

Research Agenda - Aravind Ganesh

My research focuses on certain legal provisions contained in the EU treaties, which commit the EU to advancing human rights, the rule of law, and democracy in all its “relations with the wider world.”¹ Certain authors have described these provisions as collectively giving rise to an “EU missionary principle.”² I adopt this terminology because it captures both the promise and the dangers inherent in the EU taking on such a role in the world.

While my research draws upon the literature on EU ethical foreign relations law and theory, it differs significantly from it: that literature has focussed almost exclusively on the role of human rights in issues of high foreign policy, e.g. the inclusion of human rights clauses in Free Trade Agreements (FTAs) and investment treaties, human rights conditionality in relations with foreign countries, and development cooperation. Comparatively little has been said about the role EU law may play with respect to problem of social injustice arising from the overseas conduct of multinational corporations domiciled in the EU, or from EU domestic policies on economic liberalisation. I will examine the implications of the missionary principle upon the human rights, and in particular socio-economic rights of ‘distant’ individuals, meaning non-EU citizens located outside the EU, with a view to exploring whether there may be *legal* solutions precisely this problem. In this vein, I also refer to the extensive literatures on business and human rights, and on the extraterritoriality of human rights treaty obligations. However, while those bodies of literature are illuminating, they have a distinct feel of *lex ferenda* about them, with their heavy emphasis upon proposed instruments, non-binding codes of voluntary guidelines, and the pronouncements of non-judicial bodies. The dominant trend discernible in actual international human rights *practice* on the other hand, presumes that the socio-economic rights protection lies primarily within the *domaine réservé* of states where the affected individuals are situated. Instead, the obligation to spread human rights, democracy, and the rule of law is to be acquitted by setting up international or intergovernmental organisations with the consent of those territorial sovereigns.³ Under the conventional picture of international law, unilateral action on behalf of foreign populations is domination, which is unacceptable except in very extreme cases: to act unilaterally for the benefit of foreign persons is to claim authority over them. Moreover, the risk of unintended consequences is particularly great in socio-economic rights issues, which very much turn on complicated questions of resource allocation that presuppose access to information.

My argument is that the missionary principle is binding law, and that it challenges this settled consensus at international law. It pertains not only to EU external relations, but also to instances where the exercise of internal competences results in serious adverse effects upon the socio-economic rights of distant individuals. I argue that EU institutions have interpreted the missionary principle to *permit* such unilateral action for the benefit of such individuals. This is demonstrated, I believe, by the decision in *Air Transport Association of America*, where the CJEU upheld an environmental protection measure that unilaterally imposed costs on foreign airplanes present in EU territory for carbon emissions overseas.⁴ As for human rights measures proper, consider Regulation (EU) No. 1219/2012⁵ which provides that investment treaties

¹ Article 3(5) TEU. The other significant provisions of interest include Articles 2, 3(6), 21(1)-(3) TEU, as well as Articles 205, 207, and 208 TFEU.

² See, e.g., Morten Broberg, *What is the Direction for the EU's Development Cooperation After Lisbon?—A Legal Examination*, 16 EUR. FGN. AFF. REV. 539, 539 (2011); and Ester Herlin-Karnell, *The EU as a Promoter of Values and the European Global Project*, in DMITRY KOCHENOV & FABIAN AMTENBRINK(EDS.), *THE EUROPEAN UNION'S SHAPING OF THE INTERNATIONAL LEGAL ORDER*, 90–91 (2014).

³ See e.g. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 131, ¶¶ 111, 112, and 113 (July 9) (the ICJ explained the unique lack of a jurisdictional stipulation in the ICESCR as arising from “the fact that this Covenant guarantees rights which are essentially territorial”).

⁴ Case C-366/10, *Air Transport Association of America v. Secretary of State for Energy and Climate Change*, 2011 E.C.R. I-02735.

