Rights vs. the Polity?

A Critical Review-Essay of Mary Ann Glendon's *Rights Talk*

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1. After the second World War a search for a European identity was going on. In the late 1940s there had developed a desperate need for a contrast to the Socialist Camp, at that time emerging triumphantly but also horrifying in its totalitarian oppression and bleak material results. What was found as the European identity was the Rule of Law and the rights rhetoric, at that time starting to develop from the Universal Declaration on Human Rights adopted in 1948. The rights rhetoric eventually went wild. Not only were the rights of man equal to setting limits to what the State could do to him, which was something that could be managed by a judicial system, but soon new rights and more rights were created of an entirely different kind, second generation rights and third generation rights that were not rights at all but mere programs for how society should develop, programs completely out of reach of what courts could achieve.

2. Professor May Ann Glendon of Harvard University makes an all-out attack on the rights rhetoric in her book: *Rights Talk. The Impoverishment of Political Discourse.* (NY: The Free Press, Macmillan, Inc., 1991) She has many things to say, her observations are striking, and her criticism is vicious. But she addresses mainly the shortcomings of present-day United States and in particular the role of American lawyers. How does her thinking apply in the European setting? She likes to show that the Europeans in many places have fewer faults than will be found in the United States, and so it may well be. But what about the very core in her argument: the rights rhetoric?

3. Nation-building powers have been tested in the United States in bygone days. Mary Ann Glendon believes in political discourse and legislative intervention on a moderate scale. She also believes in the intermediate structures, such as family, congregation, association, which are neither government nor individual but have enormous impact when building human society. She thinks that the rights rhetoric has a destructive influence upon these society-building elements because the proper forum for rights rhetoric is the court and there are narrow limits to what can be achieved by reducing problems to litigation and court judgments.

4. Rights rhetoric in Europe plays a very different role. In this conglomerate of some 50 or so different sovereign states, rights rhetoric fills a philosophical void. Much talent and indeed genius has been devoted in Europe into building superstructures such as the Council of Europe and the European Communities, now given the more ambitious name of the European Union. The trouble with these superstructures is that they have been very technical, and at the center is a philosophical void. What more than these technicalities do the European countries have in common? This is the starting point for the rights rhetoric in Europe; for the Universal Declaration was taken care of in Europe and given treaty form, The European Convention on Human Rights (1950). From a modest beginning this body of rights with its surrounding institutional framework – a Commission to investigate and begin proceedings, a Court to adjudicate the complaint and the defense of the respondent government, and a Committee of Ministers to see to it that the member governments in fact abide by the Court's judgments – has grown into an all-encompassing European system that is sometimes labeled the European constitutional complaints system. It is a system of great complexity but also of great promise. Since its inception in 1952 it has handled some 30,000 complaints at the Commission level and some 500 cases at the Court level. This has not been possible without developing a vast body of basic legal concepts, autonomous in relation to the domestic legal systems of the various member countries that only provide the departing points for the European reasoning. The reasoning has tried to find the basics of a societal system based on the Rule of Law, which would include defining such terms as law, court, criminal charge, civil rights,

taxes, impartiality, fair trial, *nullum crimen sine lege,* discrimination, and other juridical fundamentals. Such basics are also the basics of the rights rhetoric.

5. At the national level this European rights rhetoric has meant setting up a shield against the intrusive totalitarian state, in favour of common European ideals, and against national pet sins when you go further down the ladder of how to govern states. In European countries under more or less Socialist governments this has meant a clash, a clash that has brought out into the open, for all Europe to see, how much the European philosophy differs from the philosophy that used to prevail in the Socialist Camp, now defunct, but not only there. The right to access to court has been found to be one of these European rights. But courts were not favoured in the Socialist Camp; rather Socialist society was permeated by deep aversion against judges. Everything was looked at through the spectacles of class theory and judges and courts were symbols of the class enemies that had to be reduced to minimal proportions. Using lay judges and giving them the decisive vote was the acceptable compromise, both in the old DDR and in Prime Minister Olof Palme's Sweden (1969-76 and 1982-86); that is, the most authoritative judge in this system was the one with the best connections with the ruling Party hierarchy. That is also a way of running society but it is certainly a far cry from the rights rhetoric immanent in the Rule of Law.

