1980)

emancipation rather than establishment of achieved freedom promise effective entry to discussions on the polity or judicial organ best able to protect rights. In contrast, established freedom fossilises rights and prevents dynamic approaches. Instead of being a space for renegotiation, a domocentric and homogenous community becomes a static and stagnant structure upholding diverse forms of domination. This structure lacks the capacity to legitimate due to its inability to curtail power.

Rights understood as a responsibility for emancipating the other offer an alternative form of legitimacy. If we base rights on responsibility towards the Other for the possibility of emancipation, determining which polity, judicial system or institution is most legitimate need no longer to be based on potentially exclusive notions. Securing the most democratic source and remedy in the area of rights will depend on determining which polity, institution or judicial organ is best able to respond and prevent marginalising forces of diverse structures of domination. The organ, structure or system that will allow the voice of the other to be heard and best respond to the other's call for emancipation will be the best suited for legitimate intervention. Abstract notions of a legitimate community, collective identity or the position of rights between different legal regimes will never suffice to effectively respond to the call for emancipation. The legitimacy of rights is thus relational and requires full contextualisation of the agents and powers involved and a response to the question whose emancipation we are responsible for.

9. Conclusions

The analysis above does not aim to dismiss concerns over legitimacy altogether. Quite the contrary, its objective is to secure the democratic legitimacy of rights so that the dialogue between different communities occurs without recourse to antagonistic struggles and exclusive notions. These antagonisms result in no more than homogenising notions of a community and exclusion of those selectively framed as standing outside. These same antagonisms also silence dissent and fossilise communities into non-negotiable structures of hegemony. A homogeneous and domocentric community necessarily turns rights against those framed as a 'danger'. Legitimacy of rights should therefore be understood differently from mere privileges to decide on the shape of rights. The notion of a right based on the idea of a privilege will always necessarily result in the entanglement of rights with 'powers of the state' (Lévinas 1994, 96) and exclusive notions of a community. Therefore rebuilding the logic of rights is imperative for a discussion on their most 'appropriate' sources. Only rights understood as responsibility towards the other for the possibility of emancipation can result in legitimate

construction, application and adjudication of rights. The ontological question on the nature of a political community and its legitimacy must be preceded by the notion of responsibility and the role of rights as emancipatory tools. With these notions at the foundation, the question of legitimacy appears more complex than simple questions of competences and requires examination of who is best suited to respond to the emancipatory call of the Other.

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