⁵ Regulation (EU) No. 1219/2012 [2012] O.J. L 351/40.

between Member States and third countries must comply with the norms set out in Chapter 1, Title V TEU,⁶ and Regulation (EU) No. 1352/2011, prohibiting the EU companies from exporting chemicals used overseas in executions by lethal injection.⁷

As a visiting fellow with the GlobalTrust project, I wish to explore possible theoretical bases for such unilateral action under to the missionary principle. I accept the fundamental premise of international human rights practice—that human rights supply political legitimacy. The internal political legitimacy of states and polities is not self-standing, but is dependent upon that of the entire international legal order. Accordingly, the missionary principle reflects an obligation of political morality on the part of the EU to shore up its internal political legitimacy, by strengthening the political legitimacy of the international legal order. However, as described above, the EU regularly takes unilateral measures to advance the human rights of distant persons, contrary to conventional understandings of human rights practice as described above, and this attracts the charge of domination. I am attracted to Professor Benvenisti's response to this charge: he argues that the basis for unilateral action by a political community lies not in any claim of power or authority of such distant persons, but in the need to justify their exclusion from that political community's assets: namely, its government, territory, and resources.⁸ The enclosure of property is justified only if the political community ensures that the excluded person has "enough, and as good left."⁹ This implies administrative obligations to account to foreigners for domestic decisions affecting their interests, which in turn implies a duty to include them in the processes for making those decisions.

The spectre of domination is not completely exorcised, however. What should the EU do, when the unilateral action meant for the protection of the socio-economic rights of foreign persons is opposed by the very governments of those persons? Numerous countries—perhaps even democratically elected—remain skeptical about human rights, and they are particularly dubious about socio-economic rights as a means to alleviate poverty and suffering. Would it be acceptable for the EU to undertake unilateral action for the protection of socio-economic rights in such circumstances? My tentative answer would be that the EU may not compel other countries outright, but it is still entitled to pursue unilateral action, as long as it takes the form of 'principled non-participation'. It is not domination merely to insist - in essence - upon taking no part in an enterprise sufficiently at odds with one's values. It might of course require positive action to operationalise this attitude; for example, it is necessary to take positive steps to ban trading in chemicals used in lethal injections, in order to express the EU's revulsion against capital punishment. However, the attitude remains fundamentally negative—of having no part in that enterprise.¹⁰ What are the limits of non-participation? To what extent can this logic be extended to socio-economic rights, where the issues are arguably not so clear-cut?

⁶ That chapter contains Article 21(1) TEU, which provides that "(t)he Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law." See also subsections 2 and 3.

⁷ [2011] O.J. L338/33. Note that the legal basis for this regulation was not specified as lying in any of the articles making up the missionary principle. The preamble simply states "Having regard to the Treaty on the Functioning of the European Union..." However, the December 2011 Joint Communication by the Commission and CFSP High Representative - the highest-level policy document set out so far on the EU's stance on human rights in external relations - included the predecessor to this regulation as an example of the sort of measure that was envisaged under the EU's commitment to integrate human rights in all areas of EU external action. See European Commission and High Representative of the European Union for Foreign Affairs and Security Policy, Communication on Human Rights and Democracy at the Heart of EU External Action - Towards a More Effective Approach, COM (2011) 886 final, 12 (Dec. 12, 2011).

⁸ Eyal Benvenisti, *Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders*, 107 AM. J. INT. L. 295, 308-312 (2013). See also Anne Peters, *Humanity as the A and Ω of Sovereignty*, 20 EUR. J. INT'L L. 513 (2009).

⁹ JOHN LOCKE, SECOND TREATISE OF GOVERNMENT, § 33.

¹⁰ In this regard, see *Kadi I*, where the CJEU held that the EU's constitutional values rendered it incapable of complying with a UN Security Council resolution requiring the freezing of an individual's assets without any due process protections. This can, I believe, be understood as an example of principled 'non-participation'. Joined Cases C-402/05 P and C-415/05 P *Kadi & Al Barakat v. Council of the EU & EC Commission*, 2008 ECR I 6351.