6. The European human rights system meant that you should give your national courts a chance – 'exhausting domestic remedies' – but that you could proceed to a European jurisdiction if those courts failed to convince you that you were wrong and provided that you had a case that came under the protection of the European Convention. The access to court rhetoric thus was experienced like breathing fresh air in a climate of suffocation, and it should be no surprise that in proportion to population, Socialist Sweden during the 1980s was leading in the league of complaints. What was even better was that you need not obtain a final judgment from the European Court in order to get things improved. The openness of the European system – all of Europe could see and read what was happening – meant that governments were often quick to settle cases and recall or amend legislation when it seemed likely that a complaint would receive a sympathetic hearing in Strasbourg. On the side of governments, functionaries were often disaffected, but such is the force of the rights rhetoric that nobody was ever against human rights. The media were bewildered, certainly in Sweden: Here were people complaining who clearly were not in favour of Socialist ideals, but nevertheless they were arguing on grounds of human rights. In response, normally, there was some reluctant and misleading reporting; but mostly the lid was put on, and reading newspapers was not a way to find out what the human rights rhetoric was about. The word spread from mouth to mouth and within numerous small networks.

7. If you compare this European phenomenon with Mary Ann Glendon's account of the American scene, great differences come to light. In Europe rights rhetoric is still in the nation-building stage, a man-to-man discourse in the building of a bigger and better Europe. There is no belief in a European legislator who is able to intervene and improve things in an effective political system. The European Court system is the only place to turn to when tyrannical majorities turn against hopeless minorities, defined by race (such as the Lapps or the Samis) or by class (such as 'the rich' or 'the bourgeois' or 'the capitalists'), or even merely helpless minorities who have little hope of ever becoming majorities. There is certainly room for some of the criticism that Mary Ann Glendon advances against the judicial solution to social problems; but in Europe it is mitigated by the absence of something better and by the extra-mural advantage of integrating Europe into a bigger and more harmonious entity than we ever knew before.

8. For such reasons it is interesting that Mary Ann Glendon makes the comparison between the reasoning of the European Court and that of the U.S. Supreme Court in rights cases. She has picked for her comparison two cases in which obsolete sodomy statutes were challenged: *Bowers v. Hardwick* (478 U.S. 186) decided by the U.S. Supreme Court in 1986, and *Dudgeon v. United Kingdom* (4 European Human Rights Reports 149) decided by the European Court of Human Rights in 1981.

The comparison makes her see things that otherwise perhaps would have remained obscure. At one place she states: "The six Dudgeon opinions, issued by some of the world's leading jurists, contained ideas and information that could have fo-

cussed issues, enlarged perspectives, improved the quality of reasoning, and utlimately helped to place our Court's decision – whichever way it went – on a sounder and more persuasive footing." [152]

9. Her characterization of the American style in *Bowers* sets out some of the differences. She speaks about "the rigid categories employed" [151], about resorting "more to bald assertion than principled justification" [156], and about "hard-edged, American-style proclamations of individual rights" [167]; she discovers "the relative lack of depth and seriousness of the analysis contained in its majority and dissenting opinions" [151]. "[T]he failure of our Court adequately to conceptualize the privacy right in the first place has led to great difficulty in developing any principled limitation upon it" [156].

The European way of reasoning is different, she finds. It is "an art of integration creating a world in which differences can coexist" [155]. "[T]he European judges have become proficient at the principled, modest, collegial, flexible, pragmatic techniques of judicial decision-making that were once the pride of the American common law.... if the American Justices in the *Bowers* case had read the *Dudgeon* opinions, they would have experienced a shock of recognition." [156] She speaks about "the more searching and tentative style of the European Court, its open wrestling with the weaknesses as well as the strengths of the positions it eventually took in *Dudgeon*". This style, she asserts, "gives winners fewer grounds for gloating and leaves the losers less reason to feel angry and alienated."

10. It would seem that Professor Glendon finds the present American way to be too absolutist and thereby too rigid for rational development. "In *Bowers*, every one of the opinion writers assumed that if a right were involved, there was virtually no state interest that could prevail against it. Dealing with what they considered to be a nearly absolute right, the majority could not see their way to extending it to cover homosexual activity. Paradoxically, the European Court, dealing with a strong, but not unbounded, concept of privacy, was able to give the principle of protecting private life more generous scope." [157] "The [European] Court avoided suggesting either that the practices in question amounted to fundamental human rights, or that all legal distinctions between homosexuals and heterosexuals were now invalid." [156] "By prudently limiting the scope of its decision, the Court left related issues open for similar careful consideration in the future.... the Court made it clear that it was not endorsing a notion of private life that would exclude *any* consideration of the social implications of sexual activity." [156]

11. The points are well taken. But there is something in Glendon's analysis that fails to transmit the importance of the different setting in which the European Court is active. The U.S. Supreme Court is firmly established, and it is sovereign in its precinct. State legislatures are far away and have little presence in Washington D.C. The U.S. Supreme Court Justices are there for life. They need not worry about being reelected and any discontent in the mostly far-away American states does not threaten to shatter the mighty Union that today is the one remaining superpower of the world. They can work in splendid isolation and to them it is tempting to "make the case look like a battle between Yahoos and perverts" as Glendon puts it, once they have arrived at their decision and started to give their opinions final form. [154]

The European Court presides over a much more fragile structure. For one thing, in the building next door, each and every member State of the Council of Europe has an Ambassador who watches carefully over the cases against his government advancing through the Convention machinery. The individual petitioners in the various cases are one-time appearances, whereas the governments are there to stay. Consequently, there is every reason for the judges of the European Court, once they have arrived at their decision and started giving their opinions final form, to phrase it so that "those who were disappointed could see that their point of view had been considered carefully." [155]

12. The flashbacks that Professor Glendon provides are very pertinent because they relate to periods when the American Union was less solid and when separatism at times was a problem, no less than it sometimes appears in present-day Strasbourg or Luxembourg or Brussels. It should also be said that it is not fully fair to compare the American scholarship in the field, as she does, with French or German scholarship [168 f]. Her analysis is perfectly correct, but the comparison that is due is with scholarship at the all-European level. At that level, the field is too broad and language difficulties too great to allow place for

the "mania for thoroughness of coverage, or striving for balanced evaluation, that characterizes European books bearing similar titles." [169] At the European level, just as in American national scholarship, the books tend to be more imaginative and more idiosyncratic. In fact, under the impact of the all-European development that puts national legal regimes under stress, even national scholarship suffers and will often desert 'thoroughness of coverage' and 'balanced evaluation' in favour of the one-sided, the unbalanced, and the idiosyncratic as being more to the liking of important national political interests. The Annual Reports with the headline "Human Rights in Sweden" was, for example, an attempt to counterbalance such features in Swedish scholarship facing the European Convention on Human Rights.

13. Mary Ann Glendon's work is unique inasmuch as it attempts to reduce the lofty rights rhetoric with its ever-increasing use to something that lawyers can handle to the benefit of their respective legal systems. She reduces it to a technique that finds its place between the classical, time-tested and well-known techniques of statutory intervention and judicial decision. Reduced, it becomes relative, but being relative it is also easier to handle. She writes for an American readership, but what she has to say is of great relevance also for Europeans who are as bewildered by the rights rhetoric as the Americans but not always aware of the distances separating the American Union and the European Union. In both places her book is indeed a blessing. ❖